quantitative restriction and internal taxation.

3. Similarity between products within the meaning of the first paragraph of Article 95 exists when the products in question are normally to be considered as coming within the same fiscal, customs or statistical classification, as the case may be.

4. The second paragraph of Article 95 of the Treaty is capable of producing direct effects and creating individual rights which national courts must protect.

5. The second paragraph of Article 95 is complementary to the first. It prohibits the imposition of any internal taxation which imposes a higher charge on an imported than on a domestic product which competes with the imported product, although it is not similar to it within the meaning of the first paragraph of Article 95. The prohibition also applies in the absence of direct competition where the internal taxation subjects the imported product to a specific fiscal charge in such a way as to protect certain activities distinct from those used in the manufacture of the imported product. However, the said second paragraph is only applicable when the various economic relationships envisaged by it are not merely fortuitous, but lasting and characteristic.
The effects of a tax on the economic relationships referred to in the second paragraph of Article 95 must be assessed in the light of the objectives of Article 95, which are to ensure normal conditions of competition and to remove all restrictions of the fiscal nature capable of hindering the free movement of goods within the Common Market.
The Treaty does not prevent national courts from deciding, where necessary, the level below which the tax in question would cease to have the protective effects prohibited by the Treaty and from drawing all appropriate conclusions therefrom.

In Case 26/67

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

FIRMA FINK-FRUCHT GMBH, Frankfurt-am-Main,

and

HAUTPZOLLAMT (Principal Customs Office) MÜNCHEN-LANDSBERGERSTRASSE,

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

1. *Summary*

The facts of the case may be summarized as follows:

On 5 July 1966 the Fink-Frucht GmbH undertaking cleared through customs a consignment from Italy consisting mainly of sweet peppers, on which the appropriate customs office charged the undertaking turnover equalization tax ('Umsatzausgleichssteuer—UASt'—hereinafter referred to as 'equalization tax') at the rate of 2.5% in accordance with German law.
Fink-Frucht appealed to the Finanzgericht (Finance Court) claiming that the provisions of German tax law applied were contrary to Article 95 of the EEC Treaty.

2. *Subject-matter of the reference: opinion of the Finanzgericht*

A — On 12 July 1967 the Finanzgericht, Munich, decided to request the Court for a preliminary ruling on the following questions:

(1) Does the first paragraph of Article 95 of the EEC Treaty
   (a) merely prohibit all discrimination as regards taxation of products from other Member States; or
   (b) permit the turnover equalization tax (UASt) to be levied solely where similar domestic products exist and where these are directly or indirectly subject to turnover tax, with the result that, if there are in the national territory no products either similar or comparable to the imported products, the equalization tax is prohibited because it would be without purpose?
   (c) Alternatively, is the equalization tax in the lastmentioned case to be regarded as having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the EEC Treaty?

(2) What is the meaning of the phrase 'similar products' as used in the first paragraph of Article 95, and how are these to be distinguished from the products referred to in the second paragraph?

(3) Does the second paragraph of Article 95 have direct effects and does it create individual rights which national courts must protect?

(4) What is the meaning of the legal concept of 'taxation of such a nature as to afford indirect protection to other products' used in the second paragraph of Article 95, in particular:
   (a) Does the expression 'of such a nature' mean any tax, however small, the effect of which is to afford a measure of protection to domestic products competing even remotely with the imported product, or does it mean a tax which changes the price of the imported product to such a point that domestic consumers give preference to the competing domestic products?
   (b) What products are covered by the second paragraph of Article 95, and what criteria are to be applied in order to determine either that other products on the market are being protected indirectly (same characteristics, same use, equivalent utility value), or that there is no such indirect protection (essential differences in price)?
   (c) What is the position where the imported product may have several different uses?

(5) Does the second paragraph of Article 95 prohibit the collection of any tax, or does it merely—as in the first paragraph—prohibit the collection of taxes in excess of the internal taxation levied on competing domestic products?

B — The observation put forward by the Finanzgericht are as follows:

Question 1

The Finanzgericht refers to the various theories on the subject of this question to be found in legal writing.

