OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 25 JANUARY 1968[1]

Mr President,
Members of the Court,

The seven requests for preliminary rulings on which I have today to give an opinion were addressed, pursuant to Article 177 of the Treaty of Rome, by four German courts amongst which is the Bundesfinanzhof (Federal Finance Court). These requests deal with the interpretation of the tax provisions of this Treaty, more precisely with Articles 95 and 97 thereof. You are asked to reply to approximately fifty questions some of which occur in several of the cases or overlap, and you are questioned on the meaning and scope of practically every term in the articles in question: what, for example are 'an indirect charge', 'similar products' or 'those capable of being substituted'? What is to be understood by 'average rate'? Does Article 95 create individual rights which national courts must protect? Does Article 97 do so as well? Thus the whole system of the turnover tax is considered in relation to the Treaty, in particular the cumulative multi-stage tax system which operated in the Federal Republic of Germany before 1 January 1967 and which may be continued in four other Member States until 1 January 1970. That is sufficient to outline the extent and the complexity of the problems which you must solve and which have already been considered in the oral observations heard by you.

It might be thought that first of all the questions put by the various courts should be grouped according to whether they relate to one or other of the provisions of Articles 95 and 97 and that they should then be considered in this logical sequence. Reasons of clarity and simplicity on the contrary induce me to keep strictly to the order in which you have chosen to hear those cases. Thus I shall first of all broach Case 28/67 which was referred to you by the Bundesfinanzhof, the supreme court in financial and tax matters, and which poses the most important questions of principle.

I

28/67 — *Firma Molkerei-Zentrale v Hauptzollamt Paderborn*

The facts which gave rise to the request for a preliminary ruling are as follows: an undertaking, which on 15 July 1962 imported into Germany whole-milk powder from Belgium, was required to pay in addition to the customs duty a tax of 4% by way of turnover equalization tax (Umsatzausgleichsteuer). It argued unsuccessfully before the Finanzgericht that this levy was contrary to Article 95 of the Treaty because the appropriate German law on turnover tax had since 1 February 1956 exempted domestic powdered milk from this tax and because consignments of the primary product, namely, milk, were also exempt. This was the argument which it repeated before the Bundesfinanzhof. Its argument thus rests on the view that Article 95 of the Treaty produces direct effects and creates individual rights which national courts must protect; this is in accordance with your decision in Case 57/65 (*Lütticke*, 16 June 1966, Rec. 1966, p. 293).

It is on this basic issue that the Bundesfinanzhof has serious doubts which are set forth very clearly and fully in its order of reference and which may be summarized as follows. The precedence of Community law over national law is not as such disputed, but your case-law—in particular the judgment in the *Lütticke* case—has been interpreted in Germany as implying that when a provision of the Treaty which is alleged to have direct effect imposes an obligation on a State, an individual may plead this infringement of the Treaty before the national court; the Community institutions—in particular the Commission—are charged with compelling the Member States to fulfil their obligations through the machinery of Article 169. To grant to individuals a direct remedy arising from infringement of the Treaty, instead of merely authorizing them

1 — Translated from the French.

to request the Member State to put an end to an illegal situation 'by means of an appropriate procedure', is in fact to confer upon them a wider right than that accorded to the Community institutions. With regard to Article 95, this solution moreover does not accord with the position as to the power of the courts under the constitution of the Federal Republic of Germany, as it is not the task of the courts to make good by thousands of separate decisions provisions of tax law which the competent authority has omitted to adopt. To a large extent, this concerns in addition questions of fact, which might give rise to divergent decisions by the Finanzgerichte which the supreme court could not harmonize. A contradiction might arise between the case-law of the national courts and that of the Court giving a ruling within the framework of Articles 169 and 170 of the Treaty. In short it must be recognized—this is the final argument—that your case-law has resulted in countless applications to the Finanzgerichte, which has given rise in the Federal Republic to a regrettable lack of legal certainty with regard to the turnover equalization tax.

1. The Bundesfinanzhof thus asks you—this is its first question—whether you continue to uphold your decision concerning the interpretation of the first paragraph of Article 95 of the Treaty; it further asks whether this article can confer on individuals the right to require before the national courts that despite the as yet unamended terms of the law, they should be placed in the same position as if the Member State had fulfilled the obligation which this article imposes on it with regard to legislation, whilst under Articles 169 and 170 the Commission and the other Member States may only require that the Member State should implement the Treaty, and whether the third paragraph of Article 95 has consequently created a breach in the legislative sovereignty of the Member States in the field of internal taxation.

This is the first time that you have been expressly requested to reconsider the interpretation given by you to a Community provision. Although courts have queried the meaning of provisions on which a ruling has already been given, those new requests were made either before your preliminary ruling was given (*Da Costa*, Joined Cases 28 to 30/62, [1963] E.C.R. 31) or before it was published in the Recueil (*Hessische Knappschaft*, Case 44/65 [1965] E.C.R. 965). But your case-law recognizes that national courts may make subsequent references regarding a question of interpretation, and it is not only normal but desirable that a superior court in a Member State should exercise this power when, for reasons of law or of fact, your interpretation appears to it to be debatable.

Having said that, however, I do not think that the Court should modify the standpoint it has adopted.

The basic objection raised by the Bundesfinanzhof is not confined to Article 95 of the Treaty and does not relate to the line of argument which led the Court to declare that this article was directly applicable. It is more general and essentially concerns the fact that a dual system of legal protection has been established based on proceedings by the Commission and by the Member States before the Court of Justice and by individuals before the national courts. Those two procedures are different: when the first is brought to a successful conclusion, the Member States in default must take the necessary measures to comply with the Court's judgment. The other procedure has the following effects: if the national court, on application by an individual or, where appropriate, following your interpretation of the provisions of Community law relied on, finds that the national law does not conform to those provisions, it applies Community law directly to the actual case on which it is required to give judgment. The two procedures are thus complementary and equally appropriate, as it must be recognized that in practice all kinds of difficulties, legal and factual, delay or prevent the initiation and completion of the procedure under Article 169. It may thus happen, as the Bundesfinanzhof states, that an individual may find himself in the same position before the national court as if the national law had already been amended but is not this a logical consequence of the procedence of Community law which the Bundesfinanzhof does not question?

The Court was confronted with a similar objection based on Articles 169 and 170 when it began to develop its case-law on the directly applicable provisions of the EEC Treaty. It was raised in Case 26/62 (5 February 1963, [1963] E.C.R. 1) by the Netherlands, Belgian and German Governments and the Court rejected it in a passage which is worth repeating: 'A restriction of the guarantees against an infringement of Article 12 by the Member States to the procedures under Articles 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty. The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States'. In my view there are no grounds in law for reconsidering a position which you have consistently maintained for five years.

