In Case 78/76

Reference to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht Frankfurt for a preliminary ruling in the action pending before that court between:

FIRMA STEINIKE UND WEINLIG, Hamburg,

and

FEDERAL REPUBLIC OF GERMANY, represented by the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Foresty)

on the interpretation of Articles 9 (1), 12, 13 (2), 92, 93 and 95 of the EEC Treaty,

THE COURT

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

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The order making the reference and the written observations submitted under 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. Firma Steinike & Weinlig, Hamburg, the plaintiff in the main action, imported citrus concentrates from Italy and third countries into the Federal Republic of Germany. As imported the juices are not fit for human consumption but are processed by the firm into basic materials for the soft drinks industry. When the imported product was processed a demand was made on the plaintiff in the main action by the competent federal agency for a contribution intended to finance a 'Fonds zur Absatzförderung

der deutschen Land-, Forst- und Ernährungswirtschaft' (Fund for sales promotion in the German Agricultural and Food Industry and in German Forestry), hereinafter referred to as 'the Fund'. The objective of this fund, set up by a Federal Law of 26 June 1969 (BGBl. I, p. 635) is to promote, by means of a body called 'Centrale Marketing Gesellschaft' (CMG), the sale and export of products of the German agricultural and food industry and of German forestry by opening up and fostering markets at home and abroad. The CMG engages in collective advertising, organizes fairs and exhibitions and undertakes market research etc.

According to Paragraph 1 of the Law, the Fund is an institution governed by public law and is financed *inter alia* by federal grants and contributions from undertakings in the agricultural, forestry and food sector. The amount of the contribution depends upon the kind of undertakings concerned. Agricultural and forestry undertakings pay a contribution which is fixed according to land tax or head of cattle; processing undertakings pay a contribution based on 'the most direct link in the marketing process between producer and consumer'. With this objective Paragraph 10 (8) of the Law of 26 June 1969 establishing the Fund fixes the rate and basis of the payment of the contribution in question sector by sector (sugar refineries, mills, breweries etc.). With regard to fruit and vegetables the relevant provision is Paragraph 10 (8) (e) which provides that a contribution shall be payable by fruit and vegetable processing undertakings at the rate of DM 0·30 per DM 100 worth of unprocessed fruit and vegetables when processed or when first processed in so far as such products are not liable to the contribution referred to in Paragraph 10 (8) (d).

2. Until 1972 fruit and vegetables imported from abroad contributed to the financing of the Fund if they were processed in the Federal Republic of Germany into further products for, in this case, they were regarded as benefiting likewise from the sales promotion, but the Law on the Fund was amended by a Law of 23 March 1972 exempting from then on citrus concentrates from the contribution.

3. In the national court the plaintiff in the main action challenged the legality of the contribution which it was required to pay (DM 20 000 over a period of 19 months) on the ground that this contribution financed a State aid prohibited by Article 92 of the Treaty.

The Verwaltungsgericht Frankfurt, before which the action came, referred the following questions to the Court:

(a) Do the procedural rules prescribed in Article 93 of the EEC Treaty preclude a national court from obtaining a preliminary ruling on Article 92 of the EEC Treaty and subsequently from deciding upon the application of this provision?

(b) Is the meaning of the expression 'undertakings or the production of certain goods' in Article 92 of the EEC Treaty restricted to private businesses or does it also include non-profit-making institutions governed by public law?

(c) Is the concept 'any aid granted *through* State resources' satisfied even if the State agency itself receives aid from the State or private undertakings?

(d) Is there aid in the sense of granting a gratuitous advantage if the recipient of aid is not a private undertaking but a State agency, and can there be said to be gratuitousness when the charge on the individual undertaking is insignificant in relation to the total amount of contributions?

(e) Is competition distorted and trade between Member States affected if the market research and advertising carried on by the State agency in its own country and abroad is also carried on by similar institutions of other Community countries?

(f) If the charge is not levied on the imported goods themselves but on their processing, is it a charge having equivalent effect under Articles 9 (1), 12 and 13 (2) of the EEC Treaty?

(g) Does the imposition of taxation on 'the products of other Member States' not when they are imported but only when they are processed amount to discrimination within the meaning of Article 95 of the EEC Treaty?

According to the grounds of the order of reference the questions raised are based on the following considerations:

(a) In the opinion of the national court it is doubtful whether the effect of the procedure referred to in Article 93 of the Treaty, according to which it is for the Commission to find whether aid granted by a State is compatible with Article 92 of the Treaty, is to prevent national courts from considering a national provision granting or providing for aid and, if necessary, finding that it is incompatible with Article 92 of the Treaty. Such a prohibition would give rise to misgivings of a constitutional nature and it would seem doubtful whether it would be necessary to interpret Article 93 in such a way.