Question 2

Whilst admittedly factual circumstances must play a part in each case in the application of the concept of 'similar products', the absence of some general criteria to be observed by the national courts and, where necessary, by experts, would lead to legal uncertainty.
A definition of the required characteristics of the products referred to in the first and second paragraphs of Article 95 is needed particularly if the first alternative given in Question 5 is to be answered in the affirmative.

Question 3

When the Court declared in its judgment in Case 57/65 (Rec. 1966, p. 295 et seq.) that Article 95 creates individual rights it referred only to the first paragraph of that article.
Whether or not a tax is of such a nature as to 'afford indirect protection to other products' is 'more a question of customs policy'. Moreover, the wording of the second paragraph of Article 95 is neither sufficiently clear nor sufficiently wide for it to be applied directly by national courts and administrations.
Question 3 appears especially well justified if it is found necessary to draw a precise distinction between groups of products to which the first paragraph applies and those covered by the second paragraph (cf. Questions 2 and 5).

Question 4

The legal concept raised in this question may be understood, on the one hand, to apply even where there are such differences between the products to be compared, in their nature, their objective utility or in view of subjective habits of consumers, that the purchaser would only choose the relevant home product if there were an unusually large increase in the price of the imported product. On the other hand, it may equally be considered that the concept applies only to a 'close competitive relationship', that is, that it must be possible for a slight adjustment in price to be enough to persuade the purchaser to change from one product to another.

Question 5

The wording of the second paragraph of Article 95 appears to prohibit not merely excessive, but all, internal taxation; some writers indeed support this view, but others believe that this provision is no wider than the first paragraph of Article 95.

II — Procedure

The order referring the matter was received at the Court Registry on 24 July 1967.
The Government of the Federal Republic of Germany, the Commission of the European Communities and the Fink-Frucht undertaking submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice, and presented oral argument at the hearings on 5, 6 and 7 December 1967.
The Advocate-General delivered his oral, reasoned opinion at the hearing on 25 January 1968.
The Fink-Frucht undertaking was represented by Messrs Ditges and Ehle, Advocates of Cologne, the Government of the Federal Republic of Germany by Messrs Everling and Hahnfeld (Ministerialräte) and Mr Bülow, (Oberlandesgerichtsrat), and the Commission of the European Communities by its Legal Adviser, Mr Wägenbaur.

III — Summary of the observations submitted by the parties

Question 1

A — The *Fink-Frucht undertaking* introduces its observations by pointing out that this question indirectly raises another, more general problem whether there is in fact any

provision in the Treaty covering the collection of tax on imported products which do not compete with domestic products.

On this point, it makes the following observations:

The only purpose of the equalization tax is to compensate for the taxes imposed on comparable domestic products. Since fruit and vegetables are exempt from turnover tax in Germany, it is clear from the start that the only compensation in question is that for indirect taxes levied at an earlier stage. However, when there is no comparable product at all, there is no way of justifying the equalization tax, because it cannot have either the purpose or the effect of 'equalizing' anything. If this case fell outside the terms of the Treaty, Member States would be entitled to collect tax at whatever rate they wished. However, since such a result would be contrary to the objectives of the Community, the only problem which remains is to determine which of the prohibitions imposed by the Treaty are applicable here.

The fact that the first paragraph of Article 95 contains a prohibition against discrimination is not disputed. Doubts do arise, however, as to whether or not the article goes on to make an exception, which would compel one to conclude, *a contrario*, that the taxation of products not competing with domestic products must be prohibited; there are very good grounds for this theory. Another argument is possible: Article 95 requires that domestic and foreign products be placed on the same footing; if there is no competing domestic product, the imported one must be treated in the same manner as that accorded to a national product comparable to it, if such exists; if it is found (as in the present case) that this national product is not directly subject to turnover tax, the equalization tax can, of course, be collected, but only up to the amount of the indirect tax imposed on the (hypothetical) comparable domestic product.

In fact both these theories are open to criticism and the task of deciding which prohibitions are applicable, those set out in Article 95 or those in Articles 12, 13 and 17 of the Treaty, must accordingly be left to the Court.

B — As regards Question 1(c), Fink-Frucht considers that logically the examination should first be directed to the possibility that, in the cases contemplated here, equalization taxes should be regarded as customs duties or charges having equivalent effect.

