the national judge to compare in specific cases the situations which may arise.

4. The minor and incidental nature of the obstacle created by a national tax and the fact that it could only have been avoided in practice by abolishing the tax are not sufficient to prevent Article 95 from being applicable.

In Case 20/76,

Reference to the Court pursuant to Article 177 of the EEC Treaty by the Finanzgericht Baden-Württemberg, Außensenate Stuttgart, for a preliminary ruling in the proceedings pending before that court between:

SCHÖTTLE & SÖHNE OHG, Oberkollwangen,

and

FINANZAMT FREUDENSTADT,

on the interpretation of Article 95 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, P. Pescatore, President of Chamber, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate-General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order for reference and the written 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 procedure

1. In November 1967 the Government of the Federal Republic of Germany adopted the Transport Policy Programme

for 1968 to 1972 (Verkehrspolitisches Programm für die Jahre 1968 bis 1972).

This programme included *inter alia* temporary taxation of certain carriage of goods by road in order to divert long-distance transport towards the railways. The draft law on this tax was communicated to the Commission which, in a recommendation (JO 1968, No 35, p. 14) drew the attention of the Government of the Federal Republic of Germany to the fact that 'under the draft law international short-distance transport is subject to tax in respect of the distance covered in Germany while national short-distance transport is exempt. By virtue of this, goods imported into Germany may be indirectly subject to charges in excess of those on German products ...'.

The abovementioned law, the Law on the taxation of the carriage of goods by road, (Gesetz über die Besteuerung des Straßengüterverkehrs, Bundesgesetzblatt, I 1961 page 1157) remained in force from 1 January 1969 to December 1971. Under the first paragraph of the law, carriage of goods over long distances and all international carriage were subject to the tax. The tax was calculated on the 'tonne per kilometre'. Domestic local transport of goods (Güternahverkehr) was not subject to the tax. Furthermore, international transport into the Federal Republic to a destination within the local zone (Nahzone) of the town or village at which the border was crossed and international transport to a foreign destination which commenced in this zone were exempt.

The Law relating to the powered transport of goods (the Güterkraftverkehrgesetz, Bundesgesetzblatt, 1952 L, page 697), defines local transport of goods. The first paragraph of that law provides that:

'1. Local transport of goods is any transport of goods for others by means of a powered vehicle within the borders of a town or village or within the local zone.
2. The local zone is the territory within a radius of 50 km calculated directly from the centre of the place of origin of the vehicle (centre of the town or village). The local zone shall include all towns and villages the centres of which lie within the local zone. It must be determined and publicly notified for each by the lower transport authorities.
3. The highest regional transport authority (Oberste Landesverkehrsbehörde) may divide towns with more than one thousand inhabitants into districts. It may determine a centre for each district. Each of these district centres shall be regarded as the centre for the whole area of the town or village.
4. For areas close to the border the Federal Transport Minister may provide exceptions from Subparagraph (2) by means of regulations'.

Paragraph 6 (1) of the Law relating to the powered transport of goods provides:

'For all powered vehicles which are to be used in longdistance goods transport or local goods transport a place of origin must be determined. The undertaking must have the registered office of the undertaking or permanent business premises at this place of origin'.

Under Paragraph 3 (5) of the Law on the taxation of the carriage of goods by road the tax was not applied if the place of unloading or the place of loading of goods carried by road lay within the local zone of the town or village in the area of which the loaded vehicle first entered the territory in which the law was applicable or last left it, in other words in the local area of the place at which the frontier was crossed. All the local zones along the frontiers of the Federal Republic together form an area which is commonly called the free zone (Freizone).

2. Firma Schöttle & Söhne OHG runs a sand and gravel wholesale undertaking in Baden-Württemberg in the north of the Black Forest. It used to transport to the Stuttgart area materials for the most part from a gravel quarry at Lauterbourg in Alsace.

Following the introduction of the tax on the carriage of goods by road the plaintiff in the main proceedings had to pay 4 pfennigs per tonne per km for the transport of gravel from Alsace to Stuttgart which meant that the transaction was no longer competitive. Consequently it decided to obtain supplies in the Baden part of the Rhine plain which its lorries could reach without its being subject to the tax on the carriage of goods by road as the journey was entirely within the local zone of the undertaking.

In August 1969 the plaintiff in the main proceedings had to pay the tax in question, having carried a single load of gravel from Lauterbourg (Alsace) to Stuttgart. It subsequently lodged an objection seeking to be exempted from this tax. Before the Finanzgericht Baden-Württemberg it argued that the imposition of the tax constituted an infringement of the German Basic Law (Grundgesetz) and of Article 95 of the EEC Treaty.