(b) Article 92 (1) refers to aid 'favouring certain undertakings or the production of certain goods' and it is necessary to determine whether these words likewise cover non-profit-making institutions governed by public law, such as the Fund.

(c) and (d) Article 92 prohibits aid granted through State resources and in view of the facts of the case it is necessary to inquire whether this applies where the institution which grants the aid is financed by contributions from undertakings which it benefits. Is there aid in the sense of a gratuitous benefit when the beneficiary is a State institution or has an undertaking a gratuitous advantage because it makes only an insignificant contribution compared with the benefit which it draws from the Fund?

(e) The national court doubts whether an aid fund of the kind in question is such as to distort competition and affect trade within the Community, as specified by Article 92, since similar funds exist in the other Member States.

(f) and (g) Since the contribution to the Fund is levied not when the product in question is imported but when it is subsequently processed and since the contribution relates to goods not produced in Germany, the national court wishes to be able to judge whether the conditions which, according to the case-law of the Court of Justice, determine whether there is a charge having equivalent effect (Articles 12 and 13) or discriminatory internal taxation (Article 95) are fulfilled.

The order of reference of 22 July 1976 was registered at the Registry of the Court of Justice on 2 August 1976.

The plaintiff in the main action, the Government of the Federal Republic of Germany, and the Commission of the European Communities submitted written observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

Upon reading the report of the Judge-Rapporteur, and upon hearing the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

(1) The Commission

The Commission makes the preliminary observation that the Law of 26 June 1969 was first submitted to it in accordance with Article 93 of the EEC Treaty and that it remains under the constant review to which the systems of aid in the Member States are subjected.

Admissibility of the request for interpretation

Without challenging the admissibility of the reference for a preliminary ruling, the Commission voices the opinion that it has no purpose in so far as it relates to the interpretation of the substantive provisions of Article 92 (1) and, since they do not as such have direct effect in the legal system of the Member States, they cannot therefore be relied on before the national courts.

Answer to be given to the questions raised

A — The question whether the rules contained in Article 93 of the Treaty prevent national courts from ruling on the application of Article 92

Citing the case-law of the Court of Justice (Case 6/64, 15 July 1974, *Costa* v *Enel* [1964] ECR 585; Case 120/73, 11 December 1973, *Lorenz* [1973] ECR 1471; Case 77/72, 19 June 1973, *Capolongo* [1973] ECR 611) the Commission considers that the following is the position:

(a) In the case of 'new aid', that is to say, aid granted after the entry into force of the Treaty, national courts have jurisdiction only to consider whether it has been granted in accordance with the procedure for checking provided for in Article 93 or by the regulations adopted under Article 94 and, if this is not so, to find that aid granted in disregard of this procedure comes under a prohibition which has direct effect and may be relied on before the courts.

(b) In the case of existing aid, that is to say aid established *before* the entry into force of the Treaty, or aid introduced subsequently but in accordance with the procedure for checking provided for by Article 93, national courts cannot decide whether such aid is incompatible with Article 92 nor can such incompatibility be relied on before them, save where the constant review by the Commission has previously led it to decide that the State concerned must abolish or alter this aid.

(c) In view, however, of the fact that the Court has made it a princple not 'to criticize the grounds and purpose of the request for interpretation' (Judgment of 15 July 1964, Case 6/64 *Costa* v *Enel* [1964] ECR 585) there is nothing to prevent a national court from asking the Court about Article 92 or more generally about a provision which does not have direct effect. Such questions, however, serve no purpose. This is especially so where they relate to measures of aid validly instituted and subjected to the constant review of existing systems of aid, that is to say in a case where, as a result of Articles 92 to 94 taken together and interpreted by the Court of Justice, no action may be brought before the national court to apply the provisions of Article 92.

(d) In the abovementioned circumstances it is only in case they may be of use that the Commission submits observations on the substantive interpretation of Article 92 with replies to questions (b), (c), (d) and (e).

B — The substantive interpretation of Article 92

Question (b)

In the Commission's view the concepts of 'production' and 'undertakings' in Article 92 are independent of the legal institutions in which they are found.

In the present case the legal status of the Fund is of even less consequence since it is not the true beneficiary of the aid which merely passes through its hands to benefit undertakings and the production of German agriculture and the food industry.

Questions (c) and (d)

To reply to these questions it is necessary first, as shown above, to distinguish the true beneficiary of the aid from the agency which administers it and first receives it. It is from the point of view of the former that it is necessary to judge the propriety of the aid. Further, for the application of Article 92 (1) it matters little that the 'State resources' come from the 'general budget', special taxes or even contributions imposed by a sovereign act (Judgment of 25 June 1970, Case 47/69 *Government of the French Republic* v *Commission* [1970] ECR 487; Judgment of 2 July 1974, Case 173/73 *Italian Government* v *Commission* [1974] ECR 709).