In support of this idea, it emphasizes the following points:

The charges have the same effect as customs duties of a fiscal nature, because their sole purpose is to bring revenue to the State. However, Article 17(3) of the Treaty permits Member States to 'substitute for these duties an internal tax which complies with the provisions of Article 95'; nevertheless, it is doubtful whether Article 17 allows such a substitution in cases like the present. If, despite this, one relies on Article 17, then the equalization taxes applicable to non-comparable products should have been abolished no later than six years after the Treaty's entry into force (Article 17(4)).

The prohibition against quantitative restrictions and measures having equivalent effect also impinges on the field of fiscal provisions which affect international trade to the extent to which provisions concerning customs duties, taxes having equivalent effect or internal taxation do not apply. Only in the event of none of these provisions being applicable in the circumstances (which cannot be conceded) might it prove necessary to invoke this prohibition.

The *Federal Government* has the following remarks to make:

The first paragraph of Article 95 contains a clearly-stated prohibition, applicable solely in the circumstances which it expressly describes; in addition, the second paragraph of that article would be pointless if equalization taxes applied to products not in competitition with domestic products were prohibited by the first paragraph; and where Community law has not restricted them, the legislative powers of national administrations remain intact.

Article 95 must be considered in conjunction with the many other provisions in the Treaty designed to prevent distortion of competition between Member States (Articles 85 et seq., 92 et seq. and 100 et seq.); since the principle of taxation in the country

of destination is applied by all Member States, the product when exported is exempt from turnover tax and other indirect taxes applicable to it in the exporting country (export refunds); Article 96 is intended to guarantee that such exemptions do not exceed the amount of the charge originally imposed on the product. The importing country, for its part, levies turnover tax (or other indirect taxes) on the product, with the main aim of ensuring that the imported product does not have any advantage over competing national products; it is for this reason that the taxes in question are generally known as 'equalization taxes' ('Ausgleichssteuern'), when a better name for them might be 'turnover taxes on importation' ('Umsatzsteuern bei der Einfuhr'); but in any case these taxes are collected in all Member States on all products, that is, without determining whether in any particular case the domestic products are subject to a charge to be equalized.

These points are confirmed in Article 17(3) of the Treaty; as a general rule, customs duties of a fiscal nature are imposed on products which are not manufactured in the national territory. By permitting conversion of these duties into internal taxation, the provision acknowledges that the taxes in question do not have 'an effect equivalent to customs duties'; in addition, the wording compels one to conclude that Article 95 does not prohibit the collection of taxes on the importation of products for which there is no domestic competition, for in fact, if the contrary were true, Article 17(3) would be practically deprived of its purpose, because it is precisely the absence of such competition that characterizes products subject to customs duties of a fiscal nature.

The Treaty distinguishes clearly between customs duties and taxes ('Abgaben'), on the one hand, and quantitative restrictions on the other. Consequently it is impossible to regard taxes as quantitative restrictions.

Like the Federal Government, and for essentially the same reasons, the *Commission* considers that Article 95 is not applicable to products not competing against domestic products and that the equalization tax levied on products of this kind is not a measure having an effect equivalent to quantitative restrictions.

In its opinion, the activities of Member States can be restricted by the prohibition against taxes having an effect equivalent to customs duties, a prohibition which leads one to conclude that the national legislature is not entitled to collect 'exorbitant' taxes even on the products in question.

Question 2

Fink-Frucht submits the following observations:

The second paragraph of Article 95 merely supplements the first paragraph. Consequently, the definition of the concept of 'similar products' is not very significant since in cases of doubt the second paragraph will still be applicable.

'Similar' products should mean all products 'which are close substitutes' ('en relation étroite de substitution'), that is to say, all products which current opinion accepts without discussion as interchangeable, in view of their objective characteristics and the uses which they are intended to fulfil.

The equivalence required need by no means be absolute, for to argue otherwise would be to attribute greater significance to the second paragraph of Article 95 than was intended by the States signatory to the Treaty.

The *Federal Government* considers that the use of the expression 'similar' products indicates, literally, either that the products compared are completely equivalent to each other, or that they have similar characteristics and one need not look for similarity in quality.