Nevertheless I appreciate the Bundesfinanzhof's anxiety over the legal uncertainty arising from the flood of applications to the German courts having jurisdiction with regard to the equalization tax; it must be pointed out that this phenomenon has not occurred in other Member States employing the cumulative multi-stage tax system. The Commission is no doubt correct in seeking the cause of this flood in the possibly hasty conclusions which have been drawn from the Court's judgment in Case 57/65. It was considered that this necessarily implied that Article 97—which deals with the cumulative multi-stage tax system and the system of average rates—was also directly applicable, whence arose the numerous applications. As we shall see, this problem has yet to be settled and it has been brought before you by the Bundesfinanzhof. So far as Article 95 is concerned, I do not think that there are grounds for giving a new interpretation of this article or one differing from that arising from your judgment in Case 57/65.

2. The second question seeks to establish whether Article 97 is directly applicable in the sense that it accords to all citizens the right to cause the national court to establish whether the average rate of the tax conforms to the principles set out in Article 95, and whether this may be effected by means of an application for the annulment of a tax assessment.

The article in dispute, which applies to those Member States employing the cumulative multi-stage tax system, consists of two paragraphs: the first authorizes those States, in connexion with internal taxation by them on imported products, to establish average rates for products or groups of products provided that they do not infringe the principles laid down in Article 95; the second provides that where the average rates established by a Member State do not conform to those principles the Commission shall address appropriate directives or decisions to the State concerned.

The case-law of the Court has gradually defined the conditions under which a provision of the Treaty may be considered as directly applicable. In connexion with Case 57/65 I endeavoured to summarize them, stating that an obligation on a Member State is directly applicable when it is clear and unconditional, and neither assumes for its implementation any legal measure by the Community institutions, nor leaves to the State responsible a real discretion with regard to the application of the provision. It is clearly much easier to fulfil those conditions in connexion with an obligation to refrain from doing something, an abstention (Cases 26/62 and 6/64) but there is no *a priori* exclusion of an obligation to do something.

But Article 97 is to be regarded above all—and this is quite different—as an *authorization* conferred on Member States in connexion with the cumulative multi-stage tax. Under this system it is technically impossible to calculate precisely the amount of taxation levied as turnover tax on goods at prior stages; this amount may vary for example according to whether the undertakings contributing to the manufacture of the product are integrated to a greater or lesser degree. This is a finding of evidence which suggests itself at the outset, but does not thereby make it necessary at this point to decide the question what should be

recognized as prior taxation. This is the reason for the power granted to Member States to adopt average rates which, by definition, may vary from the actual charge; in order to determine this average charge, the States use different methods of calculation; this induced the Commission on 30 June 1967 to submit a proposal for a directive introducing a common method for the calculation of average rates, a suggestion which was fully discussed in the written and oral procedures, and its provisions are sufficient to show the difficulties to which the establishment of those rates gives rise. The State is not only empowered to fix the rate but to decide whether the rate shall be applied to a product or to a group of products, and of what products the group shall be composed. The Court must clarify, with regard to other requests for a ruling, what must be understood by groups of products and the extent of the discretion of the State concerned; here it is sufficient to find that this discretion exists.

It is true that Article 97 involves a limit, to the extent to which it refers to the *principles* set out in Article 95, which fix a ceiling for the amount of equalization taxes, but this is insufficient to over-ride the discretion to which I have referred. In this connexion the plaintiff has remarked that under national law although a decision is taken within the framework of the discretion it is nevertheless subject to review by the courts; this is correct, at any rate to a certain extent, but it does not appear that the argument is very relevant within the framework of the Treaty, since here it is the discretion not of the administration, but of the legislature which is at issue.

This area of discretion, which may be regarded as having a greater or lesser scope but may not be excluded, appears to me to preclude the possibility of considering Article 97 as directly applicable. Without wishing to maintain that it is a conclusive argument, I may in this connexion mention the provision in the second paragraph of the same article which provides that, where the average rates do not conform to the principles of Article 95, the Commission shall address appropriate directives or decisions to the Member State. This procedure is peculiar to Article 97 and precludes the *de plano* commencement of the procedure under Article 169, varying in this from Article 95; it seems that this can only be explained by the exceptional nature of the provision in dispute and the difficulties involved in its implementation.

My suggestion for the Court's reply to the second question is contradicted by the argument maintained by the plaintiff in the main action, the Government of the Federal Republic and the Commission but the latter do not concur completely with one another, as the Commission maintains a rather more flexible attitude. It is insufficient for the defendant administration to maintain before the national court that the tax is based on an average rate lawful under Article 97 for that court to be completely deprived of its power of review. The court is empowered to consider whether it is indeed faced with a case coming under Article 97, that is to say, whether it is faced with a turnover equalization tax calculated on a cumulative multi-stage tax system and of an average rate applicable to products or to groups of products.

3. In its third question the Bundesfinanzhof asks you what must be understood by average rates within the meaning of Article 97; it also asks you, in terms of the reply to this question, whether the disputed rate of the turnover equalization tax of 4% then applicable to whole-milk powder constitutes such an average rate.

With regard to this latter point which in fact concerns the application of Community law to a particular case, I agree with the Government of the Federal Republic and the Commission, that it is not for the Court to give an answer. This is a matter for the national court alone.

On the other hand the main question is one of the most delicate which has been put to you and, even after the arguments which have been devoted to it in the present case, I have difficulty in answering it with absolute clarity.

To the Government of the Federal Republic, however, the matter is simple. The cumulative multi-stage tax inevitably implies average rates, as for all the reasons which have been given it is generally only possible to make an approximate calculation of the taxation imposed on domestic

products, in particular the indirect taxation which forms the subject of the Bundesfinanzhof's fifth question. It is therefore necessary to establish, on the basis of 'aggregate figures and assessments', average rates which no doubt must remain within the framework of the principles of Article 95, 'on the basis of the information available to the administration and taking into account the work which may be required of it', and the very vague nature of those propositions will be noted. In all cases where there is a similar domestic product or one capable of being substituted for the domestic product, the rate of the turnover equalization tax is always an average rate, as German legislation states, and, summarizing its arguments the German Government considers that for the purposes of Article 97 by average rates there must be understood the rates in force in the Member States employing the cumulative tax system.

The rigid presentation of this argument and its absolute nature can only lead to its being rejected. The Commission rightly observes that for a rate to be an average rate within the meaning of Article 97 it is not sufficient that it be so described by national law. Whilst the Member State's discretion must be recognized, it must, if it is not to become arbitrary, have limits which may be outlined as follows.

