JUDGMENT OF THE COURT
4 APRIL 1968[1]

Firma Gebrüder Lück v Hauptzollamt Köln-Rheinau (Reference for a preliminary ruling by the Finanzgericht, Düsseldorf)

Case 34/67

Summary

1. *Policy of the EEC — Common rules — Tax provisions — Cumulative multi-stage tax — Average rates for imposed products or groups of imported products within the meaning of the first paragraph of Article 97 — No individual rights*

2. *Policy of the EEC — Common rules — Tax provisions — Taxation imposed on domestic products — Concept*
   (EEC Treaty, Article 95)

3. *Policy of the EEC — Common rules — Tax provisions — Rights conferred on individuals by Community law — Powers of national courts for the purpose of protecting such rights*
   (EEC Treaty, Article 95)

1. Cf. paragraph 4, summary, Case 28/67.

2. The concept of taxation imposed on a domestic product within the meaning of Article 95 of the Treaty means the tax burden which results from the application of the rate of tax fixed by law.

3. Article 95 of the Treaty has the effect of excluding the application of any national measure incompatible with it. However, the Article does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferrd by Community law. Particularly when an internal tax is incompatible with the first paragraph of Article 95 only beyond a certain amount, it is for the national court to decide, according to the rules of its national law, whether the illegality affects the whole tax or only so much of it as exceeds that amount. It is also for that court to decide whether the rules of national law which conflict with the said provision must be repealed or whether they are void as from 1 January 1962, or to select any other solution.

   Cf. paragraph 2, summary, Case 28/67.

In Case 34/67

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

1 — Language of the Case: German.

FIRMA GEBRÜDER LÜCK, Cologne-Braunsfeld,

and

HAUPTZOLLAMT (Principal Customs Office) KÖLN-RHEINAU

on the interpretation of Articles 95 and 97 of the EEC Treaty,

THE COURT

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

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and procedure

The facts of the case may be summarized as follows:

1. *Origin of the case*

On 12 and 28 July 1966 the plaintiff in the main action (hereinafter referred to as 'the plaintiff') cleared through customs produce imported by it from Italy consisting of tomato purée, tinned pears and tinned beans. For tomato purée in packages weighing less than 1 kg, and for the tinned pears and beans, the relevant customs office levied turnover equalization tax ('Umsatzausgleichssteuer' or 'UASt', hereinafter referred to as the 'equalization tax') at a rate of 6%; for tomato purée in packages weighing more than 1 kg, the tax was levied at 4%.
The plaintiff took the matter to the Finanzgericht (Finance Court), Düsseldorf, claiming in particular that the imposition of a turnover equalization tax at 4% is contrary to the prohibition against discrimination laid down in Article 95 of the EEC Treaty: it alleges in fact that although the rate of turnover tax is fixed at 4%, tinned fruit and vegetables manufactured by domestic producers are actually taxed at only 2.7%, if certain exemptions—in particular on exports—are taken into account. Since the equalization tax charged cannot therefore be justified in the present instance by the charges levied directly on the domestic product, the deciding factor must be the 'indirect prior taxation' to which it is subject. This amounts simply to the charge levied by way of turnover tax on the basic materials and semi-finished products used in the manufacture of the final product. More especially, the plaintiff alleges the burden of the turnover tax applied to the means of production and working materials used in the manufacture of tinned foodstuffs is not one which can be offset under the first paragraph of Article 95 of the Treaty. Should the national court decide that the turnover equalization taxes of 6% and 4%

are contrary to Article 95 of the Treaty because of their rate, the plaintiff claims that it has no jurisdiction to fix another rate for the same tax and so the charges must be reimbursed in full, having no legal justification.

2. *Content of the order making the reference; discussion by the Finanzgericht*

A — On 6 September 1967 the IVth Senate of the Finanzgericht decided to ask the Court for a preliminary ruling on the following questions:

'1. Does the expression "imposed directly", referring to taxation on domestic products relate to the burden resulting from the rate of tax as fixed by law, or the true rate which results when the average exemptions enjoyed by similar products or groups of similar products are taken into account?