The following arguments are put forward by the *Commission*:

The word-similar' has a wider meaning than 'equivalent'. In order to establish whether there is a similarity, one must first of all enquire whether, in view of their properties, nature and quality, the products compared afford the same possibilities of utilization. It is rarely possible, however, to answer this question with a simple yes or no; the deciding influence will be current opinion and the use for which the product is intended in the particular case in question.

Nor is it possible to apply an abstract distinction between the respective spheres

of application of the first and the second paragraphs of Article 95; often the differences are simply differences of degree.
This problem presents no difficulty because the legal consequences of the provisions are identical.
The principal function of the second paragraph is to dispose of the objection which might otherwise prevent the application of the first paragraph, namely that it does not apply to 'similar products'.

Question 3

Fink-Frucht observes that:

The second paragraph of Article 95 is a provision supplementary to the first; that in itself is sufficient reason to convince one that the principle of direct effect (so far confirmed by the Court only with regard to the first paragraph) applies equally to the second paragraph.
Furthermore, the requirements which the Court has held necessary for direct effect apply also with regard to the prohibition stated in the second paragraph, assuming that this provision is complete and legally self-sufficient. It does not matter that it may not be absolutely clear because the Court has power to remedy this.
The Finanzgericht, Munich, mistakenly claims that this provision 'relates to customs policy', when in reality it is solely designed to give effect to the principle of applying to all products the same treatment as that given to domestic products.
Finally, the legal protection enjoyed by individuals should be the same irrespective of whether the courts consider that the possibility of substitution under consideration is close (first paragraph) or remote (second paragraph).

The *Federal Government* believes that the question should be answered in the negative and bases its opinion on the following arguments:

To maintain that the first two paragraphs of Article 95 must have the same effect in law is merely to give one more reason for holding that the first paragraph, too, is not directly applicable; reference should be made to the criticisms made by the Bundesfinanzhof (Federal Finance Court) of the Court's decision in Case 28/67, in which the Court delivered judgment on 3 April 1968. This apart, it is perfectly possible to interpret the two paragraphs in Article 95 differently. The second paragraph is 'extremely vague and incomplete' and cannot therefore have direct effect; the value-judgments which it requires should not be forced on national courts.

The *Commission* for its part considers that, on the basis of the case-law of the Court, the question should be answered in the affirmative, and comments as follows:

The second paragraph of Article 95 is a clear provision, as long as it is understood that 'clear' does not mean 'leaving no room for doubt'. It allows no area of discretion to the Member States, for its sole purpose is, on the contrary, to define certain legal concepts.
The Finanzgericht is mistaken in its belief that this is a matter of customs policy.
The Commission supports the view that there is proof of the fact that the second paragraph of Article 95 must necessarily have direct effects in the difficulty of defining the respective spheres of application of the first and the second paragraphs of Article 95.

Question 4

Fink-Frucht makes the following comments:

The phrase 'of such a nature' does not necessarily imply that a harmful effect must be a foreseeable one, or have actually occurred. It is sufficient if common experience shows that one cannot exclude the possibility of such an effect occurring; the second paragraph of Article 95 covers any adverse effect on the marketing of the imported product, and it matters little how such adverse effect manifests itself and where in the importing country it occurs.
A broad capacity for substitution ('relation large de substitution') such as that which exists, for example, between umbrellas and raincoats, is enough for the second paragraph of Article 95 to be applicable; it is possible, on this principle, that absolutely no product exists which is incapable of being substituted by another.

Finally, if the imported product can be put to a number of uses, it is enough for the indirect protection condemned by the second paragraph of Article 95 to affect one of those uses.

The question is answered by the *Federal Government* in the following manner:

Taxation is of such a nature as to afford indirect protection to other products when an analysis of the market reveals that, because of their essential characteristics, the use for which they are intended and their price, the products compared are in competition with each other and that this competition (that is to say, the buyers' choice) is strongly influenced by the taxes.

It is unnecessary for the product to be given a competitive advantage in actual fact; it is enough that the taxation is objectively of such a nature as to bring about such a result.

It is scarcely possible to determine whether products are in competition with each other on the basis of abstract criteria; all that can be said is this:

— The essential properties of the products must coincide. In this context the aspects which are important may be extremely varied: format, efficiency, conservability, physical appearance, taste, etc. None of these properties can be judged except in conjunction with the others.