The establishing of average rates presupposes that the turnover tax levied on similar domestic products at successive stages of manufacture is known; this must not result from an arbitrary general assessment but from calculations. Since production cycles vary in length, and the number of processes which a product undergoes varies according to the undertaking, this might lead to average rates' being adopted taking account of those differences. Moreover since certain components of the indirect tax only represent a very low percentage of the total tax, a flat rate might even be adopted in this connexion. Nevertheless the charge borne by similar domestic products must be calculated as precisely as possible, and it must be possible to review those calculations; if this were not so, for example, the Commission would be unable to fulfil the rôle conferred upon it by the second paragraph of Article 97, and ensure that the average rate is calculated on the correct basis. It should be added that those calculations must have been made recently enough to be still representative at the time when the rate of the countervailing charge is established.

4. The Bundesfinanzhof then asks whether individuals continue to derive from Article 97 the right to have an average rate reviewed by the national courts even if the Commission has fulfilled its obligation of ensuring that the Treaty is observed or if the Member State has modified the average rate in accordance with the requirement of the Community institution. This question presupposes that Article 97 directly confers on individuals a right to have the court review the average rates applied in specific cases. If, as I suggest, you consider that this is not so, the question becomes pointless.

5. The final question put by the Bundesfinanzhof is as follows: What must be understood by internal taxation imposed indirectly on domestic products within the meaning of the first paragraph of Article 95? Since the rule of international trade is to apply the principle of taxation in the country of destination, the Member States are justified in wishing to have a *complete* set off for taxation on the import of domestic products, which makes for the widest possible interpretation of the concept of 'indirect taxation'.

On this basis the disputed concept may be explained as follows. The manufacture of a finished product involves basic products: primary and semi-finished products. It also involves auxiliary materials which are consumed in the manufacture (for instance, glue in the manufacture of books) and of accessory materials (packing). Furthermore, the manufacturing process requires methods of production and services such as transport and marketing.

All those factors are combined in the manufacture of the product; internal taxation *indirectly* imposed on a product must be understood to include charges imposed on all those various elements.

This assessment must be made at all stages of manufacture, but it is clear that the tax burden on the price of the final product is reduced as the successive stages are re-

traced; this does not exclude resorting to flat rates in order to calculate the charge levied on basic products and auxiliary materials.

Against this notion an objection is nevertheless raised on the basis of the judgment which you gave in Case 45/64 ([1965] E.C.R. 857) concerning the interpretation of Article 96 of the Treaty, relating to export repayments. An argument is based on the fact that you said that the term 'indirectly' referred to taxation imposed during the various stages of production on 'raw materials or semi-finished products used in the manufacture of the product', to deduce that you intended to excluse taxation levied on the means of production and of transport and the consumption of power. I am not convinced by this since what was important was the charges the repayment of which was disputed and which you refused to recognize; it was in particular concerned with registration, stamp and mortgage duties which were imposed on the producer undertaking in the very varied aspects of its general commercial or financial activity rather than on the products as such, either at the various stages of their manufacture or at the final stage. The same holds good for charges on licences and concessions, motor vehicles and advertising which are also referred to in this judgment. It is evident that all those taxes have nothing in common with the German turnover tax. Thus the judgment in Case 45/64 does not appear to me to exclude the wide interpretation of indirect taxation as I have explained it.

II

31/67 — *Firma Stier v Hauptzollamt Hamburg*

This case is referred to you by the Finanzgericht, Hamburg, and relates to Article 95 of the Treaty.

The Stier undertaking, which imported in 1966 3 834 cases of lemons originating in Italy, received a claim from the customs for a turnover equalization tax on importation amounting to 2.5%. It claimed before the Finanzgericht that German tax law in purported application of which this tax was claimed was contrary to Article 95 of the Treaty; this Article, it asserted, only permitted an equalization tax to be applied on the importation of imported products competing on the domestic market with comparable domestic products. Germany produces no lemons (first paragraph of Article 95) and no other fruits capable of replacing these fruits for the consumer (second paragraph of Article 95).

1. In these circumstances the Finanzgericht has put to you three questions the first of which asks whether a Member State has the right to charge taxes on products originating in other Member States which compete neither with similar domestic products nor with domestic products capable of being substituted for them, or whether on the other hand this measure is contrary to the principles of law contained in the Treaty.

The order containing the reference clearly shows for what reasons and in what spirit the Finanzgericht believes that it must refer the matter to you. For it, as is shown by the drafting of the question, the terms of Article 95 do not settle the matter: it believes that what is required rather than an interpretation of the Treaty is perhaps the filling in of a gap which is to be found there and that it is your duty to do this. Moreover the rule of law formulated by the plaintiff undertaking to avoid the tax seems to the Court to be capable of being deduced by way of analogy from the objectives of the Treaty, in particular from the provisions of the Treaty which guarantee free movement of goods on the internal market of the Community and prohibit obstacles to trade between Member States. Finally, in view of the fact that 'plausible arguments' may be invoked in support of this idea, the court thinks that it must refer the question to you even though the second paragraph of Article 177 of the Treaty does not require it to do so—and this is an attitude which in fact is only to be encouraged.

What is the scope of Article 95? This must be our starting point in answering the question put by the Finanzgericht.

For the applicant in the main action, the first paragraph of Article 95, providing that imported products may not be subjected to taxation in excess of that imposed on similar domestic products, certainly imposes a prohibition but also provides an *authoriza-*

tion. As this is clearly limited to products competing with domestic products, the prohibition on taxation for other products imported from Member States follows directly from Article 95 and the interpretation thus given to this provision is said to be in conformity with the objectives of the Treaty, which must in particular ensure freedom of movement of goods. This line of reasoning seems to me to be subtle rather than convincing, even if Article 95 is compared with the rather similar provisions of Articles II and III of GATT, for it is a misuse of language to see in the first paragraph of Article 95 an authorizing provision, since its essential purpose is to *prohibit discrimination* between imported products and domestic products.

The Stier undertaking maintains that, if the interpretation which it suggests is not accepted, the tax in question must be considered as a custom duty or, if not, a charge having an effect equivalent to a customs duty. It shows in fact the characteristics of a customs duty of a fiscal nature since it has as its sole object the provision of finance for the State; in this case the provisions with regard to the progressive reduction of customs duties ought to have been applied to it and to have reduced its rate on 1 January 1966 to 1.6% at most. The same result would be reached if one were to consider it as a charge having equivalent effect, which would not be contrary to your judgment in Case 57/65.