3. The national judge stayed the proceedings and, pursuant to Article 177 of the EEC Treaty, referred four questions to the Court of Justice for a preliminary ruling.

The order for reference was received at the Court of Justice on 23 February 1976. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on behalf of the plaintiff in the main action and the Commission of the European Communities.

II — The questions, the reasons for the questions and the written observations

The first question

'Does a tax which is imposed on the basis of distances covered within a Member State for the carriage of goods by road which cross a frontier, constitute taxation on products within the meaning of Article 95 of the EEC Treaty?'

In the opinion of the *Finanzgericht* the basis of the taxation is not the product or the value which it represents but the transportation service as the product of the weight and the distance covered. Thus, like a charge for the use of roads which is economically comparable to it, the tax is not imposed *directly* on products. However it is possible that it may also be regarded as a charge imposed indirectly on products. In the case of a charge imposed solely for reasons of transport policy doubts may arise as to whether the indirect relationship between such a charge and the product itself is not too distant to be taken into account.

Firma Schöttle & Söhne OHG observes that the term 'indirectly' contained in Article 95 must be widely interpreted. It must cover all charges imposed at any stage of manufacture or marketing. The tax on the carriage of goods by road affects the marketing of the imported goods and makes them more expensive in comparison with similar national products transported by comparable channels of distribution.

Article 95 intends to protect imported products against all forms of inequality of treatment. A charge whose object may be unobjectionable from the point of view of Community law but which in fact gives rise to a heavier charge on imported products and consequently protects national products causes inequality of treatment on the basis of the differentiating criterion of the foreign

origin. Consequently the answer to the first question must be in the affirmative.

The *Commission* observes that in view of its purpose the prohibition must be widely interpreted as this is the only way to guarantee complete protection against overt or disguised discrimination. The interpretation follows moreover directly from the text which twice contains the terms 'directly or indirectly', the first with regard to internal charges on imported products, the second in respect of internal charges on similar national products (cf. *Molkerei Westfalen/Lippe GmbH* v *Hauptzollamt Paderborn* ([1968] ECR 143)).

A tax such as the German tax on the carriage of goods by road which is charged on the basis of the distance covered on the national territory in cases of importation by lorry thus constitutes a charge on products.

The aim of the legislature in introducing the tax is therefore not relevant in this respect even if it merely formed part of the transport policy and was not intended to be a source of income.

It suggests the following answer to the first question:

'"A charge indirectly affecting products" within the meaning of Article 95 of the EEC Treaty also includes a charge imposed on the international carriage of goods by road on the basis of the distance covered within the national territory'.

The second question

'If question (a) is answered in the affirmative: Is the taxation of transport crossing frontiers within the area of the so-called local zone, that is all towns and villages the centres of which lie within a 50 km radius of the centre of the town or village in which the transport undertaking is situate, a direct imposition of higher internal taxation within the meaning of Article 95 of the EEC Treaty if, although no taxation is imposed on transport in the same area within the country, the different treatment is restricted to foreign goods which are delivered in a strip of territory running parellel to and between approximately 50 and approximately 100 km from the border?'

The *Finanzgericht* states that since transport into or outside the 'free zones' was exempted from the tax but the situation of the 'free zones' was dependent on the frontier crossing point, the charge could in most cases be avoided by the judicious choice of the frontier crossing point. A theoretical linking together of all possible 'free zones' along the frontiers of the Member State would produce a zone approximately 50 km wide running parallel to the frontier within which foreign products could not be subject to a charge.

In these inland areas which foreign products could only reach by long-distance transport, that is to say, broadly speaking, all those towns or villages which are more than 100 km from the border, there could also be no discrimination against foreign products. Therefore it is only within the narrowly defined strip of territory between 50 and 100 km from the border that the imposition of higher taxes on foreign products than on domestic products by virtue of the law on the taxation of the carriage of goods by road was at all conceivable.

If it were necessary to undertake a comprehensive comparison of the general situation of a certain type of product from another Member State with that of the same domestic type of product within the context of Article 95 of the EEC Treaty because of the general term 'product', the effects might be so minimal that there could be no question of unequal tratment in the sense of Article 95 of the EEC Treaty.

