JUDGMENT OF THE COURT
4 APRIL 1968[1]

Firma Kunstmühle Tivoli v Hauptzollamt Würzburg[2] (Reference for a preliminary ruling by the Finanzgericht, Munich)

Case 20/67

Summary

1. Policy of the EEC — Common rules — Tax provisions — Imports from third countries — Inapplicability of Article 95 of the EEC Treaty

2. Agriculture — Common agricultural policy — Common organization of the markets — Turnover equalization tax — Not a charge having an effect equivalent to that of custom duties
(Regulation No 19 of the Council of the EEC on the progressive establishment of the market in cereals, Article 20(1))

1. Since the provisions of Article 95 of the Treaty establishing the European Economic Community relate only to products originating in Member States, they cannot be applied to imports from a third country.

2. A tax which is levied within the framework of turnover tax legislation and is designed to place all categories of products, whatever their origin, in a comparable fiscal situation does not, in the absense of any protective intention, constitute a charge having an effect equivalent to a customs duty within the meaning of Article 20(1) of Regulation No 19 on the progressive establishment of a common organization of the market in cereals.

Cf. paragraph 1, summary, Case 7/67.

Cf. paragraph 5, summary, Case 57/65, Rec. 1966, p. 295.

In Case 20/67

Reference to the Court under Article 177 of the Treaty establishing the European Economic Community by the Finanzgericht, Munich, (a court with jurisdiction in taxation matters) for a preliminary ruling in the action pending before that court between

FIRMA KUNSTMÜHLE TIVOLI, Munich,

and

1 — Language of the Case: German.
2 — CMLR.

HAUPTZOLLAMT (Principal Customs Office) WÜRZBURG,

on the interpretation of Regulation No 19 of the Council on the progressive establishment of a common organization of the market in cereals (Official Journal of 20 April 1962, p. 933 et seq.)

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

1. *Summary*

A — According to Article 1 of Regulation No 19 of the Council on the progressive establishment of a common organization of the market in cereals (Official Journal of 20 April 1962, p. 933) (hereinafter referred to as 'Regulation No 19') 'A common organization of the market in cereals shall be progressively established, comprising a levy system applicable to trade between Member States and to trade between Member States and third countries' (for certain categories of cereals).
The other provisions of the regulation set out the details of this 'levy system'. Article 20(1) provides in particular that:
'The application of the levy system to third countries shall entail the abolition of all customs duties, or charges having equivalent effect, on imports from third countries'.

B — Between 1 July 1966 and 3 October 1966 the Kunstmühle Tivoli undertaking (hereinafter referred to as 'the Tivoli undertaking') cleared through customs several consignments of hard wheat from the United States of America. The customs office concerned levied a turnover equalization tax (hereinafter referred to as the 'equalization tax') on these imports at 1.5% in accordance with German law.
For this reason the Tivoli undertaking brought an action before the Finanzgericht (Finance Court), Munich. Its argument before that court was that, since no domestic product comparable to the abovementioned product exists in Germany, the levy in question contravenes Article 20(1) of Regulation No 19.

2. *Contents of the order referring the matter; arguments of the Finanzgericht*

A — On 17 May 1967 the Finanzgericht, Munich, decided to request the Court of Justice for a preliminary ruling on the following question:

'Is the turnover equalization tax levied on the importation of a product a charge having an effect equivalent to a customs duty within the meaning of Regulation No 19 [of the Council of the EEC] when no similar or competing product (which could be used as a substitute) within the meaning of the first and second paragraphs of Article

95 of the EEC Treaty is produced in the national territory?'

B — The opinion of the Finanzgericht is, in effect, as follows:

(a) The parties to the main action rightly agree that hard wheat imported into Germany does not meet with any competition from any 'similar' domestic product (first paragraph of Article 95 of the EEC Treaty) or from one which may be substituted for it (second paragraph of Article 95).
(b) Taxes levied on the importation of goods for which the domestic market does not offer any competition do not fall under any of the prohibitions of Community law.
They are not 'charges having an effect equivalent to customs duties'. This concept has the same meaning in Regulation No 19 as in Articles 9 and 12 of the Treaty, because it is not to be supposed that those who drafted the regulation intended to impose additional restrictions on the fiscal sovereignty of Member States. From the point of view of Community law, it follows from the judgment delivered by the Court in Joined Cases 2 and 3/62 ([1962] E.C.R. 425) that it is only protective and discriminatory effects which must be considered as 'effects equivalent to a customs duty', and there are no such effects here.
Articles 95 and 97 of the Treaty cannot apply either, because they only concern cases in which the imported product meets competition from comparable domestic products.
Article 17(3) of the Treaty confirms what has been said above. According to this provision Member States have the right to substitute for customs duties of a fiscal nature an internal tax which complies with the provisions of Article 95. 'Where this tax does not come under Article 95 because there is no similar domestic product or one which may be substituted for it, the EEC Treaty certainly does not restrict the fiscal sovereignty of a Member State'. The levying, in such a case, of a turnover equalization tax on imported products is, it seems, justified by the German law on the equalization tax which imposes it on all deliveries of products carried out in Germany in return for payment. It also defines importation as a specific criterion for the imposition of the tax, with a view to aligning imported products which are not subject to the turnover tax to the domestic fiscal rate.

II — Procedure

The order referring the matter reached the Registry of the Court of Justice on 24 May 1967.

The Government of the Federal Republic of Germany, the Commission of the European Communities and the Tivoli undertaking submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, and delivered oral argument at the hearings on 5 and 7 December 1967. The Advocate-General delivered his reasoned, oral opinion at the hearing on 25 January 1968.
The Tivoli undertaking was represented by Messrs Dres, Modest, Heemann, Gündisch and Brändel of Hamburg, the Government of the Federal Republic by Mr Everling, Ministerialrat, Mr Hahnfeld, Ministerialrat, and Mr Bülow, Oberlandesgerichtsrat, and the Commission of the European Communities by its Legal Adviser, Mr Albrecht.

III — Summary of the observations submitted by the interested parties

The observations of the *Tivoli undertaking* may be summarized as follows:

A — If the opinion of the Finanzgericht were correct, each Member State would have the right to subject the importation of products for which the home market offers no competition to a tax fixed at an arbitrary rate. Therefore it would be open to it in certain circumstances to create obstacles to importation. This would also be the case as regards products coming from other Member States. Such a result would not be compatible with the very objectives of the Treaty, which are precisely to ensure that undertakings have the same chance of selling their goods in all parts of the territory governed by the Treaty.

B — Taxes on the importation of products for which the home market offers no competition cannot logically equalize taxation on comparable domestic products and

therefore they are not 'internal taxation' within the meaning of Articles 95 and 97 of the Treaty. They must on the contrary be considered as 'charges having an effect equivalent to customs duties'.

This finding follows from the judgment delivered by the Court of Justice in Case 57/65 (Rec. 1966, p. 293). It is also supported by Article 17(1) of the Treaty which states that the provisions of Article 9 et seq. also apply to customs duties of a fiscal nature. A characteristic of such duties is that they do not protect (or do not only protect) domestic production, but are intended only (or also) to bring in revenue to the state. Thus the levying of these duties is not directly subject to a condition precedent that the imported product must be comparable to a domestic product with which it competes.

From all these observations, as from the use of the words 'charges having equivalent effect', it must be concluded that for the legal classification of an entry tax the Treaty looks not to its nomenclature and its intended result, but to the effect obtained. For want of more detailed provisions, it must be supposed that Articles 12 and 13 of the EEC Treaty are applicable once the charge in question produces just *one* of the effects of a customs duty. Thus the fact that it increases the price of the imported product is enough; it does not also have to result in discrimination.

The argument to the contrary cannot rely on the judgment delivered by the Court in Joined Cases 2 and 3/62. The decision in question can only be interpreted as meaning that there is no 'increasing of the price' of a product when the purpose of the tax is only to offset a charge imposed at an earlier stage on the domestic product. The judgment in Joined Cases 52 and 55/65 (Rec. 1966, p. 227) shows that the Court considers the 'increasing of the price' as a decisive factor.