If we return now to Article 95 we must admit with the German Government and the Commission that it is by no means possible to deduce from it a prohibition on the imposition of internal taxation on products imported from Member States which are not in competition with domestic products. The Treaty, applying the rule normally followed in international trade, subjects imported products to the taxation in force in the country of destination and Article 95 forbids the application to them of a fiscal system less favourable than that applied to similar domestic products or those capable of being substituted for them. The purpose of this provision is to ensure equality of competition and it is valid only within this limit but if there are neither similar products nor products which may be substituted for them it is not possible to find in Article 95 any provision limiting the right of the importing state to impose taxation. However, we must not forget that in contrast to the position in customs matters, the Treaty only impinges in a fairly limited manner on the sovereignty of Member States in fiscal and financial matters, as is shown by Articles 95 to 99 inclusive, and the German Government provides a rather hard and fast interpretation of this when it says that in this matter the Treaty permits everything which it does not expressly prohibit. Thus the realization of conditions analogous to those of an internal market appears above all in this sphere to be connected with the harmonization of laws for which preparations are now being made by the introduction of value added tax. It may be stated here that the directives of the Council of 11 April 1967 do not exclude the charging of this tax at the time of the importation of products in the case of which there exist no similar domestic products or ones capable of being substituted for them. Moreover it is not possible to state in a general way that the charging of internal taxation on goods not produced within the country is incompatible with the general system of the Treaty. Article 17(3) of the Treaty permits the replacement of customs duties of a fiscal nature by an internal tax which complies with the provisions of Article 95. It concerns, if not essentially, at least to a large extent, goods not produced within the country and not competing with domestic products. The interpretation given to the objectives of the Treaty by the applicant would deprive Article 17(3) of a great part of its content.

Consequently I take the view that the first question of the Finanzgericht must receive a reply to the effect that the provisions of the Treaty are not opposed to a Member State's charging internal taxation on products originating in other Member States which do not compete either with similar domestic products within the meaning of the first paragraph of Article 95 nor with domestic products which may be substituted for them within the meaning of the second paragraph of Article 95.

2. The Finanzgericht next asks you whether a rule of law worked out on the basis of the

law inscribed in the Treaty within the meaning of the preceding question and contrary to the right to impose national taxes has direct legal effects in favour of the individual.

This question of course presupposes that the Treaty excludes the possibility of imposing internal taxation on the products in question. If you share the point of view which I have put forward it loses its purpose.

3. On the other hand you will have to give a ruling on the last question put to you, namely whether, to the extent to which its right to impose taxation is in principle recognized, a Member State is subject in this sphere, as far as concerns the amount of internal taxation, to restrictions by virtue of the Treaty and, if so, to what restrictions. The question is a rather difficult one and perhaps is not capable of a perfectly satisfying answer. Fortunately it remains a theoretical one.

One may, as the Government of the Federal Republic does, conclude from the fact that the Treaty does not contain any rules on the charging of internal taxation on importation of similar products, that the right to impose taxes applies in this matter without any limit, whether we are thinking of the decision to charge such taxes or to determine their amount. The Government adds that in the event of difficulties or abuses arising in this sphere a solution might be found in the direction of harmonization and it cites as an example the recent directives of the Council with regard to value added tax.

The Commission approaches the problem for a different angle. Resuming the argument which it put forward in Case 20/67 and which I shall shortly be considering, it puts forward the view that the fact that a Member State imposes an exorbitant tax on goods not produced within the national territory and not competing with other national products might constitute a violation of the prohibition on the introduction of charges having an effect equivalent to that of customs duties. What counts is the effect of the tax and not its nature. To the extent to which a charge of this kind exceeds the 'general level of indirect taxation', it has the same effect as a customs duty of the same amount, added to a normal indirect tax; there must therefore be applied to it the prohibition on charges having an effect equivalent to that of customs duties. The Commission recognizes however that the question under discussion has no interest at the present time because the German turnover equalization tax on imported lemons at a rate of 2.5% is within the limit of the normal rates of turnover tax for ordinary or tropical fruits.

The argument is an attractive one although some objections may be raised to it. One is that, as was mentioned during the oral procedure by the representative of the German Government, it does not throw much light on the dinstiction between internal taxation and charges having equivalent effect. Another is that it is almost impossible to define what an exorbitant tax is: as far as the Federal Republic is concerned there was quoted a rate of 100% of the average price of the goods for coffee and of 75% for tea—two products which do not compete with German products. Must it be accepted that these are exorbitant if not prohibitive taxes? One may reply to this objection that the Commission is referring to the general level of indirect taxation which is no doubt to be regarded as the normal level of taxation for products of the same type and that, moreover, the products mentioned by the German Government come under Article 17 of the Treaty and belong to a special category for which the rate of taxation has always been high.

Reference must be made to another point: Article 12 et seq. provide for the manner of abolition of charges having equivalent effect, which is to take place before the end of the transitional period. In any case in which after that date it appears that the rate of a tax is 'exorbitant', it will be for the Commission by means of a directive or a decision to cause the Member State concerned to reduce it, but this would naturally be outside the conditions of application and the procedural rules of Article 12 et seq. of the Treaty.

Once again all this is rather theoretical, not only in the present case but even generally speaking. The German Government points out with reason that prohibitive rates are self-contradictory as they bring nothing in and it is not therefore to be feared that

Member States should in this sphere apply excessive rates. The proof is that up to the present the Commission has never had to intervene in this field. Moreover this tax, which changes its character when it changes its rate, seems to me to complicate fruitlessly a classification which is already complex. Although therefore I am not ignoring the advantage which there might be in laying it down that the powers of the State are not unlimited, I shall not suggest to you that you reply to the question put in the sense of the observations submitted by the Commission.

III

25/67 — *Firma Milch-, Fett- und Eierkontor v Hauptzollamt Saarbrücken*

On 22 March 1967 the undertaking Milch-, Fett- und Eierkontor cleared through the Saarbrücken customs office a consignment of slaughtered poultry from the Netherlands. In addition to the duty, the customs office on this occasion levied turnover equalization tax at the rate of 4%.

The importer commenced an action against the decision of the customs office before the Finanzgericht, Saarland. It maintained that the imposition of the equalization tax at the rate of 4% constituted an infringement of Article 95 of the Treaty and of Article 11(1) of Regulation No 22 of the Council of the EEC on the progressive establishment of a common organization of the market in poultry meat; the first of those provisions because under the German legislation on turnover tax the said tax is not levied, or only at a much reduced rate, on similar domestic products, the second because Article 11 of Regulation No 22 prohibits the levying of charges having an effect equivalent to customs duties on imports from Member States. In the event of its being considered that Article 97 is important for the solution of the dispute, the undertaking adds that this article is an implementing provision of Article 95 and that it must be applied in such a way as to observe the principles laid down by Article 95; in addition there is no proof whatever that the disputed rate of the tax at 4% is an average rate and the burden of proof that the average rate applied was legal rests on the customs administration. Finally, whilst in making a concrete comparison of taxation account may be taken of taxation imposed indirectly on similar domestic products, this cannot in all cases include the turnover tax imposed on the means of production and services.