Firma Schöttle & Söhne OHG observes that the mere hypothetical alteration of the equality of opportunity in the sphere of competition implies the existence of prohibited discrimination. In fact the detriment caused by the tax to products originating in each of the neighbouring states along the whole length of the 50 km strip cannot be regarded as minimal. It is also relevant that the effect of the additional tax on each undertaking involved in local transport established at a distance from the frontier comparable to that of the plaintiff must be regarded as serious. Such undertakings which, because the validity of their licences is restricted to local transport, are obliged to carry out the greater part of their transport operations in the strip of territory subject to the additional charge cease to be competitive because of this measure when they transport foreign goods.

The *Commission* observes that Article 95 does not merely seek to eliminate obstacles to trade at frontiers. On the contrary this article requires that a comparison be made of fiscal charges at any place whatever in the country. In this respect reliance may not be placed on the fact that a certain category of goods is, in general terms, subject to a different tax. The prohibition on imposing directly or indirectly higher internal charges makes it necessary on the contrary to carry out a comparison of charges which takes account of the facts of the particular case, for example the tax burden imposed on transport by a specific means.

High taxation of the imported products would constitute an infringement of Article 95 of the EEC Treaty even if that disparity were only evident in a small number of cases.

It proposes the following answer to this question:

'The first paragraph of Article 95 of the EEC Treaty must be interpreted as meaning that an indirect imposition of higher internal charges within the meaning of what has been stated under (1) above exists where products imported by international transport are subject to tax in a particular zone while national transport of goods in the same zone is not always subject to the tax.'

The third question

'Is discrimination within the meaning of Article 95 of the EEC Treaty excluded if transport of domestic goods abroad is subject to the same tax as transport of foreign goods into the country?'

The *Finanzgericht* states that the fact that, under the law, not only products from other Member States but also domestic products which are transported in the opposite direction are liable to tax in Germany shows clearly that discrimination against foreign goods was not intended by the legislature.

Firma Schöttle & Söhne OHG states that Article 95 prevents distortions of competition in the national market which are contrary to Community law from being compensated by the taxation of national products abroad. Therefore it is not relevant to state that the German law is not intentionally discriminatory. The prohibition on discrimination relates solely to the result of the unlawful conduct and the reasons for or the wrongful nature of the conduct are not relevant. The third question should also be answered in the affirmative.

The *Commission* points out that in order to determine whether there has been an infringement of Article 95 a comparison of the charges must be carried out. In this respect it is solely necessary to compare the charge on the imported product and that imposed on similar national products. The position of the exported products on the other hand is not relevant in the context of Article 95.

Furthermore the Commission observes that it is not the intention of the

legislature which is relevant but solely the objective situation. It proposes the following answer:

'Discrimination within the meaning of the first paragraph of Article 95 of the EEC Treaty is not excluded by the fact that the tax in question affects not only the carriage of imported products on the national territory but also the carriage of national products to a foreign country.'

The fourth question

'Is discrimination within the meaning of Article 95 of the EEC Treaty excluded by the fact that the taxation is of considerable national importance to an objective in the field of transport policy which is approved by Community law and that the discriminatory incidental effects are minimal and only avoidable by considerable extra administrative work and were restricted to the years 1969 to 1971?'

The *Finanzgericht* states that to prevent undertakings whose local area touched or overlapped the border of a neighbouring State from being able to undertake long-distance goods transport without paying tax the provisions contained in Paragraph 1 (1) No 2 of the Law relating to the carriage of goods by road were included in the Law. If Article 95 obliged the Federal Republic of Germany to make the same distinction between long-distance and local transport as national law with regard to transport within the country it would have been necessary to determine the central points of all towns and villages outside Germany which might possibly fall within the boundaries of domestic local zones. However the additional administrative expenses which would be involved would not be in proportion to the advantage thereby gained.

Firma Schöttle & Söhne OHG observes that Articles 7 and 95 of the EEC Treaty contain an absolute prohibition the extent of which is clearly defined. It may be ignored at will to the detriment of the protected community national as soon as this appears opportune to the national administration because the necessary rules entail administrative difficulties.

In order to avoid the discriminatory effect it would have been sufficient to enlarge the free zone referred to in Paragraph 3 (5) of the Law on the taxation of the carriage of goods by road in such a way that short-distance transport undertakings continue to be exempt from the tax on transport entailing the crossing of the border where the place of loading or unloading is on that part of the territory situated between 50 and 100 km from the border.

The *Commission* observes that whereas from a general economic point of view the discriminatory effect of the German tax was minimal it is however rather doubtful whether this is also the case from the point of view of the undertaking.