2. To what extent is internal taxation imposed... indirectly on similar domestic products capable of being offset in the case of industrial products? Does it include the turnover tax affecting, for instance, auxiliary materials, packaging material, working materials and means of production and taxation resulting from finishing processes and carriage effected by third parties?

3. What effect does the recognition of the priority of the directly applicable rules of Article 95 of the EEC Treaty have on provisions of national law which conflict with them? Can such provisions simply be repealed or (in view of the third paragraph of Article 95 of the Treaty) are they void as from 1 January 1962?'

B — The Finanzgericht considers it now unnecessary to refer again to the Court the question of the direct rights of individuals to plead before national courts Article 97 in conjunction with Article 95 of the Treaty. It considers that Article 97 must be regarded not as an independent provision, but merely as a special rule for adapting Article 95, according to which an average rate determined solely in the light of the principle of non-discrimination is substituted for the precise calculation of the taxation on a domestic product at earlier stages of production. According to the Finanzgericht Article 97 in no way modifies the rights enjoyed by persons concerned under Article 95.

Question 1

The Finanzgericht considers that, for the reasons explained by the plaintiff, there remain doubts as to the interpretation of the concept of taxation 'imposed directly' on domestic products.

Question 2

The Finanzgericht remarks that the problem of defining the concept of 'indirect taxation' has already been referred to the European Court of Justice. The IVth Senate is aware of orders of other Finanzgerichte making references to the Court, but as these concern agricultural produce it thinks that this question should nevertheless be put to the Court in the present case because it concerns fiscal charges imposed on industrial goods. As the factors involved in the problem are different, the question of the extent to which indirect charges can be offset takes on a special significance.

Question 3

The IVth Senate proceeds on the basis that EEC law prevails over the law of the Federal Republic. But it is uncertain as to the way in which Article 95 takes effect as it imposes a particular course of conduct on Member States but does not prescribe any positive rule to take the place of the rules of national law.

3. *Procedure*

The order making the reference was received by the Court on 5 October 1967. Written observations were submitted in due time pursuant to Article 20 of the Statute of the Court of Justice of the EEC by the plaintiff, the Government of the Federal German Republic, the Government of the Kingdom of the Netherlands and the Commission of the European Communities.
The plaintiff, the Government of the Federal

German Republic and the Commission of the European Communities presented their oral observations at the hearing on 23 January 1968.
The Advocate-General delivered his opinion at the hearing on 8 February 1968.

II — Observations submitted under Article 20 of the Statute of the Court of Justice

These observations may be summarized as follows: The *Commission* notes that the Finanzgericht has not asked how far individuals can, if necessary, derive rights from Article 97 in conjunction with Article 95. However, the problem is already under consideration by the Court in a number of cases actually pending before it which have been referred for preliminary rulings (Cases 13/67, 25/67, 28/67).
The Commission refers the Court to its observations submitted in these cases to the effect that Article 97 of the Treaty does not entitle individuals to ask national courts to decide whether the average rate of tax fixed by law is compatible with the principles set out in Article 95.

Question 1

The *plaintiff* claims that whilst the rate of turnover tax is 4%, tinned fruit and vegetables manufactured by domestic producers are actually charged only 2.7%, if the exemptions available, in particular for exports, are taken into account. It referson this point to the decision given on 20 December 1966 by the Bundesverfassungsgericht (Federal Constitutional Court) I, BvR, 320/57, 70/63; Neue Juristische Wochenschrift 1967, p. 149. Article 95 is intended to guarantee equality of treatment under national laws for nationals of the Member States in the Community. Thus only the burden of taxation actually affecting domestic products can be taken into account. To consider the tax rate alone would amount to material discrimination. Only the rate of turnover tax actually payable by domestic industrial undertakings for the product or group of products in question should be taken into consideration.
The *Government of the Federal Republic of Germany* replies that the reference to exemptions granted on exports is misguided because the taxation applicable to imports should be aligned with taxation on domestic products, that is, products intended for use or consumption within the national territory. Thus there can be no question of extending the comparison to exported products. Only the products which remain on national territory compete with the imported products and, consequently, only taxation on the former should be taken into account.
It questions, moreover, whether it is necessary to conclude from the decision of the constitutional court that tinned fruit and vegetables are only in fact subject to a 2.7% turnover tax.
Consequently, taxation 'imposed directly' on domestic products should be taken to mean the burden resulting from the rate of taxation fixed by law, the exemptions granted on export having no effect on the direct taxation.
The Commission, using similar arguments, agrees with the conclusions of the Government of the Federal Republic of Germany.