— Special importance should be attached to the function which the products are designed to fulfil; but only the principal function can be included in the consideration.

— Considerable differences in price may be a reason for declaring that there is no competition between the products.

— In applying these criteria, however, it is necessary to bear in mind the diversity which exists for the benefit of the buyers, and the fact that in consequence only the basic correspondence should be taken into account.

The *Commission's* observations are as follows:

The second paragraph of Article 95 relates to all those cases where internal taxation is 'manifestly of such a nature as to protect competing products'. This being so, the prohibition applies to any tax (however minimal) which affects imported products to a greater extent.

On the other hand, the protective effect of the tax stems from the idea that the user, faced with a choice between several comparable products, will generally select the cheapest.

The reply which should be given to point (c) of the question is as follows: for the second paragraph of Article 95 to be applicable, all that is required is that the effect which it envisages exists 'for an appreciable proportion of the products'; in other words, the criterion is 'the existence of economically perceptible competition against domestic products'.

Question 5

Fink-Frucht considers that the question should be answered as suggested in the second alternative, in accordance with the general spirit of Article 95.

The *Federal Government* holds the same opinion and considers that the sole object of Article 95 is to prevent products from suffering from a competitive disadvantage.

The *Commission* is also of the same view, and says that:

— it is impossible to hold that indirect protection can arise from even the lowest tax;

— on the contrary, it can only arise as the effect of one which is excessively high;

— moreover, it would be somewhat surprising if the Treaty accorded better treatment to products capable of substitution than to similar products.

Grounds of judgment

By an order of 12 July 1967 which reached the Court on 24 July 1967, the Finanzgericht, Munich, asked for a preliminary ruling under Article 177 of the Treaty establishing the European Economic Community on a number of questions

involving the interpretation of Articles 95 and 30 of the said Treaty in connexion with the imposition of the turnover equalization tax on the importation of certain goods.

Applicability of Articles 95 and 30 in the absence of any competition between imported and domestic products (Question 1)

The court making the reference asks whether the first paragraph of Article 95 prohibits a Member State from imposing turnover equalization tax on products imported from another Member State where there are no similar or comparable domestic products, and whether the equalization tax in such cases amounts to a measure having equivalent effect to quantitative restrictions within the meaning of Article 30.

The first and second paragraphs of Article 95 prohibit Member States from imposing on imports from other Member States any internal taxation in excess of that imposed on similar domestic products, or of such a nature as to afford indirect protection to other domestic products. Article 95 is intended to remove certain restrictions on the free movement of goods. But to conclude that it prohibits the imposition of any internal taxation on imported goods which do not compete with domestic products would be to give it a scope exceeding its purpose. Internal taxes, and turnover tax in particular, are essentially fiscal in purpose. There is therefore no reason why certain imported products should be given privileged treatment because they do not compete with any domestic products capable of being protected. Where such a tax is imposed at the import stage, even on products which do not compete with domestic products, its purpose is to put every kind of product, whatever its origin, in a comparable fiscal situation in the territory of the state imposing the tax. It must therefore be concluded that Article 95 does not prohibit Member States from imposing internal taxation on imported products when there is no similar domestic product, or any other domestic products capable of being protected.

Nor does internal taxation imposed under the conditions set out above come within the prohibition on quantitative restrictions and measures having equivalent effect, within the meaning of Article 30 of the Treaty. Such restrictions, which are intended to limit the quantities imported, are in fact different both in their purpose and the way in which they operate from measures of a fiscal nature. Furthermore, since Article 30 et seq., on the one hand, and Article 95, on the other, lay down different periods of time and different procedures for the elimination of the restrictions to which they refer, it would be difficult to concede that one and the same tax could be both a measure having an effect equivalent to a quantitative restriction and internal taxation.

The direct effect of the second paragraph of Article 95 (Question 3)

In its third question the court making the reference asks the Court of Justice to rule

whether 'the second paragraph of Article 95 has direct effects and creates individual rights which national courts must protect'.

