Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the courts, may be the same as that of a directly applicable provision of a regulation. Therefore, in each particular case, it must be ascertained whether the nature, background and wording of the provision in question are capable of producing direct effects in the legal relationships between the addressee of the act and third parties.

2. The second paragraph of Article 4 of the Council Decision of 13 May 1965, which prohibits the Member States from applying the common system of turnover tax concurrently with specific taxes levied instead of turnover tax, is capable, in conjunction with the provisions of the Council Directives of 11 April 1967 and 9 December 1969, of producing direct effects in the legal relationships between the Member States to which the decision is addressed and those subject to their jurisdiction and of creating for the latter the right to invoke these provisions before the Courts.

3. The prohibition on applying the common system of turnover tax concurrently with specific taxes becomes effective on the date laid down in the Third Council Directive of 9 December 1969, namely on 1 January 1972.

4. Whilst the second paragraph of Article 4 of the Decision of 13 May 1965 provides for the abolition of 'specific taxes' in order to ensure a common and consistent system of taxation of turnover, this objective does not prohibit the imposition on transport services of other taxes which are of a different nature and have aims different from those pursued by the common system of turnover tax. A tax which is not imposed on commercial transactions but merely because goods are carried by road and the basis of assessment of which is not consideration for a service but the physical load expressed in metric tonne/kilometers to which the roads are subjected by the activity taxed, does not correspond to the usual form of turnover tax within the meaning of the second paragraph of Article 4 of the Decision of 13 May 1965.

5. It is not for the Court, in the procedure laid down by Article 177 of the EEC Treaty, to assess, from the point of view of Community law, the features of a measure adopted by one of the Member States. On the other hand it is within its jurisdiction to interpret the relevant provision of Community law in order to enable the national court to apply it correctly to the measure in question.

In Case 20/70

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Baden-Württemberg (Freiburg), for a preliminary ruling in the action pending before that court between

TRANSPORTS LESAGE & CIE, Mulhouse (France),

and

HAUPTZOLLAMT FREIBURG

on the interpretation of Article 4 of Council Decision No 65/271/EEC of 13 May 1965 and Article 1 of Council Directive No 67/227/EEC of 11 April 1967,

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

Article 4 of Council Decision No 65/271/EEC of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway (OJ Special Edition 1965, p. 67 et seq.) reads as follows:

> 'Once a common system of turnover tax has been adopted by the Council and brought into force in the Member States, the latter shall apply that system, in a manner to be determined, to the carriage of goods by rail, road and inland waterway.
>
> By the date when the common system of turnover tax referred to in the preceding subparagraph has been brought into force, that system shall, in so far as the carriage of goods by road, by rail and by inland waterway is subject to specific taxes instead of to the turnover tax, replace such specific taxes.'

The First Council Directive (67/227/EEC) on the harmonization of legislation of Member States concerning turnover taxes was made on 11 April 1967 (OJ Special Edition 1967, p. 14 et seq.) and Article 1 thereof reads as follows:

> 'Member States shall replace their present system of turnover taxes by the common system of value-added tax defined in Article 2. In each Member State the legislation to effect this replacement shall be enacted as rapidly as possible, so that it can enter into force on a date to be fixed

by the Member State in the light of the conjunctural situation; this date shall not be later than 1 January 1970.

From the entry into force of such legislation, the Member State shall not maintain or introduce any measure providing for flate-rate equalization of turnover taxes on importation or exportation in trade between Member States.'

The Third Council Directive (69/463/EEC) of 9 December 1969 on the harmonization of legislation of Member States concerning turnover taxes—Introduction of value-added tax in Member States—(OJ Special Edition 1969, p. 551 et seq.) substituted the date of 1 January 1972 for that of 1 January 1970 laid down in Article 1 of the First Directive of 11 April 1967.

The Federal Republic of Germany fulfilled its obligations under Article 1 of the First Directive of 11 April 1967 by introducing value-added tax under the terms of the Umsatzteurgesetz (Law on turnover tax) of 29 May 1967 (Bundesgesetzblatt I, p. 545). This law, which came into force on 1 January 1968, also applies to transport charges. The Beförderungssteuergesetz (Law on transport tax) which was until then in force in the version of 13 June 1955 (Bundesgesetzblatt, I, p. 366) was repealed (Article 31 of the Law on turnover tax of 29 May 1967).