Question 2

The *plaintiff* argues on the basis that the taxation imposed directly and indirectly on domestic products must be taken into consideration and can therefore be offset. As to defining the factors which can be considered to constitute indirect taxation, it states that:

— the turnover tax on the means of production and working materials required in the manufacture of containers cannot be offset because it is not borne by 'the product', that is to say, it is not imposed on it directly within the meaning of Article 95; on this point the plaintiff refers to the arguments set out in other cases which are still pending;
— the raw materials for the tinned foods are the fruit and vegetables, and according to paragraph 4, No 19 of the German Law on turnover tax supplies of fruit and vegetables are exempt from this tax when furnished by a domestic producer; the processed product is not, therefore, subject to a direct tax which on completion of the tin becomes indirect taxation which may affect the raw material consisting of fruit and vegetables is accord-

ingly to be disregarded, because it is impossible to prove its existence and because the word 'indirectly' used in Article 95 should be understood to refer to taxation imposed at a single previous stage ('als einstufige Mittelbarheit aufzufassen sei').

The result is the same even if the raw materials processed were imported. In that event the equalization tax on them would be 2.5%, and that charge could not be offset. — As regards the manufacture of tinned food, the containers are what are known as auxiliary materials, supplied by another sector of the industry. Apart from minor indirect taxes which can be ignored, they are taxed directly in respect of turnover. The direct taxation of auxiliary materials in the form of turnover tax also amounts to indirect taxation on the finished product. Because of the difference in value between the auxiliary product (for example 10 tins at DM 0.50 and the finished product (for example 10 tins of food at DM 10) the direct tax on the auxiliary product is scarcely an appreciable factor in calculating the indirect taxation on the finished product. Assuming that, of the 6% rate of the equalization tax, 2% represents indirect taxation, this would amount to DM 0.20 for 10 tins of food of a value of DM 10; however, the direct tax for 10 tins of food costing DM 0.50 would only be DM 0.02, the rate of turnover tax being 4%. This calculation takes no account of the fact that owing to tax exemptions, the direct tax would be no more than 3%, so that the equalization tax is already too high (according to the above calculations: DM 0.10 for 10 tins). At the same time, this also shows that even a 4% equalization tax, such as that levied on tins weighing more than 1 kg, would not necessarily be absolutely correct, even if the rate of turnover tax on the domestic product were as high.

The *Government of the Federal Republic of Germany* refers to the arguments set out in the written and oral observations submitted by it in Cases 13/67, 25/67, and 28/67.

The reply which it favours is that indirect taxation should be understood to mean the charge representing turnover tax imposed on semi-finished products acquired and raw materials, as well as the charge imposed as turnover tax on the manufacture of the product, the manufacture of the semi-finished products and the production of raw materials, especially those affecting the means of production and working materials, such as plant, auxiliary materials and accessories, and power. Included in this also must be the turnover tax imposed on packaging materials and the means of production, as well as on the finishing processes and carriage effected by third parties.

The *Government of the Kingdom of the Netherlands* confines its observations to noting that the reference made by the plaintiff to Netherlands tax legislation is no longer applicable.

The *Commission* considers that a logical application of the principle concerning the country of destination requires domestic taxes to be offset *in toto*. It is therefore necessary to take into account the total tax burden on the product in the form of turnover tax and the fact that the limitations which the plaintiff seeks to impose on the concept of 'indirect taxation' are not supported by the objectives stated in Articles 95 and 97 of the Treaty. This argument does not conflict with the judgment in Case 45/64 on which the plaintiff relies.

Question 3

The *Government of the Federal Republic of Germany* states that it has grave doubts as to whether the interpretative jurisdiction conferred on the Court by Article 177 of the EEG Treaty goes so far as to enable the Court to rule on the scope and the fate of previous national law which is contrary to provisions of Community law. Only the constitution of a Member State can make it possible to decide whether and, if so, to what extent, a national law must be considered void *erga omnes*, or simply wholly or partially inapplicable in a particular instance. The same is true as regards the scope and the means of exercise of the right of review enjoyed by national courts and any obligation which they may have to carry out such a review. In the Federal Republic, a law can only be repealed, in principle, by an act of the legislature, and only the Federal Constitutional Court has the power to repeal a law with retroactive effect, subject to the conditions set out in

Article 100 of the Grundgesetz (Basic Law). Question 3 should therefore be considered inadmissible.