Although in the last-mentioned case the charge corresponded exactly to the benefit — and this is somewhat unusual — it was nevertheless the State intervention which enabled the receipients to 'help themselves' and Article 92 was applicable.

Questions (e)

The application of Article 92 of the Treaty cannot be excluded simply because similar institutions exist in other Member States to administer and grant aid.

In view of the differences in the structures of production from one Member State to another the same aid could have very different effects on competition. Member States could not in any event ensure justice by establishing in their turn identical or similar aid.

C — The interpretation of the provisions prohibiting charges having an effect equivalent to customs duties and discriminatory internal taxation

Questions (f) and (g)

These questions concern the interpretation of Articles 9 (1), 12 and 13 (2) and ask whether the contribution in question must be regarded as a charge having an effect equivalent to a customs duty.

With regard to this question and that under (g) (which relates to Article 95 of the Treaty) the Commission refers first of all to the case-law of the Court to the effect that a contribution cannot be both a charge having an effect equivalent to a customs duty and internal taxation, since the two concepts are mutually exclusive.

In the Commission's view, although the definition of a charge having equivalent effect as given in the judgment of 18 June 1975 in Case 94/74 *IGAV* [1975] ECR 699 implies, as Mr Advocate-General Roemer stressed in his opinion in Case 29/72 *Marimex* [1972] ECR 1309 at p. 1323, that the basic requirement is 'that the duty is imposed because of crossing the frontier and that crossing of the frontier constitutes the decisive reason for this', the fulfilment of this condition is not necessarily excluded by the fact that the imported products are subject to a charge on their processing after crossing the frontier, especially if the imported product was intended, as in the present case, by reason of its nature, to be processed and if similar national products were not taxed on processing.

Nevertheless in the Commission's view there is no doubt that the system of dues established under the Fund comes within the sphere of internal taxation within the meaning of Article 95, as interpreted, *inter alia,* by the abovementioned judgment in *IGAV.*

The Commission however draws attention to the fact that according to the case-law of the Court (Case 77/72, 19 June 1973, *Capolongo* [1973] ECR 611 and Case 94/74, 18 June 1975, *IGAV* [1975) ECR 699) a duty which on principle should be regarded as internal taxation may nevertheless be regarded as a charge having an effect equivalent to a

customs duty where, although applying equally to domestic and imported products, it is used specifically and exclusively to benefit domestic products.

The application of Article 13 to situations normally covered by Article 95 should, however, be confined to 'the strictly limited one of substantial fraud on the law', otherwise the distinction between the respective scopes of Articles 13 and 95 would be eroded.

The Commission doubts whether it is a case of charges having an effect equivalent to customs duties. It is not sufficiently well established that the contribution in question exclusively benefits German products and it is doubtful whether there is sufficient identity between, on the one hand, the domestic and imported products subject to the contribution, and on the other hand, the domestic products benefiting from the activities of the Fund.

In so far as the contribution is not a charge having equivalent effect, it must be conceded that it is internal taxation within the meaning of Article 95. The Commission observes that in this event it is also necessary to consider whether it is not discriminatory by reason of the fact that the yield which it obtains from the contributions benefits exclusively domestic products. If it is discriminatory internal taxation and accordingly incompatible with Article 95, the national court would, in the Commission's view, be confronted with a difficult problem.

It follows from the judgment of 4 April 1968 in Case 34/67 *Lück* [1968] ECR 245 that in this case it is for the national courts to decide according to their national law whether taxation which infringes Article 95 must be completely annulled or only reduced to the level of taxation affecting similar domestic products. If this second solution is required in German law it may be asked in a case where the inequality between the taxation affecting domestic products and that affecting imported products arises from the fact that the yield of the taxation goes exclusively for purposes benefiting domestic products alone how the benefit granted to domestic products should be assessed. In the Commission's view this would be an impossible task so that the national court would be led to declare the system completely incompatible with Article 95.

The Commission proposes the following answers to the questions raised by the Verwaltungsgericht Frankfurt:

(1) The provisions of Article 92 have no effect in the legal system of Member States enabling them to be relied on before national courts unless they have been put into concrete form by the general measures provided for by Article 94 or by the decisions in individual cases contemplated by Article 93 (2).

(2) The fact that a charge affects an imported product not on import but on being processed does not prevent the charge from having an effect equivalent to a customs duty within the meaning of Articles 9, 12 and 13 (2) of the Treaty provided that all the requisite conditions for the application of these provisions are fulfilled.