In an order containing lengthy reasons, the Finanzgericht has taken the view that the solution to the dispute depends on the interpretation to be given to Articles 95 and 97 of the Treaty, in particular on the question whether the latter article creates individual rights which national courts must protect. It thus asks you to give a ruling on twelve questions some of which are divided into various sub-questions, certain of which also repeat the problems already encountered in Case 28/67, and this allows me merely to clarify or to fill out what I have said on those points.

Rather than broach each of those questions successively, I shall regroup them around certain principal problems in accordance with a more or less logical order since the Government of the Federal Republic and the Commission are at one in adopting it.

1. The first group of problems concerns the average rates.

What must be understood by average rates within the meaning of Article 97? This is the first question.

Can a general rate of tax which was introduced in 1951 and has since remained unaltered constitute an average rate within the meaning of Article 97? That is the second question.

Finally the sixth question, which is asked on the assumption that Article 97 creates individual rights, groups a number of difficulties which arise in connexion with those rates: can average rates be lawful when the cumulative charge under the turnover tax on domestic products of the same nature was not calculated on the basis of definite statistics but was only assessed, when the calculations were made on the basis of statistics for periods before 31 December 1961 and when they were formed into a single group of domestic products whose systems of production and of distribution or on which the cumulative charge on the turnover tax varies by more than 0.50% or which are not similar?

(a) In connexion with the first question, I

refer generally to what I said in Case 28/67. I should however like to add, in reply to an observation made by counsel for the plaintiff at the hearing, that the concept of an average rate must be appraised within the framework of Community law and of Articles 95 and 97. It is thus impossible to draw any conclusion regarding the present case from the interpretation given by the German court—even if it had been the supreme court—to the concept of the average rate, to its application or to the review which may be effected in the context of Article 29 of the German income tax law.

(b) With regard to the question whether the general rate of a charge introduced in 1951 and remaining unchanged since can constitute an average rate within the meaning of Article 97, the Commission gave a negative answer in its written observations to this second question of the Finanzgericht, but adopted a more flexible attitude in the course of the oral procedure, and rightly I think. In fact Article 97 may not be interpreted as implying the abolition of all rates applied before its entry into force and as authorizing the Member States to establish average rates after its entry into force. The earlier cumulative multi-stage tax system and the measures in implementation thereof can continue to the extent to which they conform to the provisions of the Treaty. It thus appears to me that a rate fixed in 1951 is not *a priori* precluded from bring considered as an average rate. It appears that this depends on the case in question.

(c) This leaves the various arguments put forward in the sixth question, the answer to which can only be hinted at to a certain extent.

What I have said in connexion with Case 28/67 implies that in calculating the aggregate charge under the turnover tax imposed on similar domestic products, a mere 'assessment' is insufficient. But it is perhaps too much to require 'definite statistics', as the Finanzgericht would have it; I should prefer to express it more simply, that proper calculations which may be checked are necessary.

The Finanzgericht also asks you for a ruling where calculations were made on a statistical basis, but for periods before 31 December 1961. It is no doubt desirable, in calculating the charge levied on similar domestic products, to take into account recent statistical data, but a period of reference cannot be fixed generally. It is merely necessary that since this period conditions have altered appreciably.

The most delicate problem is that relating to the definition of 'groups of products' provided for in Article 97. In the view of the Government of the Federal Republic, it is in principle for the legislature to decide on the categories of products which must be taken into account for establishing average rates and, since no limit is imposed by Community law, it must have a wide area of discretion.

The Commission rightly considers that it cannot be the intention of Article 97 to afford to Member States an opportunity of manipulating the average rates by this device. It cites the instance of iron mines, a preliminary stage in the manufacture of a machine; those two products are the links at the opposite ends of a production chain charged differently and the Commission rightly considers that it is inadmissible to form a group of products from it. Likewise there must be rejected as illogical the idea put forward by the plaintiff of recognizing all products appearing under the same heading of the customs tariff as a group of products.

The sole criterion which may be put forward—and it is imprecise—is that only comparable products on which approximately similar charges are imposed may be formed into a group. In any event it seems impossible, contrary to the Finanzgericht's view on this point, to establish a fixed limit of 0.50% of the cumulative burden of the tax beyond which products cannot be formed into the same group.

2. The second group of questions to which we now come—the third, fourth and fifth—relate to the legal nature of Article 97, on which you have already been questioned in Case 28/67. The peculiarity of the present case is the basis of the Finanzgericht's question whether this article constitutes a special case under Article 95 or an independent rule.

I agree with the Commission that this approach to the problem is of no assistance in resolving the sole important question:

whether Article 97 is directly applicable. Even if that article is a supplementary provision in relation to the principal rule constituted by Article 95, the question of its direct applicability cannot be appraised in relation to Article 95 alone. In fact, the direct applicability of Article 95 may be a necessary condition for the recognition of the same nature in Article 97, but it is not a sufficient condition. The problem can only be solved within the framework of the principles arising from your case-law. In this connexion, I have been sufficiently explicit in Case 28/67 for me to say that it appears to me that the question should be answered in the negative.

3. The third group of problems—the eighth, ninth and tenth questions—concerns the interpretation of the concept of 'indirect' taxation mentioned in Article 95, which may be employed in calculating the permitted equalization tax.

In the first case I have indicated the *ratio legis* of this provision of Article 95 which must lead to understanding the term 'indirectly' in its widest sense. This generally is the view of the Finanzgericht which nevertheless asks you for certain clarifications: with regard to the requests which form questions eight and nine, I consider that these have already been answered in Case 28/67.

The tenth question is more unusual. You will recall that the disputed tax relates to the import of slaughtered poultry. The Finanzgericht wishes to know whether there must be taken into consideration the turnover tax imposed on the basic products of primary products (for example hatching eggs for poultry, seed in the case of plants) and whether the same holds good in the case of the charge on the means of production employed to obtain primary products (for example brooders for poultry or broodhens). On the basis of what appears to me a reasonable distinction, the Commission considers that an affirmative reply must be given because different stages of production prior to the raising of poultry are concerned. In principle account must be taken of the prior tax on laying hens or artificial brooders but it is evident that the influence on the general tax of the charge on those basic products is negligible.