The *Commission* is also doubtful whether Question 3 is wholly admissible. It is for the national law to determine whether, when a fiscal law conflicts with Articles 95 and 97, the precedence of Community law must be expressed in such a way as to result in the annulment of the notice of assessment to tax in its entirety, or only in so far as it exceeds the limits prescribed by Article 95. To that extent the question is inadmissible but on the other hand there is nothing to prevent the Court from considering the question within the same limits as those with it has already applied in Case 57/65.

The ***plaintiff*** considers that the question is inadmissible. The effects of a provision of Community law are an inherent part of the provision and can only be translated into fact by an interpretation of the provision itself. In interpreting the provisions of Community law one must also take into account any questions requiring a uniform answer to ensure the uniform application of the law within the Community. Thus the question put is designed to secure the development of a rule in the conflict of laws applicable to Community law both in the present case and for the future.

A finding that the provisions of national law which are contrary to those of Community law are of no effect, can only be of a definitive nature, which amounts to a ruling that those national laws are null and void. As regards Article 95 of the EEC Treaty, any provisions of national law which conflict with the Community rules have been void since the beginning of the second stage, and implementing measures which have nevertheless been adopted have no foundation in law. If a Member State justifies a rate of tax by claiming that it is an 'average rate' within the meaning of Article 97, when it is clear that the rate in question was fixed without regard to the principles set out in Article 95, the tax itself must be void in its entirety. On the other hand, there is some doubt as to the fate of implementing provisions adopted after 1 January 1962 but which have not been contested.

Grounds of judgment

By an order dated 6 September 1967, received at the Court on 5 October 1967, the Finanzgericht (Finance Court), Düsseldorf, referred for a preliminary ruling under Article 177 of the EEC Treaty three questions concerning the interpretation of Article 95 of that Treaty. It is apparent from the order making the reference that the dispute in the main action concerns the application of average rates, within the meaning of Article 97 of the Treaty, by a Member State applying, at the time when the dispute arose, a turnover tax according to the cumulative multi-stage tax system. Consequently, while the questions referred only involve the application of Article 95 indirectly through Article 97 of the Treaty, the order making the reference has not put to the Court a question whether the provisions of Article 97 are capable of creating individual rights which national courts must protect. In fact, the court making the reference held that Article 97 is no more than a special rule concerned with the adaptation of Article 95 and, consequently, does not in any way affect the rights which those concerned may derive from the latter.

In its judgment delivered on 3 April 1968 in Case 28/67, on a reference from the Bundesfinanzhof (Federal Finance Court), the Court ruled that Article 97 does not create individual rights which national courts must protect. Accordingly it is appropriate that the Finanzgericht, Düsseldorf, should be asked to refer to the

interpretation given in that judgment, and that only the first and third questions contained in the reference should now be considered.

The first question asks whether by the concept of taxation imposed directly on domestic products Article 95 refers to the burden resulting from the rate fixed by law, or the actual burden which results when average exemptions enjoyed by similar products or groups of similar products are taken into account. The question relates in particular to the exemptions or payments of drawback on domestic products intended for export, the grant of which has the effect of lightening the aggregate burden of taxation on domestic production of similar products.

Article 95 prohibits the placing of products originating in other Member States in a disadvantageous position as compared with products from the importing country which are marketed in the territory of that country. It is therefore necessary to exclude from the comparison any domestic production to the extent to which it is exported and does not take part in competition within the national territory. Thus only taxation affecting domestic products marketed in the national territory may be taken into consideration in ascertaining what taxation is imposed on domestic products and constitutes the ceiling allowed by Article 95 of the Treaty. The taxation imposed on domestic products within the meaning of Article 95 of the Treaty is therefore that which results from the application of the rate of tax fixed by law.