(3) Under the terms of Article 95 of the Treaty it is necessary to take account also of internal taxation affecting products from other Member States only after import and on the occasion of their processing.

(2) Observations of the Government of the Federal Republic of Germany

Question (a)

In the view of the Government of the Federal Republic of Germany Article 93 of the EEC Treaty cannot justify a limitation on the power of national courts to make a reference for a

preliminary ruling under Article 177 of the EEC Treaty.

Basically the Verwaltungsgericht requires to know whether Article 92 of the EEC Treaty creates subjective rights in favour of the individual, that is to say whether the provision is directly applicable. The Government of the Federal Republic of Germany considers that a distinction must be made between: (1) aid introduced without the procedural rules set out in Article 93 being observed; (2) aid declared legitimate; or (3) aid prohibited as a result of due process.

In the first case, as shown by the case-law of the Court of Justice, the prohibition on putting the aid into effect is directly applicable and creates rights in favour of the individual which the national courts are required to protect. This direct effect of Article 93 means that the national court can verify whether the measures taken accord with the concept of aid as used in Articles 92 and 93.

The national court can in this case judge the incompatibility of the aid, which presupposes that the direct effect of the last part of Article 93 (3) to a certain extent involves Article 92 of the EEC Treaty being directly applicable.

On the other hand where aid has been duly instituted and recognized by the Commission as compatible with the Treaty or where it has been prohibited by the Treaty, individuals cannot rely on the direct effect of Article 92.

This is the position in the case of a system of aid, existing when the Treaty was entered into, and not yet abolished or aid duly notified by the Member State after the Treaty was entered into and against which the Commission has not raised objections or aid which has been altered by the Member State as a result of objection from the Commission.

Recognition of direct effect in these cases would necessarily mean allowing the national court to rule independently on the compatibility of the system of aid approved by the Commission and thus give the national court jurisdiction which the Treaty gives to the Commission.

The Government of the Federal Republic of Germany proposes the following reply to the first question:

(1) No rule in the Treaty prevents a national court from making a reference for a preliminary ruling under Article 177 of the EEC Treaty in relation to Article 92.

(2) Where a national system of aid is introduced or continued in accordance with the procedure provided for in Article 93, Article 92 of the EEC Treaty gives the individual no rights requiring to be protected by national courts.

Question (b)

The Government of the Federal Republic of Germany makes the preliminary observation that in its view question (b) and also questions (c), (d) and (e) serve no purpose since Article 92 is not directly applicable. Nevertheless it will make brief observations on the questions.

In answer to question (b) the German Government observes that neither the legal form nor the aim of making a profit are decisive criteria in the interpretation of the concept of 'undertaking' in Article 92; the decisive factor is the permanent pursuit of economic objectives which may also be the case with a non-profit-making institution governed by public law.

Question (c)

With regard to question (c) the Government of the Federal Republic of Germany takes the view that the condition 'through State resources' is fulfilled not only where they are budgetary resources but also where the State obtains the resources on the capital market or through charges in the nature of taxes.

Question (d)

The Government of the Federal Republic of Germany states that the fact that the beneficiary of aid is a State agency does not exclude the possibility that there is aid within the meaning of Article 92 of the EEC Treaty. However, the form of financing chosen by the legislature, namely the obligatory payment of a contribution, does not make the Fund, which is a self-governing institution of the agricultural economic system, a recipient of aid within the meaning of Article 92 of the Treaty.

Question (e)

In judging whether a State measure distorts competition it does not matter whether similar measures distorting competition are adopted by other Member States of the Community. Market research and advertising, however, by a State agency cannot be regarded as affecting trade between Member States and distorting competition where the activity of the State agency benefits both domestic and foreign producers.

Question (f)

With regard to the question whether a charge, which is not levied on the imported product itself but when it is processed, is a charge having an effect equivalent to a dustoms duty, the Government of the Federal Republic of Germany takes the view that the contributions in question cannot be classified as charges having an effect equivalent to customs duties.

According to the judgments in Cases 77/72 *Capolongo* and 94/74 *IGAV* there can in the case of a non-discriminatory system of domestic charges be said to be a charge having an effect equivalent to a customs duty only where the goods bearing the charge and those benefiting from it are in competition with one another and to the extent that there is a *specific* advantage in competition for the domestic products. In the case of the Fund the resources arising from the contribution exacted both from home-produced fruit and vegetables and from imported products are used to help the sale of products processed in Germany both from imported and home-produced fruit and vegetables. The advantage from the charge does not, therefore, benefit the domestic raw product competing with the imported product.