4. In its eleventh and twelfth questions, the Finanzgericht asks whether the turnover equalization tax must be regarded in whole or in part as a charge having an effect equivalent to customs duties within the meaning of Article 11 of Regulation No 22/62—in its own view, the question which it puts to you should be answered in the negative—and, if so, whether this article creates direct individual rights which national courts must protect.

The article in question provides that in trade between Member States, both as regards import and export, the following measures are incompatible with the intra-Community levy system:

— the imposition of any customs duties or charges having equivalent effect; and
— the application of any quantitative restriction or measure having equivalent effect.

It will be noted that the terminology of the regulation follows that of the Treaty; contrary to the view of the plaintiff in the main action, there are thus grounds for considering that this concept must receive the same interpretation here as in the Treaty.

Having said that, we must as a general rule consider the turnover equalization tax levied in Germany as internal taxation (since its aim is to equalize the turnover tax levied on domestic products) and not as a charge having equivalent effect.

This holds good if the tax in question exceeds the charge on similar domestic products by the portion of the tax which exceeds the corresponding charge, since, as from your judgment in Case 57/65, the turnover equalization tax forms a single legal entity.

An affirmative answer should be given to the question whether individuals may invoke an infringement of Article 11 of Regulation No 22 before the national courts.

5. We come finally to the last question put by the Finanzgericht: with whom does the burden of proof rest when the dispute turns on whether the rate of a charge constitutes an average rate within the meaning of Article 97 of the Treaty?

The Government of the Federal Republic and the Commission express understand-

able doubts as to the admissibility of this question. It may in fact be wondered whether in this we are still in the sphere of interpretation of Community provisions, or whether it does not rather relate to a problem concerning the national law of the court before which the real nature of the rate applied is debated. I personally favour the second argument.

Nevertheless if the question were to be considered admissible I should agree with the Finanzgericht that at all events it is for the customs administration to explain the basis and the method of fixing the average rate in dispute. But this solution, if it must be recognized, can only rest on the most general considerations of natural justice: if this proof were not required of the administration, it would in practice render pointless any application by the importer.

IV

27/67 — *Firma Fink-Frucht v Hauptzollamt München*

On this occasion the import of fresh sweet peppers from Italy to Germany meant that the plaintiff in the main action, Firma Fink-Frucht, had to pay the turnover equalization tax.

The importer brought the matter before the Finanzgericht, Munich, alleging that Article 95 of the Treaty had been infringed. It maintained that the turnover equalization tax levied had a discriminatory effect in comparsion with the direct or indirect turnover tax on similar domestic products or competing products. The customs office, on the other hand, replied that neither Article 95 nor Article 97 of the Treaty was applicable, since Germany produces no fresh sweet peppers and no other domestic products capable of being substituted for them.

Under those circumstances the Finanzgericht brought before you five questions on the meaning and scope of Article 95.

1. First of all it asks whether the first paragraph of Article 95 merely lays down a prohibition against discrimination between the Member States, or whether it must be understood as authorizing the levy of a turnover equalization tax only where there are similar domestic products on which the turnover tax is imposed directly or indirectly, with the result that since it is not an equalizing tax it is prohibited when in the national territory there are neither similar products nor competing products capable of being compared with the imported products. It further asks you whether, where necessary, the turnover equalization tax must be regarded as a measure having an effect equivalent to quantitative restrictions under Article 30 of the Treaty. It will be noted that although the plaintiff expressly refers only to the first paragraph of Article 95, in fact the question as a whole also relates to the second paragraph.

As I said in connexion with Case 31/67, our starting point must be the idea that Article 95 contains a prohibition on Member States' placing products imported from Member States in a less favourable position than similar domestic products or competing products; but if there are no similar or competing products in the State in question Article 95 does not apply. Since the fiscal sovereignty of the States remains intact, subject to the limitations imposed by the provisions of the Treaty, when the conditions for the application of Article 95 are not present, the Member States retain the right to impose indirect taxation on products which are not manufactured in the country. It does not necessarily follow from this that they are not subject to any restriction on the basis of the EEC Treaty. Finally—and in this I am replying to the last part of the question—if any increase in the price of imported products may result in restricting imports, when this rise in prices is caused by levying a duty or tax, such taxation may be affected by the special provisions of Articles 12 and 95. Those articles are sufficient in themselves without its being necessary to apply Article 30 which relates to measures having an effect equivalent to quantitative restrictions.

2. The second question deals with the concept of 'similar products' which appears in the Treaty and how they are to be distinguished from the products referred to in the second paragraph.

The first paragraph of Article 95 is applicable when 'similar domestic products' may be compared with products imported from other Member States, and the second para-

graph of Article 95 applies when Member States impose on the products of other Member States internal taxation of such a nature as to 'afford indirect protection to other products'. We are thus concerned with a situation where there are no 'similar' products in the State, but only products in competition with the imported product. For its content and its position in the provision, the second paragraph of Article 95 thus appears as a supplementary condition to the first paragraph of Article 95.

Once we have said this, it is difficult, as is shown by the various observations which have been submitted, to give a precise definition of 'similar' products and to distinguish them from the products referred to in the second paragraph, as the Finanzgericht asks, but this difficulty is less important if it is admitted, as I shall later suggest to you is the case, that the products dealt with by the two paragraphs are subject to the same legal rules.

According to the plaintiff in the main action, whilst it is not necessary to require them to be completely equivalent, there must be considered as similar all products which are strictly capable of being substituted, that is to say, all those which, taking into account their characteristics and the value of their use, are currently regarded as interchangeable. According to the Government of the Federal Republic, by similar products there must be understood identical products or products of the same type. The Commission indicates that 'similar' is not the equivalent of 'identical' and has a wider scope than the latter term.

It will be understood that the concept in question is difficult to define clearly. There is nevertheless universal agreement that in appraising whether products are similar the essential factor, when the subject of the disputed provision is of an economic nature, is whether they are *capable* of identical *use* owing to their nature and special properties and whether they fulfil the same need or are capable of satisfying the same taste. It must be noted finally that most products have several possible uses which they share, to a greater or lesser degree, with other products.

The second paragraph supplements the foregoing provision. It refers to the situation when an imported product is in some way in competition with a domestic product without there being similar products.

It is nevertheless impossible to delimit strictly the respective scope of those two provisions; similar products and products which without being similar are nevertheless competing are only distinguished by the degree and breadth of the differences separating them.

The other questions put by the Finanzgericht relate solely to the second paragraph of Article 95.

3. You are asked first of all to interpret the concept of '*taxation of such a nature as to afford indirect protection to other products*' employed in that paragraph. Does it refer to the smallest tax which gives a measure of protection to domestic products even remotely in competition with the imported product or does it refer to a tax which changes the price of the imported product sufficiently to make domestic consumers favour the competing domestic products? I think that the second paragraph must be understood in a fairly wide sense. In your judgment in Case 34/62 ([1963] E.C.R. 131), you admitted, for example, that oranges on the one hand and apples, pears and peaches on the other might be in competition, so that the former might not be burdened by heavier indirect taxation than that on the said fruit produced in the State.