The *Commission* doubts whether it is true that the secondary discriminatory effect could only have been avoided at the cost of a substantial increase in administrative work. Even if this were the case the direct nature of the prohibition contained in Article 95 would not be at all altered by the fact that a Member State has to surmount certain difficulties in order to be able to comply with the provision within the context of the legislative measures adopted by it.

It proposes the following answer:

'The importance attached to the tax from the point of view of its political purpose, the scope of the discrimination, the increase in work required to avoid it and its term of validity are of no relevance with regard to the first paragraph of Article 95 of the EEC Treaty.'

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court put certain

questions to the Federal Republic of Germany. In answer to these questions the Federal Republic of Germany submitted the following observations.

Observations of the Federal Republic of Germany

The provision in Article 3 (5) of the Law on the taxation of the carriage of goods by road establishing a free zone was intended to take account of the reservations expressed by the Commission without however accepting the Commission's legal viewpoint. Later the Commission informed the Federal Government that it would raise no more objections to these provisions. In particular in the course of further consultations the Commission at no time brought the matter up again.

The Federal Government is of the opinion and continues to take the view that the tax on the carriage of goods by road does not fall under Article 95 because it is not a charge imposed on the goods themselves, that is, the product as such (Case 45/64, *Commission* v *Italy* [1965] ECR 857).

Article 95 only covers specific charges on products but not additional duties to which an undertaking is subject and in this respect a specific charge can only be said to exist when the product itself constitutes the basis of assessment for the charge (Case 28/67 *Molkereizentrale Westfalen/Lippe* v *Hauptzollamt Paderborn* [1968] ECR 143).

The basis of assessment of the tax on the carriage of goods by road was not the goods carried but the physical load imposed on the roads by the transport of the goods, expressed in metric tons per kilometre (Case 9/70, *Grad* v *Finanzamt Traunstein* [1970] ECR 825).

If such charges which were not related to the product itself but to its distribution were drawn into the scope of application of Article 95 then that provision would be extended far beyond its objective, which is to guarantee identical distribution conditions for imported and domestic products.

The provision of Paragraph 3 (5) of the German Law in question must be examined in the context of the Transport Policy Programme of the Federal Government for 1968 to 1972. It was intended to divert extensively the transport of goods by lorry, in particular heavy goods transport, to other means of transport, by means of the charge imposed under the programme.

Local traffic was exempt from this special tax as not being capable of replacement by other means of transport. However international transport from and into national local zones was subject to the tax. As there exists no provision for zones in neighbouring foreign countries the road haulage undertakings established in these local zones are to a large extent involved in long-distance goods transport. Their transport in the territory of the Federal Republic of Germany falls within local traffic within the meaning of Paragraph 2 (1) of the Law relating to the powered transport of goods irrespective of whether they transport goods abroad, so long as they do not leave the local zone within the Federal Republic of Germany. Their transport remains local transport even if the distance covered abroad is in excess of 50 kilometres. As the international transport operations carried out by these local transport undertakings could equally be carried out by other means of transport they were made subject to the tax irrespective of what proportion the distance covered in the Federal Republic was of the total transport distance.

The charge on the international carriage of goods by road was particularly necessary because important German industrial centres lie within the local area

of the borders of the Federal Republic of Germany. Because of their close economic links with the economic centres of other Member States these centres constitute the place of origin and destinations of a considerable volume of long-distance transport which, because of the proximity to the frontier, are carried out to a large extent by German local transport vehicles.

In this respect the legislature did not have the intention of imposing tax on genuine local traffic which crossed a frontier. For that reason by means of the rules in question contained in Paragraph 3 (5) it established tax-free zones along the frontier; in conjunction with the rules relating to local zones under the Law relating to the powered transport of goods, transport which crosses a border within a 50 km radius of the town or village in the territory of which it crosses the frontier is exempt from tax.

In the view of the Government of the Federal Republic the solution chosen by it was quite compatible with the prohibition on discrimination contained in the EEC Treaty. The technically different form of the rules for domestic transport and for international transport has not however resulted in discrimination against international local traffic. In the opinion of the German Government there did not exist any other solutions capable of conforming to the aim of the transport policy of the law on the one hand and with the EEC Treaty on the other. If for example the legislature had exempted from tax international transport by German local transport vehicles within a complete local zone the length of the frontier, that is to a distance of approximately 100 km from the frontier, then foreign transport undertakings would have been put at a disadvantage. An extension of the tax-free zone for transport by foreign vehicles to a distance of 100 km from the border would however have prejudiced German undertakings. As the frontier crossing-point had to be regarded as the place of origin (Standort) in the case of foreign transport, foreign vehicles would thereby have been granted a local zone with a radius of 100 km compared with a zone of a 50 km radius for German vehicles. The introduction of a tax-free zone for transport by domestic and foreign vehicles of 100 km from the border would have produced the result that the objective of the Transport Policy Programme could not have been achieved within a 100 km wide zone and, at its narrowest point, the Federal Republic of Germany is only 260 km wide.