Question (g)

With regard to the question whether the imposition of taxation on the products of other Member States not when they are imported but only when they are processed amounts to discrimination within the meaning of Article 95 of the EEC Treaty, the Government of the Federal Republic of Germany observes that for the prohibition in Article 95 of the Treaty to apply there must be discrimination between the domestic and imported products subject to the charge at the same stage of production. Question (g) by the Verwaltungsgericht Frankfurt, must therefore be answered as follows:

There can only be a varying, discriminatory charge on imported products within the meaning of Article 95 of the EEC Treaty where the domestic products competing with them, and not on the other hand the domestic processed products, are subject to a lower charge.

(3) Observations of Firma Steinike & Weinlig

The plaintiff in the main action observes that although the present case is analagous to cases already decided there is nevertheless a distinction in that now it is a question of a product which is the subject of a common organization of the market in products processed from fruit and vegetables (Regulation (EEC) No 865/68 of 28 June 1968, OJ English Special Edition 1968 (I) p. 225).

Question (a)

The plaintiff in the main action considers that this question must be answered in the affirmative. When a national court takes the view that aid infringes Article 92 of the EEC Treaty, although the Commission has not initiated the procedure with regard thereto under Article 93 of the EEC Treaty, the concept of the rule of law prevents the national court from being required to regard the aid as lawful.

It must be entitled to make a reference for a preliminary ruling in relation to Article 92 of the EEC Treaty and then apply this provision in considering the national law.

Although the question of the direct application of Article 92 is not the subject of the reference for a preliminary ruling, nevertheless the plaintiff observes that the prohibition in Article 92 is implemented by Article 12 of Regulation No 865/68 of the Council, which is itself directly applicable and which, by citing separately Article 92, has made it directly applicable. In the main action the plaintiff, moreover, has alleged an infringement of Article 93 (3) of the EEC Treaty: The German Law of 26 June 1969, published in the Bundesgesetzblatt on 28 June 1969, was not notified to the Permanent Representation of the Federal Republic of Germany until 4 July 1969. The plaintiff in the main action does not know whether this Law has been subsequently notified to the Commission, but it certainly could no longer have been notified as a 'draft measure'.

Question (b)

Question (b) asked by the Verwaltungsgericht Frankfurt is irrelevant since the Fund does not itself undertake market research or advertising but under Paragraph 2 (2) of the Law puts funds at the disposal of a 'Centrale Marketing-Gesellschaft der deutschen Agrarwirtschaft mbH' which is a private undertaking carrying out the tasks entrusted to the Fund or in turn, for promotional purposes, making funds available to bodies in the agricultural and forestry sector.

The plaintiff in the main action considers in any event that a non-profit-making institution governed by public law can also constitute an undertaking within the meaning of Article 92 of the EEC Treaty.

Question (c)

The question asked is based on the fallacy that the Fund is the beneficiary of the aid whereas in fact it simply collects and distributes funds.

In any event aid which originates from a fund which in turn is financed by contributions or direct State subsidies must be regarded as being granted 'through State resources'.

Question (d)

This question has two parts: the first which is concerned with whether there can be said to be aid within the meaning of Article 92 where the recipient of aid is not an undertaking but a State agency, overlooks the fact that it is not the Fund, which is only a collector and distributor of the relevant finance, but the individual undertakings, on behalf of whose products the CMG advertises, which benefit. With regard to the second part of the question relating to the gratuitous nature of the aid, the plaintiff states what has to be considered is whether as a whole the Law on the Fund constitutes an aid, since the contribution of the individual undertaking in relation to the total receipts cannot be decisive.

Question (e)

With regard to Question (e) the plaintiff states that there is distortion of competition and trade between Member

States is affected where the sales promotion relates to products the subject of a common organization of the market. The levying of compulsory contributions is lawful only where it is made on domestic producers or products and does not burden imported products. Only in this case may the Commission restrict its control to the aid without questioning its financing. If, on the other hand, products from other Member States are also subject to contributions, the financing of the aid has itself a protective function going beyond the effect of the actual aid or supplementing it. The fact that similar systems of sales promotion exist in other Member States cannot make the aid in question lawful for in any event there is a threat of distortion of competition by reason of the different systems.

The plaintiff in the main action takes the view that the Absatzfondsgesetz infringes also the prohibition on measures having an effect equivalent to quantitative restrictions (Articles 30 *et seq.* of the Treaty and Article 10 of Regulation No 865/68), since German undertakings can spend less on advertising.

Question (f)

The plaintiff states that this question relates to the supposition that the contribution in question is a charge having an effect equivalent to a customs duty and queries whether it is so and whether the charge may be regarded as being levied 'on import' where it is not related to the crossing of the frontier but to the subsequent processing of the imported products.