When products are in competition with each other, the second paragraph of Article 95 prohibits imposing *additional* taxation on imported products in competition with domestic products. In fact all increases in price hamper the sale of the product which is charged by favouring the product which is not charged; no doubt this effect diminishes as the cost is reduced, but there is no limit below which it may be said that an increase in cost affecting only certain products capable of satisfying the same needs has no effect on the sale of those products.

4. The Finanzgericht also wishes to know whether the second paragraph of Article 95 prohibits the imposition of *any* taxation or whether the prohibition which it lays down covers only the imposition of *higher* taxation than that imposed on competing domestic products.

There is no doubt as to the reply and the

question should be settled in terms of the second section of the subsidiary question asked by the Finanzgericht.

The sole purpose of Article 95 is to prevent imported products from being placed in an unfavourable competitive position; indirect protection does not arise from very light taxation but only from taxation heavier than that affecting domestic products. Finally, it is incomprehensible that the Treaty should grant products which are merely comparable a more favourable position that 'similar' products.

5. The Finanzgericht finally wishes to know whether the second paragraph of Article 95 produces direct effects and creates individual rights which national courts must protect.

On the basis of your case-law I consider that this question should be answered in the affirmative.

In fact this paragraph leaves no room for any discretion on the part of the Member States. The difficulties which may be involved in implementing it are purely legal and essentially arise from the concepts employed which, as we can see, may require interpretation by the competent court. Since it is difficult to determine precisely the bounds between the first and second paragraphs of Article 95, it is incomprehensible that the first should be directly applicable and not the second.

V

13/67 — *Firma Becher v Hauptzollamt München*

The request for a preliminary ruling brought before you by the Finanzgericht, Munich, as Case 13/67 will not detain us long as the questions which that court asks you have generally been treated already in certain of the cases which we have just considered.

When the Becher undertaking obtained customs clearance on 7 December 1962 for two consignments of maize from Italy it was asked to pay an equalization duty of 1.5%. It made an administrative complaint and subsequently alleged before the Finanzgericht that the provisions of German tax law which had been applied to it were contrary to Article 95 of the Treaty. In fact, consignments of domestic maize effected in Germany are exempt from turnover tax (Umsatzsteur) and there is thus no taxation directly imposed on domestic products; nor is there an indirect charge, as the taxes on auxiliary materials cannot be placed in this category. Moreover it disputes that the rate of 1.5% was a genuine average rate within the meaning of Article 97.

In those circumstances the Finanzgericht, Munich, referred three questions to you.

1. The first is whether Article 97 is directly applicable.

For reasons which I have expounded in connexion with Case 28/67 it seems to me that a negative reply must be given to this question.

2. The second concerns the interpretation of the term 'average rate'.

Under a cumulative multi-stage tax system, must the rates of the equalization tax be considered to constitute *as a general rule* average rates within the meaning of Article 97? This is the view consistently maintained by the German Government and confirmed since 1966 by Article 7 of the Law on Turnover Tax (Umsatzsteuergesetz) which I described in connexion with Case 28/67 as calling for most serious reservations. On the other hand, is it necessary to check in every case whether the rate of the charge is higher or lower than the average turnover tax imposed directly or indirectly on similar domestic products, for example when this rate corresponds only to the charge imposed at a single stage of turnover in relation to the said product. Finally, does it constitute an average rate when the same rate of tax is applied to products at different stages of production, for example to cereals, on the one hand, and to bakers' wares obtained from those cereals on the other?

The Finanzgericht observes that the rate of 1.5% applied in the present case corresponds to the rate of turnover tax on consignments of domestic cereals. As this latter tax is only imposed on a very small fraction of the commercial operations relating to those cereals, the actual tax burden is much lower than 1.5%. In order to consider the rate of the turnover equalization tax as an average rate within the meaning of Article 97, it is not only necessary to take into account indirect taxation but to form a

group from the cereals and bakers' wares subject to the same rate. But is it possible to form a group of products by joining primary products, mostly exempt from taxation, with the products which are used to make them and which have a much longer production cycle and suffer higher preliminary taxation?

I have stated that, in calculating the turnover equalization tax, products may only be formed into a 'group' when taxation is levied on similar domestic products to a substantially equivalent degree, if it is desired to avoid manoeuvres which might frustrate Articles 95 and 97. *A priori* it seems surprising that products coming under different stages of the manufacturing process may be grouped together, but is is not illegal if those products are subject to approximately the same taxation. As this is a question to be decided in each individual case, a complete and general reply cannot be given.

3. Finally, the Finanzgericht asks you whether the concept of indirect taxation includes the turnover tax, and possibly carriage tax, imposed on auxiliary materials, materials used for the packing of goods, the means of development or of production employed in the manufacture and marketing of the products, together with carriage by third parties. This question must be answered in the affirmative.

VI

7/67 — *Wöhrmann v Hauptzollamt Bad Reichenhall*
20/67 — *Tivoli v Hauptzollamt Würzburg*

The two cases in which it remains for me to give my opinion and which are both the subject of a reference for a preliminary ruling from the Finanzgericht, Munich, differ from the previous cases inasmuch as they concern the importation into Germany of products originating not in Member States but in third countries. They both relate to the interpretation of regulations on the establishment of a common organization of the markets in two agricultural sectors and the questions with which they face us are similar. It is essential to consider them together.

1. The Wöhrmann undertaking imported into Germany in 1966 unsweetened whole-milk powder coming from Austria. Apart from the levy laid down by Regulation No 13/64 of 5 February 1964 the customs imposed a charge of 3% of the value as turnover equalization tax. An action was started before the Finanzgericht, Munich, on the ground that, as milk and milk products were not subjected in Germany to turnover tax, the equalization tax in question was not 'internal taxation' within the meaning of Article 95 of the Treaty but a charge having an effect equivalent to a customs duty. However, the charging of any customs duty or charge having equivalent effect on imports from third countries is incompatible with the provisions of Article 12(2) of Regulation No 13/64.

In these circumstances the Finanzgericht has addressed to you four questions which are related to one another and which run as follows. It asks you first whether the character of a charge having an effect equivalent to a customs duty within the meaning of Article 12 of the regulation is determined in a general manner by the protective purposes of the charge or by its actual protective effect in the case of a given product. In the event of an affirmative answer's being given to the second of the two alternatives, the Court wishes to know whether an equalization tax must be considered as a charge having equivalent effect when supply of the similar domestic product is not directly subject to the turnover tax or—in the event of a negative answer's being given to this question—if there would be a charge having equivalent effect to the extent to which the equalization tax exceeds the amount of the turnover tax on similar domestic products. These are the first two questions and I shall consider them before going on to the remainder.