The third question seeks a clarification of the consequences of the precedence of Community law, that is to say, in the present case, Article 95 of the Treaty, with regard to the provisions of national law incompatible with it. The point of the question is in particular whether the national court must hold such provisions inapplicable to the extent to which they are incompatible with Community law or whether it must declare them void as from the expiry of the period prescribed by the third paragraph of Article 95.

Although Article 95 of the Treaty has the effect of excluding the application of any national measure incompatible with it, the Article does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law. Particularly when an internal tax is incompatible with the first paragraph of Article 95 only beyond a certain amount, it is for the national court to decide, according to the rules of its national law, whether the illegality affects the whole tax or only so much of it as exceeds that amount. Accordingly, it is for the court making the reference to choose a solution from among those suggested in the question and, indeed, any others.

Costs

The costs incurred by the Governments of the Federal Republic of Germany and the

Kingdom of the Netherlands and by 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 Finanzgericht, Düsseldorf, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the Government of the Federal Republic of Germany, the Commission of the European Communities and the plaintiff in the main action;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 95, 97 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to the judgment of the Court of Justice of 3 April 1968 in Case 28/67, delivered following reference from the Bundesfinanzhof (Federal Finance Court);

THE COURT

in answer to the questions referred to it by the Finanzgericht, Düsseldorf, by order of that court of 6 September 1967, hereby rules:

1. **The first paragraph of Article 97, applicable where Member States levying a turnover tax calculated on a cumulative multi-stage tax system in fact exercise the option which it gives to them, does not create rights which national courts must protect;**

2. **Taxation imposed on a domestic product within the meaning of Article 95 of the Treaty means taxation imposed at the rate which results from the application of the law;**

3. **Article 95 of the Treaty does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law.**

and declares:

The decision as to costs in these proceedings is a matter for the court making the reference.

Lecourt Donner Strauß

Trabucchi Monaco Mertens de Wilmars Pescatore

Delivered in open court in Luxembourg on 4 April 1968.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 8 FEBRUARY 1968[1]

Mr President,
Members of the Court,

The series of requests for preliminary rulings on the interpretation of Articles 95 and 97 of the EEC Treaty in relation to the German turnover equalization tax (Cases 7, 13, 20, 25, 27, 28 and 31/67), which were considered by the Court in December last year and on which my colleague Mr Gand gave his opinion on 25 January 1968, has been extended by the addition of another case with an identical or similar theme, in a reference from the Finanzgericht, Düsseldorf. Here are the facts which gave rise to it.

The plaintiff in the main action imported tomato purée and tinned pears and beans from Italy into the Federal Republic. When they were cleared through customs, turnover equalization tax was levied at 6% on the tinned pears and beans and on tomato purée in packages weighing less than 1 kg and at 4% on tomato purée in packages weighing more than 1 kg. The plaintiff appealed against this assessment to tax to the Hauptzollamt (Principal Customs Office) Cologne-Rheinau, and, when that was unsuccessful, to the Finanzgericht, Düsseldorf.

In the proceedings before that court it relied, with regard to the high rate of the turnover equalization tax, (especially the rate of 6%) on the principles contained in Articles 95 and 97 of the EEC Treaty, claiming that they had been infringed. It claimed that whilst the legal rate was 4%, tinned fruit and vegetables from domestic producers were in fact charged turnover tax at only 2.7%, if one took into account certain tax exemptions, in particular those for exports. Since therefore in its case the rate of the turnover equalization tax was not justified by the taxation imposed directly on similar domestic products, the decisive factor must be their indirect taxation at a previous stage, so that the question arises, whether this means only the turnover tax levied on the basic and semi-finished products used in the manufacture of the tinned foods, or includes in addition (the plaintiff thinks, unlawfully) the turnover tax imposed on the means of production and working materials employed in the manufacture of the tinned foods as well as the services used. If it were to be found that the 6% and 4% rates are incompatible with Articles 95 and 97 of the Treaty, the Finanzgericht, far from being able to fix any other rates of turnover equalization tax, would have to annul the disputed notices of assessment to tax and the tax would have to be fully reimbursed.

The defendant Hautpzollamt's argument against this was that the German rates of turnover equalization tax were average rates within the meaning of Article 97 of the

1 — Translated from the German.