In the plaintiff's view the contribution in question must be regarded as a charge having an effect equivalent to a customs duty in spite of the circumstances referred to in the question. The case-law of the Court shows that the prohibition in Article 13 arises from the effect of the charge and not the manner and way in which it is levied. The charge in question is not part of a general system covering systematically domestic and imported products on the same basis for no citrus fruit grows in the Federal Republic of Germany and further the contribution exclusively benefits domestic products. Since the effect equivalent to a customs duty is obvious, the charging of the imported product only at the processing stage is simply a matter of collection procedure.

Question (g)

An answer to Question (g) is unnecessary since the contribution in question is in the nature of a charge having an effect equivalent to a customs duty.

The plaintiff, however, refers to the fact that 'the prohibition on discrimination in Article 95 of the EEC Treaty relates only to the fact of taxation as such without any reference to import or the manner and time of levying'.

At the hearing on 25 January 1975 the plaintiff in the main action, represented by Dr Ehle, Advocate of the Cologne Bar, the Government of the Federal Republic, represented by its Agent, Mr Seidel and the Commission of the European Communities represented by its Agent, Mr Oldekop, submitted oral observations.

The Advocate-General delivered his opinion at the hearing on 10 February 1977.

Decision

1 By order dated 10 June 1976, received at the Court Registry on 2 August 1976, the Verwaltungsgericht Frankfurt am Main raised various questions under Article 177 of the EEC Treaty relating to the interpretation of Articles

9, 12, 13, 92, 93 and 95 of the EEC Treaty. These questions have arisen in an action between a German undertaking, the plaintiff in the main action, and the Federal Republic of Germany, represented by the Bundesamt für Ernährung und Forstwirtschaft; they relate to the compatability with Community law of a charge DM 20 000 levied on the plaintiff on the processing of citrus concentrates imported from Italy and various third countries. This charge is intended, along with other funds of a different kind, to finance the Absatzförderungsfonds der deutschen Land-, Forst- und Ernährungswirtschaft (hereinafter called 'the Fund') set up by a Federal Law of 26 June 1969. Under Paragraph 2 of this law the purpose of the Fund is, with the help of a body financed and controlled by it and functioning under the name 'Centrale Marketing-Gesellschaft der deutschen Agrarwirtschaft', to 'promote centrally by the use of modern means and methods the sale and use of products of the German agricultural and food industry and of German forestry by opening up and fostering markets at home and abroad'. The aid is given to the German food industry independently of whether its products are made from domestic raw material or from semi-finished products of domestic origin or from other Member States. The Commission, which under Article 93 (3) of the Treaty was informed in advance by the Federal Republic of the intended introduction of this aid, has raised no objection to it with result that the said legal provisions have been adopted regularly from the point of view of the procedure laid down in Article 93.

2 The plaintiff in the main action takes the view that the charges demanded of it infringe the Treaty and are not payable because on the one hand the purpose is to finance aid incompatible with Article 92 of the Treaty and on the other hand since they were levied on the processing of citrus concentrates from other Member States although there is no similar product in the country of import they are either charges having an equivalent effect to a customs duty prohibited by Articles 9, 12 and 13 of the Treaty or internal taxation discriminating against a product from another Member State contrary to Article 95.

3 The Federal Law of 23 March 1972 provides that the contested contribution shall not be levied in respect of processing in a German undertaking of 'products which do not grow naturally in the climatic conditions of the territory to which this Law (on the Fund) applies'; citrus concentrates are thus exempted from the contribution. The contested contribution applies however to citrus concentrates which were imported and processed before the law of 23 March 1972 entered into force.

4 The questions referred for a preliminary ruling must be answered in this light.

The first question

5 The Verwaltungsgericht asks first whether the procedural rules prescribed in Article 93 of the EEC Treaty preclude a national court from obtaining a preliminary ruling on Article 92 of the EEC Treaty and subsequently from deciding upon the application of this provision. This question is concerned with how far the national courts can invoke Article 92 of the Treaty in the legal systems of the Member States whether it be at the behest of parties or of their own motion.

6 Article 92 (1) provides: 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'. Article 92 (2) lists three kinds of aid which are not affected by the prohibition in Article 92 (1) and Article 92 (3) lists three further kinds of aid which may in certain circumstances be considered to be compatible with the Common Market and empowers the Council to specify other categories which may be exempted from the prohibition in Article 92 (1).

7 Further the third subparagraph of Article 93 (2) of the Treaty provides: 'On application by a Member State, the Council, may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 92 or from the regulations provided for in Article 94, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known'. The Council may under Article 94 of the Treaty 'make any appropriate regulations for the application of Articles 92 and 93 and may in particular determine the conditions in which Article 93 (3) shall apply and the categories of aid exempted from this procedure'. Finally regard must be had to the powers given to the Council by Article 12 in respect of agricultural products.