The Government of the Federal Republic is of the opinion that the application of the domestic rules to international traffic would have entailed substantial technical administrative problems. In such a case the German legislature would have had to extend the system of the establishment of local zones set up under the Law relating to the powered transport of goods to all Member States. It may be concluded from the experience acquired by the German administration of this system within Germany that its extension to foreign countries would in practice be impossible. The determination of local zones often entails extensive and complicated research as to the centre of the town or village. It therefore requires consultation with the local authorities who are acquainted with the local conditions.

Finally the application of these rules to international transport must also be rejected on the grounds that it would not be possible for the domestic authorities to supervise the conditions for tax exemption in individual cases.

The Federal Government did not intend to extend the transport policy measures which were considered justified with regard to the national territory to other markets and thus indirectly to influence the transport policy of neighbouring States.

The applicant, represented by Mr Gerstenmaier, the Government of the Federal Republic of Germany, represented by its agent Mr Seidel and the Commission of the European Communities, represented by its agent Mr Wagenbaur, presented oral argument at the hearing on 30 November 1976.

The Advocate-General delivered his opinion at the hearing on 18 January 1977.

Law

1 By order of 17 December 1975, which was received at the Court Registry on 23 February 1976, the Finanzgericht Baden-Württemberg referred to the Court pursuant to Article 177 of the EEC Treaty various questions concerning the interpretation of the first paragraph of Article 95 of the Treaty prohibiting Member States from imposing 'directly or indirectly, on the products of other Member States any internal taxation .... in excess of that imposed .... on similar domestic products'.

2 The questions arise in the context of a dispute between a German importer of gravel from French territory and the Finanzamt Freudenstadt calling in question the compatibility of the German tax on the carriage of goods by road with the first paragraph of Article 95 of the Treaty in that for transport operations which were in every way comparable the importer had to pay a tax in respect of French goods but was able to carry out the transport operation in respect of national goods without paying tax.

3 It is necessary to recall the essential features of the German law on the taxation of the carriage of goods by road.

The national rules

4 The tax in question was part of a series of measures adopted in 1968 to coordinate the various means of transport. In this context the tax on the carriage of goods by road was intended to divert long-distance traffic towards the railways and inland waterways. Consequently short-distance transport of goods which cannot reasonably be diverted from the roads was exempted from the tax.

5 For this purpose the law in question refers to the definitions of the concepts of long-distance and local transport contained in the German Law relating to the powered transport of goods, the Güterkraftverkehrsgesetz (Bundesgesetzblatt 1952 I p. 697). In the second paragraph of that law it is provided that local transport covers all transport of goods for others by powered vehicle within the borders of the town or village or the 'local' zone.

The local zone is the territory within a radius of 50 km calculated directly from the centre of the town or village in which the lorry has its place of origin and includes the territory of any town or village the centre of which is within that circle. If a town or village has several centres the local zone covers all the territory included within a radius of 50 km from each centre with the result that the territories of the local zones may vary in size.

6 A powered vehicle registered abroad is deemed to have its place of origin in the border town or village at which it crosses the German border (Paragraph 6 (b) of the Law relating to the powered transport of goods) as amended by the Fourth Law amending the Law relating to the powered transport of goods (Viertes Gesetz zur Änderung des Güterkraftverkehrsgesetz) (Bundesgesetzblatt I, p. 1157).

7 The long-distance transport of goods includes any transport of goods by a powered vehicle outside the local zone or which leaves a local zone.

8 It should be pointed out that the tax is assessed on the basis of the weight of the goods and the distance covered while in the case of own goods transport the rate of tax is progressive.

9 The law in question provides that long-distance goods transport and international local transport is subject to the tax. On the other hand international transport which commences in or has its destination in the local zone of a frontier town or village is exempt from the tax. Thus the treatment of international transport is identical to that of domestic transport by a lorry whose place of origin is the frontier town or village.

10 It appears from the data in the file that the imposition of the tax on international local traffic could in certain circumstances form a barrier to

intra-Community trade in that in the case of transport within the local zone by a national lorry the tax was only levied if the German border was crossed.