This provision contains a straightforward prohibition against protection which is the necessary complement to the prohibition set out in the first paragraph of the article. The obligation which results from that prohibition is unconditional, and no action is required on the part of the institutions of the Community or the Member States for its implementation or its entry into force. The prohibition is therefore self-sufficient and legally complete, and is thus capable of having direct effects on the legal relationships between Member States and those subject to their jurisdiction. Although this provision involves the evaluation of economic factors, this does not exclude the right and duty of national courts to ensure that the rules of the Treaty are observed whenever they can ascertain, in the light of the interpretation given below in answer to Questions 2, 4 and 5, that the conditions necessary for the application of the article are fulfilled. The answer to this question, therefore, must be that the provision in question is capable of producing direct effects and creating individual rights which national courts must protect.

The concept of 'similar products' in the first paragraph of Article 95, the relationship between the first and second paragraphs and the interpretation of the second paragraph (Questions 2, 4 and 5)

The object of Questions 2, 4 and 5 is, in substance, to establish the conditions under which an imported product, as compared with a domestic product, comes within one or other of the situations referred to in the first two paragraphs of Article 95, and also to have the conditions under which the second paragraph applies and its effects defined.

Under the terms of Article 95 no Member State shall impose, directly or indirectly, on the products of other Member States internal taxation of any kind in excess of that imposed directly or indirectly on 'similar domestic products'. Similarity between products within the meaning of the first paragraph of Article 95 exists when the products in question are normally to be considered as coming within the same fiscal, customs or statistical classification, as the case may be.

In addition to the prohibition imposed in the first paragraph of Article 95, the second paragraph of the same article forbid the imposition on imported products of any form of taxation 'of such a nature as to afford indirect protection to other products'. Such protection would occur in particular if internal taxation were to impose a heavier burden on an imported product than on a domestic product with which the imported product is, by raeson of one or more economic uses to which it may be put, in competition, even though the condition of similarity for the purposes of the first paragraph of Article 95 is not fulfilled. Even if there is no direct

competition of any sort with a domestic product, such protection would still exist if it were established that the imported product bore a specific fiscal charge because of its state of manufacture or distribution or because of any other economic circumstance in such a way as to protect certain activities distinct from those used in the manufacture of the imported product. In the interests of legal certainty, however, it is necessary for the various economic relationships covered by the second paragraph of Article 95 to be not merely fortuitous, but lasting and characteristic.

The effects of a tax on the economic relationships referred to in the second paragraph of Article 95 must be assessed in the light of the objectives of Article 95, which are to ensure normal conditions of competition and to remove all restrictions of a fiscal nature capable of hindering the free movement of goods within the Common Market. Whereas the first paragraph of Article 95 only prohibits taxation in so far as it exceeds a clearly defined level, the prohibition laid down in the second paragraph is based on the protective effect of the taxation in question to the exclusion of any exact standard of reference. A tax must therefore be considered as incompatible with the Treaty if it is capable of having the effect referred to above. In fact the Treaty does not prevent national courts from deciding, where necessary, the level below which the tax in question would cease to have the protective effects prohibited by the Treaty and from drawing all appropriate conclusions therefrom.

Costs

The costs incurred by the Government of the Federal Republic of Germany 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, Munich, 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 oral observations of 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 30, 95 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;

THE COURT

in answer to the questions referred to it by the Finanzgericht, Munich, by an order of that court of 12 July 1967 hereby rules:

1. **Neither Article 95 nor Article 30 of the Treaty establishing the European Economic Community prohibits Member States from imposing internal taxation on products imported from other Member States when there are no similar domestic products or other domestic products capable of being protected;**

2. **The second paragraph of Article 95 of the Treaty is capable of producing direct effects and creating individual rights which national courts must protect;**

3. (a) **Similarly between products within the meaning of the first paragraph of Article 95 exists when the products in question are normally to be considered as coming within the same fiscal, customs or statistical classification, as the case may be;**

   (b) **The second paragraph of Article 95 is complementary to the first. It prohibits the imposition of any internal taxation which imposes a higher charge on an imported than on a domestic product which competes with the imported product, although it is not similar to it within the meaning of the first paragraph of Article 95. The prohibition also applies in the absence of direct competition where the internal taxation subjects the imported product to a specific fiscal charge in such a way as to protect certain activities distinct from those used in the manufacture of the imported product;**

and declares:

The decision on costs in these proceedings is a matter for the Finanzgericht, Munich.

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 GAND

(See Case 28/67, p. 159)