8 These provisions show that the prohibition in Article 92 (1) is neither absolute nor unconditional since Article 92 (3) and Article 93 (2) give the Commission a wide discretion and the Council extensive power to admit aids in derogation from the general prohibition in Article 92 (1).

9 In judging in these cases whether State aid is compatible with the common market complex economic factors subject to rapid change must be taken into account and assessed. Article 93 of the Treaty therefore provides for a special procedure whereby the Commission shall keep aid under constant review. With regard to aid existing before the Treaty entered into force Article 93 (2) provides that the Commission may decide that the State concerned shall abolish or alter the aid within a period of time to be determined by the Commission. With regard to new aid which the Member States intend to introduce a special procedure is provided and if it is not followed the aid is not regarded as being regularly introduced. The conclusion to be drawn from all these considerations is that the intention of the Treaty, in providing through Article 93 for aid to be kept under constant review and supervised by the Commission, is that the finding that an aid may be incompatible with the common market is to be determined, subject to review by the Court, by means of an appropriate procedure which it is the Commission's responsiblility to set in motion.

10 The parties concerned cannot therefor simply, on the basis of Article 92 alone, challenge the compatibility of an aid with Community law before national courts or ask them to decide as to any compatibility which may be the main issue in actions before them or may arise as a subsidiary issue. There is this right however where the provisions of Article 92 have been applied by the general provisions provided for in Article 94 or by specific decisions under Article 93 (2).

11 The plaintiff in the main action claims that Article 12 of Regulation No 865/68 of the Council of 28 June 1968 on the common organization of the market in products processed from fruit and vegetables is a specific implementing measure of the aforesaid kind enabling individuals to rely on Article 92 before national courts for the purpose of a finding that State aid is incompatible with the common market and in particular with the relevant organization of the market.

12 The said Article 12 provides; 'Save as otherwise provided in this regulation, Articles 92, 93 and 94 of the Treaty shall apply to the production of and trade in the products listed in Article 1'.

13 In accordance with Article 42 of the Treaty, Article 12 declares that the provisions of Articles 92 to 94 shall apply to the agricultural products coming within the ambit of Regulation No 865/68 without however altering the nature and scope of these provisions.

14 The limitations mentioned above on reliance on Article 92 do not however mean that cases cannot come before national courts requiring them to interpret (making use if necessary of the procedure under Article 177 of the Treaty) and apply the provisions contained in Article 92, but nevertheless they cannot be called upon to find that such State aid is incompatible save in the case of aid introduced contrary to Article 93 (3). Thus a national court may have cause to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 93 (3) ought to have been subject to this procedure. In any case under Article 177 of the Treaty the national courts which make a reference for a preliminary ruling must themselves decide whether the questions referred are necessary to enable judgment to be given.

15 The answer to the first question is therefore that the provisions of Article 93 do not preclude a national court from referring a question on the interpretation of Article 92 of the Treaty to the Court of Justice if it considers that a decision thereon is necessary to enable it to give judgment; in the absence of implementing provisions within the meaning of Article 94 however a national court does not have jurisdiction to decide an action for a declaration that existing aid which has not been the subject of a decision by the Commission requiring the Member State concerned to abolish or alter it or that a new aid which has been introduced in accordance with Article 93 (3) is incompatible with the Treaty.

The second question

16 Secondly the national court asks whether the expression 'undertakings or the production of certain goods' in Article 92 of the EEC Treaty is restricted to private businesses or also includes non-profit-making institutions governed by public law.

17 Article 90 (1) of the Treaty provides: 'In the case of public undertakings and undertakings to which Member States grant special or exclusive rights,

Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94'. Article 90 (2) provides: 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

18 From this it follows that save for the reservation in Article 90 (2) of the Treaty, Article 92 covers all private and public undertakings and all their production.

The third and fourth questions

19 Thirdly the national court asks whether the concept 'any aid granted through State resources' is satisfied even if the State agency itself receives aid from the State or private undertakings. The fourth question asks whether there is aid in the sense of granting a gratuitous advantage if the recipient of aid is not a private undertaking but a State agency, and whether it can be said to be gratuitous when the charge on the individual undertaking is insignificant in relation to the total amount of contributions.

20 These two questions must be taken together.

21 The prohibition contained in Article 92 (1) covers all aid granted by a Member State or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid. In applying Article 92 regard must primarily be had to the effects of the aid on the undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid.

22 A measure adopted by the public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage by the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned.

The fifth question

23 The fifth question asks whether competition is distorted and trade between Member States affected if the market research and advertising carried on by the State agency in its own country and abroad is also carried on by similar institutions of other Community countries.