C — Article 17(3) of the EEC Treaty does not provide any argument to the contrary. The complete elimination of customs duties and of charges having equivalent effect can sometimes be advantageous for the products of the exporting state compared with those of the importing state, especially when the foreign products are not subjected to a charge comparable to the one imposed on the domestic products. The intention of Article 17(3) is merely to give Member States power to prevent such a result by levying an internal tax instead of a customs duty of a fiscal nature which has been abolished. All it means is that an imported product can be subjected to taxation if, and only if, there are comparable domestic products in competition with it, so that the charge is thus a genuine example of 'internal taxation' within the meaning of Article 95.

The observations of the *Federal Government* may be summarized as follows:

A — In distinguishing between charges having an effect equivalent to customs duties and internal taxation, the one decisive test is the general purpose of the charge in question. Therefore the turnover equalization tax must be considered as an example of internal taxation. This follows necessarily from the fact that Article 12 et seq. of the Treaty, on the one hand, and Article 95 et seq., on the other, have different objectives and lay down rules which are mutually exclusive. The Court of Justice has always accepted this point of view (judgments in Joined Cases 2 and 3/62, Joined Cases 52 and 55/65 and Case 57/65, loc. cit.; judgment in Case 10/65 [1965] E.C.R. 469).

These findings are equally true as regards imports from third countries.

One of the elements which characterizes 'charges having equivalent effect' is their protective function and the fact that they discriminate against imported products as compared with domestic ones. These elements are not present when taxation is imposed on products which are not in competition with any domestic products; in this case there is 'internal taxation' within the meaning of the EEC Treaty. The judgment delivered by the Court in Joined Cases 2 and 3/62 (loc. cit.) does not run counter to this line of reasoning, particularly since, in the case which it decided, comparable domestic products did in fact exist and could have been subjected to comparable taxes.

B — Nor can Article 95 be taken as meaning that it prohibits the levying of a turnover equalization tax in cases such as the present one.

First, it is not to be forgotten that speaking

in general terms genuine 'internal taxation' is not to be legally classified as a charge having equivalent effect just because it infringes Article 95. In any event Article 95 is not applicable in the present case. This is first of all because it does not cover imports from third countries. Secondly, and speaking generally, it is because the prohibitions which it lays down are only directed at cases in which the imported product is in competition with comparable domestic products. In so far as Community law does not expressly restrict the fiscal legislation of Member States, the States remain free to decide the rate at which the turnover equalization tax is to be levied.

C — Article 17(3) of the Treaty confirms what has already been said. By definition customs duties of a fiscal nature are levied on products which are not made within the country. In allowing these duties to be converted into internal taxation, Article 17(3) must mean that the taxation in question does not have 'an effect equivalent to that of customs duties'. From this it must also be concluded that Article 95 does not prohibit the levying of taxation on the importation of products for which the domestic market offers no competition. This is because otherwise the provision in question would have no practical point, since it is the very absence of such competition which is decisive as regards products subjected to customs duties of a fiscal nature.

The observations of the *Commission* may be summarized as follows:

A — No answer to the question asked here is to be found in the case-law of the Court, because in the cases previously decided the imported product was in competition with comparable domestic products.

B — In principle the levying of a turnover equalization tax on products which are not in competition with domestic products is compatible with the Treaty. In the thinking of national legislature, the turnover tax and the equalization tax relating to it are both intended as a levy on domestic consumption. This argument is also true of the products already mentioned. To exonerate products which have not been made inside the country from the equalization tax would encourage their consumption and would infringe the principle that there should be no fiscal discrimination. Contrary to the position with regard to customs duties, the only effect of levying the turnover equalization tax is to place all the products in the same situation from the fiscal point of view and to contribute to the financing of the expenditure of the State in a uniform way.

Article 17(3) of the Treaty confirms this interpretation. In this connexion the Commission advances substantially the same line of reasoning as the Federal Government.

The Commission also puts forward the following argument. The second paragraph of Article 95 points the same way. The protective measures referred to consist in levying on a product taxation which is heavier than the taxation on a competing product. Usually these measures are only adopted when the product against which the protection is to take effect is not made inside the country. If this were not so, there would be discrimination in favour of one domestic product as compared to another. Thus to a large extent the second paragraph of Article 95 would have no point if taxation on products which are not made within the country were illegal simply because of the prohibition on charges having an effect equivalent to customs duties.