The first question

11 The first question asks whether

'a tax which is imposed on the basis of distance covered within a Member State for the carriage of goods by road constitutes taxation on products within the meaning of Article 95 of the EEC Treaty.'

12 The first paragraph of Article 95 provides that no Member State may 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. Thus the purpose of Article 95 is to remove disguised restrictions on the free movement of goods which may result from the tax provisions of a Member State.

13 In view of the general scheme and objectives of that provision the concept of tax on a product must be interpreted in a wide sense.

14 Such restrictions may result from a tax which in fact compensates for taxes which are imposed on the activity of the undertaking and not on the products as such. This problem does not arise when the national product and the imported product are subject to tax at the same time and on the basis of a specific activity, for example, the use of national roads.

15 Nevertheless such a tax which has an immediate effect on the cost of the national and imported product must by virtue of Article 95 be applied in a manner which is not discriminatory to imported products.

16 Therefore the reply must be given to the national court that taxation imposed indirectly on products within the meaning of Article 95 of the EEC Treaty must be interpreted as also including a charge imposed on international transport of goods by road according to the distance covered on the national territory and the weight of the goods in question.

The second, third and fourth questions

17 The second, third and fourth questions ask the Court to interpret the prohibition on imposing on foreign products taxation in excess of that imposed on national products having regard to the fact that:

1. the possibility of different treatment for imported products may in any case only arise if imported products are delivered in a strip of territory approximately 50 kilometres wide running parallel to and at a distance of 50 km from the border;

2. transport of domestic goods abroad is subject to the same tax as transport of foreign goods into the country;

3. the objective of the tax is part of the transport policy and the discriminatory effects could only have been avoided by considerable extra administrative expenditure and they were restricted to the years 1969 to 1971.

18 These questions should be answered jointly.

19 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. Therefore it is irrelevant that the taxation is also imposed on the same conditions on national products which are exported and on imported products.

20 The first paragraph of Article 95 is infringed where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product.

21 Higher taxation of the imported product exists when the conditions under which the carrier is subject to tax are different with regard to international transport and purely domestic transport so that in comparable situations the product moving within the Member State is not subject to the tax to which an imported product is subject. Indeed in order to compare the tax on goods moving within the national territory with that on the imported product for the purposes of the application of Article 95, account must be taken of both

the basis of assessment of the tax and the advantages or exemptions which each tax carries with it. For the taxation of the imported product to be higher it is sufficient that in certain circumstances the national product may be transported without being subject to tax for the same distance within the Member State while the imported product is subject to the tax solely because the border was crossed. In this respect it is for the national judge to compare in specific cases the situations which may arise.

22 The information supplied by the national court shows that a real obstacle to free movement of goods may sometimes result from the application of different conditions for the imposition of taxation with regard to both international transport and domestic transport. The minor and incidental nature of the obstacle created by a national tax and the fact that it could only have been avoided in practice by abolishing the tax are not sufficient to prevent Article 95 from being applicable. Title IV of Part Two of the Treaty concerning the common transport policy enables Member States to resolve problems of competition between means of transport without however adversely affecting the free movement of goods. However the lack of such a policy is no jusitification for a derogation from Article 95 of the Treaty.

Costs

23 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities which submitted observations to the Court are not recoverable. As these proceedings are, 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 questions referred to it by the Finanzgericht Baden-Württemberg by order of 17 December 1975, hereby rules:

1. Taxation imposed indirectly on products within the meaning of Article 95 of the EEC Treaty must be interpreted as also including a charge imposed on international transport of goods by road according to the distance covered on the national territory and the weight of the goods in question.

2. **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 and it is therefore irrelevant that the taxation is also imposed on the same conditions on national products which are exported and on imported products.**

3. **In order to compare the tax on goods moving within the national territory with that on the imported product for the purposes of the application of Article 95, account must be taken of both the basis of assessment of the tax and also of the advantages or exemptions which each tax carries with it.**

4. **The minor and incidental nature of the obstacle created by a national tax and the fact that it could only have been avoided in practice by abolishing the tax are not sufficient to prevent Article 95 from being applicable.**

Kutscher Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 16 February 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 18 JANUARY 1977 [1]

Mr President,
Members of the Court,

1. The Court has, on several occasions, had to interpret the first paragraph of Article 95 of the Treaty of Rome which, as we all know, prohibits Member States from imposing, 'directly or indirectly', any internal taxation *of any kind* in excess of that imposed directly or indirectly on similar domestic products. The essential issue in the present case is

1 — Translated from the Italian.