24 Any breach by a Member State of an obligation under the Treaty in connexion with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation. The effects of more than one distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the common market are increased.

The sixth and seventh questions

25 The sixth question asks the Court to decide whether a charge levied not on the imported product itself but on its processing is a charge having an effect equivalent to a customs duty under Articles 9 (1), 12 and 13 (2) of the EEC Treaty. The seventh question asks whether the imposition of taxation on 'the products of other Member States' not when they are imported but only when they are processed amounts to discrimination within the meaning of Article 95 of the EEC Treaty.

26 These two questions relate to the distinction between a charge having an effect equivalent to a customs duty within the meaning of Articles 9, 12 and 13 of the Treaty and internal taxation within the meaning of Article 95; they are intended to enable the national court to classify the levy due to the fund into one of the two categories. The two questions must therefore be dealt with together.

27 The same charge cannot within the system of the Treaty fall simultaneously within the two aforementioned categories in view of the fact that whereas Articles 9 and 12 prohibit Member States from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, Article 95 is limited to prohibiting discrimination against the products of other Member States by means of internal taxation.

28 As was ruled in the judgment of 18 June 1975 (Case 94/74 *IGAV* [1975] ECR 710) to which the national court refers, the prohibition contained in Article 13 (2) is aimed at any tax demanded at the time of or by reason of

importation and which, being imposed specifically on an imported product to the exclusion of a similar domestic product, results in the same restrictive consequences on the free movement of goods as a customs duty by altering the cost price of that product. The essential characteristic of a charge having an effect equivalent to a customs duty, which distinguishes it from internal taxation, is that the first is imposed exclusively on the imported product whilst the second is imposed on both imported and domestic products. A charge affecting both imported products and similar products could however constitute a charge having an effect equivalent to a customs duty if such a duty, which is limited to particular products, had the sole purpose of financing activities for the specific advantage of the taxed domestic products, so as to make good, wholly or in part, the fiscal charge imposed upon them.

29 Where the conditions which distinguish a charge having an effect equivalent to a customs duty are fulfilled, the fact that it is applied at the stage of marketing or processing of the product subsequent to its crossing the frontier is irrelevant when the product is charged solely by reason of its crossing the frontier, which factor excludes the domestic product from similar taxation.

30 Financial charges within a general system of internal taxation applying systematically to domestic and imported products according to the same criteria are not to be considered as charges having equivalent effect. This could be the case even where there is no domestic product similar to the imported product providing that the charge applies to whole classes of domestic or foreign products which are all in the same position no matter what their origin. The objective of Article 95 is to abolish direct or indirect discrimination against imported products but not to place them in a privileged tax position in relation to domestic products. There is generally no discrimination such as is prohibited by Article 95 where internal taxation applies to domestic products and to previously imported products on their being processed into more elaborate products without any distinctions of rate, basis of assessment or detailed rules for the levying thereof being made between them by reason of their origin.

Costs

31 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted 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 national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Verwaltungsgericht Frankfurt by order of 10 June 1976, hereby rules:

1. **The provisions of Article 93 do not preclude a national court from referring a question on the interpretation of Article 92 of the Treaty to the Court of Justice if it considers that a decision thereon is necessary to enable it to give judgment; in the absence of implementing provisions within the meaning of Article 94 however a national court does not have jurisdiction to decide an action for a declaration that existing aid which has not been the subject of a decision by the Commission requiring the Member State concerned to abolish or that a new aid which has been introduced in accordance with Article 93 (3) is incompatible with the Treaty.**

2. **Save for the reservation in Article 90 (2) of the Treaty, Article 92 covers all private and public undertakings and all their production.**

3. **The prohibition contained in Article 92 (1) covers all aid granted by a Member State or through State resources without its being necessary to make a distinction whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid.**

4. **A measure adopted by the public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage by the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned.**

5. **Any breach by a Member State of an obligation under the Treaty in connexion with the prohibition laid down in Article 92 cannot be justified by the fact that other Member States are also failing to fulfil this obligation.**

6. **Where the conditions which distinguish a charge having an effect equivalent to a customs duty are fulfilled, the fact that it**

is applied at the stage of marketing or processing of the product subsequent to its crossing the frontier is irrelevant when the product is charged solely by reason of its crossing the frontier, which factor excludes the domestic product from similar taxation.

7. **There is generally no discrimination such as is prohibited by Article 95 where internal taxation applies to domestic products and to previously imported products on their being processed into more elaborate products without any distinctions of rate, basis of assessment or detailed rules for the levying thereof being made between them by reason of their origin.**

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 22 March 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER
(see case 74/76, p. 580)