C — Presumably turnover equalization taxes on products which are not in competition with domestic products can have 'effects equivalent to customs duties' if they are levied at excessively high or even prohibitive rates. It matters little that they may be neither protective nor discriminatory. First, this is true also of the customs duties to which the abovementioned products are subjected. Secondly, the restriction or the elimination of the free circulation of goods is also to be included amongst the 'effects equivalent to customs duties'. Since Article 95 makes no provision with regard to such an activity and since it is also a fact that this activity would be incompatible with the principles of the Common Market, the inevitable conclusion is that the prohibitions on imposing charges having equivalent effect are applicable here.

However, that is not the position in this case. The rate of the equalization tax levied

in Germany on hard wheat (1.5%) is no higher than the turnover tax levied on all categories of imported and home-grown cereals, and it is considerably lower than the rates applicable to other products.

D — Article 95 is not applicable here, because this case concerns imports from a third country. Therefore the Court need not decide the question whether the different uses to which hard wheat and soft wheat (a home-grown product) are put mean that the second paragraph of Article 95 is not applicable. The truth of the matter is that this question should be answered in the negative.

The Commission sets out its arguments on the subject in detail.

Grounds of judgment

In its order of 17 May 1967, which reached the Court on 24 May 1967, the Finanzgericht, Munich, put to the Court the following question under Article 177 of the Treaty establishing the European Economic Community: 'Is the turnover equalization tax levied on the importation of a product a charge having an effect equivalent to a customs duty within the meaning of Regulation No 19 [of the Council of the EEC] when no similar or competing product (which could be used as a substitute) within the meaning of the first and second paragraphs of Article 95 of the EEC Treaty is produced in the national territory?'

It appears from the file that the main action concerns the importation of cereals from a third country. Since the provisions of Article 95 of the Treaty establishing the European Economic Community relate only to products originating in Member States, they cannot be applied to imports from a third country. Therefore the question asked by the court making the reference must be answered solely on the basis of the provisions of Article 20(1) of Regulation No 19, on the progressive establishment of a common organization of the market in cereals, which was in force at the time when the main action arose.

Although Article 177 of the Treaty does not give the Court jurisdiction to apply the provisions of Community law to a national tax, nevertheless the Court may interpret Article 20 of Regulation No 19 with regard to the elements of a national tax levied on cereals from their countries and which adapts to the products imported a general turnover tax levied on all products sold within a Member State. Article 20(1) of the said regulation provides that the application of the levy system to third countries, which was established by that same regulation, 'shall entail the abolition of all customs duties, or charges having equivalent effect, on imports from third countries'. It follows that the question referred to the Court amounts to whether a tax levied in the circumstances stated above falls under this prohibition.

Regulation No 19 has as its purpose in particular to substitute a uniform system of levies for all the protective measures of different kinds previously applied by Member States.

In consequence, Article 20(1) of the same regulation abolished all national measures having protective effects similar to those of the levy.

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

Such a charge, of an essentially fiscal nature, when it is imposed on importation, is intended to place in a comparable fiscal situation all categories of products whatever their origin may be.

Hence, in the absence of a protective purpose, an internal tax of the type referred to by the Court making the reference cannot be considered as a charge having an effect equivalent to a customs duty within the meaning of Article 20(1) of Regulation No 19.

The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities which have submitted their observations to the Court are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Finanzgericht, Munich, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Federal Republic of Germany, the Commission of the European Communities and the applicant in the main action;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the EEC, especially Articles 95 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to Regulation No 19 of the Council of the EEC on the progressive establishment of a common organization of the market in cereals (Official Journal of 20 April 1962, p. 933 et seq.), especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Finanzgericht, Munich, by order of that court of 17 May 1967, hereby rules:

A tax imposed on the importation of products originating in third countries does not constitute a charge having an effect equivalent to a customs duty within the meaning of Article 20(1) of Regulation No 19 on the progressive establishment of a common organization of the market in cereals when it is imposed as a charge under the national system of turnover tax;

and declares:

It is for the court making the reference to decide on the costs of the present proceedings.

Lecourt Donner Strauß

Trabucchi Mertens de Wilmars

Delivered in open court in Luxembourg on 4 April 1968.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL GAND

(See Case 28/67, p. 159)