The Treaty, we know, distinguishes between and provides different treatment for customs duties and charges having equivalent effect on the one hand and internal taxation on the other. Regulation No 13/64, which you are asked to interpret, lays down that, for imports from third countries, the charging of any customs duty or charge having equivalent effect is incompatible with the levy for which it provides. How-

ever, it does not contain any similar provision with regard to internal taxation, with regard to which Member States preserve their freedom of action. This is proved by the fact that, according to Article 2 of this same Regulation, the levy corresponds to the threshold price of the importing Member State, less certain sums including 'an amount equal to the incidence of internal duties charged on imports' (an amount to be calculated in accordance with Regulation No 158/64), as well as by the fact that, when the rate of the equalization tax for milk products was reduced from 4% to 3% by the 16th Law amending the turnover tax law, dated 26 March 1965, this latter regulation was amended to take into account the new German legislation. It is true that the applicant's representative criticized this provision, which seemed to him to be incompatible with the spirit of the Treaty and of the market organization, but its validity is not the subject of the present hearing. What matters is the conformity of the legal concepts of the Treaty with those of the regulation: the latter uses them in the same sense as the former and it is, in reality, the distinction found in Articles 12 and 95 of the Treaty which reappears in the Regulation.

Your case-law has already had to take this question into consideration. From your judgments in Joined Cases 2 and 3/62 ([1962] E.C.R. 425) and 57/65 (Rec. 1966, p. 293) can be seen the idea that a charge intended to offset taxes on similar domestic products is 'internal taxation'. It is thus the general purpose which is taken into account. The purpose of the turnover equalization tax is to establish equality of fiscal charges between imported products and domestic products. If, in a given case, the exemption of the similar domestic product from all taxation were to make it lose its role and its justification, it would be legitimate to inquire whether its legal nature were to be affected. This supposition is however entirely theoretical for even admitting that the product itself may be exempt from turnover tax, it is still subject to an indirect charge which must be taken into consideration.

But—and here we come to the second question—if in a given case the amount of the equalization tax exceeds that of the tax imposed upon the similar domestic product, it does not follow that the part of the equalization tax which exceeds that tax constitues a charge having an effect equivalent to that of a customs duty. The tax necessarily keeps its unity as is clear from your judgment in case 57/65, which preserves all its force even though Article 95 does not apply here.

The Finanzgericht next inquires whether, in case of a cumulative multi-stage turnover tax it is possible to equate the amount of the equalization tax charged with that of the turnover tax which is imposed proportionally on auxiliary and accessory products, the means of production, fuels and energy used in the production of similar domestic products. What I have said in previous cases leads me to give an affirmative reply.

The last question put by the Finanzgericht is whether Article 12(2) of Regulation No 13/64 produces direct effects as far as concerns that portion of the equalization tax which has an effect equivalent to a customs duty, and whether it creates individual rights. This question, which was put in the alternative in case the tax was to be considered as capable of division into several components, has therefore lost its purpose. All told therefore the provision about which you have been asked corresponds to that of Article 12 of the Treaty about which you recognized in your judgment in Case 26/62 that it produced direct effects and created individual rights. The same solution therefore necessarily applies to Article 12(2) of Regulation No 13/64.

2. I shall finish with Case 20/67 — Tivoli — in which the Finanzgericht, Munich, has again made a reference for a preliminary ruling.

In 1966 the undertaking imported several consignments of wheat from the United States, on which a turnover equalization tax at the rate of 1.5% was claimed. The undertaking argued before the Finanzgericht that there was no domestic product in Germany comparable with the product imported by it, and that the taxation which it disputed constituted a charge having an effect equivalent to a customs duty, and infringed Article 20(1) of Regulation No 19 on the common organization of the market in cereals.

By order dated 17 May 1967 the Finanzgericht referred the case to you and asked you for a ruling whether a turnover equalization tax levied on imported goods constitutes a charge having an effect equivalent to a customs duty within the meaning of Regulation No 19, when similar products or products capable of being substituted within the meaning of the first and second paragraphs of Article 95 of the Treaty are not produced within the country.

Let me say once and for all that the parties before the Finanzgericht were in agreement in considering that hard wheat is not produced within the Federal Republic of Germany, and that is neither comparable with the soft wheat produced within that country nor usable as a substitute for it. As regards this proposition, which means that the second paragraph of Article 95 cannot possibly be applicable, the Commission has stated its doubts concerning the relationship between the two products, and I share them. I do so because there are important uses to which both kinds of wheat can be put, in particular the manufacture of feed meal. So we should be well advised to leave this question entirely aside, since the ruling which is asked of you can be given without going into it.

The provision to be interpreted is Article 20(1) of Regulation No 19 which states that the application of the system of levies as regards third countries is to entail the abolition of the levying of customs duties and charges having equivalent effect on imports from third countries. It is not disputed that, since there is no special definition, the concept of a charge having equivalent effect is used here with the same meaning as in the Treaty.

I have said as regards Case 7/67 that the dividing line between charges having equivalent effect and internal taxation can only be traced on the basis of the general objectives which are respectively attributable to them. I said that the equalization tax was thus to be classified as internal taxation. This principle can still hold good even when the taxation is levied on the importation of a product which does not meet with any similar or competing product within the country. This is because such taxation does not acquire and cannot acquire the protective nature which is the essence of a charge having equivalent effect. On this subject it will be recalled that Article 17 of the Treaty allows Member States to substitute by internal taxation customs duties of a fiscal nature, the two characteristics of which were that they were intended to provide revenue for the state and to be levied in most cases on goods which are not produced within the national territory. In authorizing this charge, Article 17 recognizes that this taxation does not have the same effect as customs duties. But another conclusion which must follow is that Article 95 does not forbid the levying of internal taxation when there is no domestic production of similar goods on ones which may be used as substitutes. Without this interpretation Article 17 of the Treaty would have no practical point.

Therefore I am of the opinion that Member States retain the right to levy an equalization tax even when there is no similar product or one which may be substituted for it within the national territory. I am further of the opinion that this tax is not a charge having an effect equivalent to a customs duty. This interpretation also holds goods as regards Regulation No 19 concerning the case of imports from third countries. Thus the only question which the Finanzgericht puts to you seems to me to require an answer in the negative.

Finally I would advise that the decision on costs in each of the seven cases is a matter for the courts which have made references to you.