In addition, since 1 January 1969 the carriage of goods by road in the Federal Republic of Germany has been subject to the tax on the carriage of goods by road in accordance with the Gesetz über die Besteuerung des Straßengüterverkehrs (Law on the taxation of the carriage of goods by road) of 28 December 1968 (Bundesgesetzblatt I, p. 1461). This tax is one pfennig per metric ton kilometer for the carriage of goods over long distances (Para. 4). If the goods being carried have been imported by sea and if carriage begins at a seaport, the tax is calculated without counting the first 170 kilometers (Para. 3). This law will cease to have effect on 31 December 1970 (Para. 14).

In November 1967 the German Government informed the Commission of its draft law on the taxation of the carriage of goods by road in accordance with Article 1 of the Council Decision of 21 March 1962 instituting a procedure for prior examination and consultation in respect of certain provisions laid down by law, regulation or administrative action concerning transport proposed in Member States (OJ No 23 of 3. 4. 1962, p. 720). This draft law was an integral part of the Transport Policy Programme for 1968 to 1972 (Verkehrspolitisches Programm für die Jahre 1968 bis 1972) adopted by the Federal Government on 8 November 1967.

On 31 January 1968 the Commission addressed a recommendation to the Federal Republic concerning this draft law in particular and requesting it not to proceed with the special tax (OJ L 35 of 8. 2. 1968, p. 14 et seq.).

Between 18 and 30 September Lesage et Cie (hereinafter referred to as 'the plaintiff') was requested by the customs office of Neuenburg/Rheinbrücke to pay the sum of DM 134.40, being the total of the amounts contained in nine notices of assessment issued under the Law of 28 December 1968, on transport which it had carried out between France and Germany. The plaintiff appealed directly to the Finanzgericht (Finance Court) Baden-Württemberg (Feiburg) against these notices of assessment.

Before that court it argued that the 'Straßengüterverkehrsteuergesetz' under which the notices of assessment had been issued was void because it infringed Article 4 of the Decision of the Council of the EEC of 13 May 1965. The provision has become applicable on 1 January 1968, the date on which the system of value-added tax entered into force in the Federal Republic. It was therefore prohibited to reintroduce systems of specific taxes. The decision of the Council enacted directly applicable rules of law creating individual rights for third parties and taking precedence over the provisions of national law. Moreover the law of 28 December 1968 infringed the second paragraph of Article 5 and Articles 74, 86 and 37 of the EEC Treaty.

The Hauptzollamt (Principal Customs Office), the defendant, argued that the German tax on the carriage of goods by road was not a turnover tax. Moreover it stated that it was on 1 January 1970 at the earliest that the Member States had to abolish all the specific taxes taking the place

of turnover tax. Finally it stated that individuals could not rely on Article 4 of the Council Decision.

By an order of 29 April 1970 the Finanzgericht Baden-Württemberg (Freiburg) stayed the proceedings and, in accordance with Article 177 of the EEC Treaty, referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

(1) Does Article 4 of the decision on harmonization of 13 May 1965 of the Council of the EEC in conjunction with Article 1 of the First Directive relating to turnover taxes of 11 April 1967 prohibit a Member State which has brought into force the common system of value-added tax in its territory and has abolished the specific taxes on transport from reintroducing this system of taxation before 1 January 1970 when the other Member States have not all yet adopted these measures?

(2) Does Article 4 of the decision on harmonization of 13 May 1965 of the Council in conjunction with Article 1 of the First Directive relating to turnover taxes of 11 April 1967 produce direct effects in the relationships between Member States and individuals and does it create individual rights which the national courts must protect?

(3) Must the tax on the carriage of goods by road in the Federal Republic (Straßengüterverkehrsteuergesetz of 28 December 1968, Bundesgesetzblatt 1968, I, p. 1461 the basis of assessment of which is not on the price of a service rendered but the product of the factors making up the service (the product of the weight of the goods and the distance covered —the number of metric tonnes/kilometers) be regarded as a specific tax within the meaning of Article 4 of the decision on harmonization of the Council of 13 May 1965?'

The Finanzgericht believes that the Court's answers to these questions are necessary for its judgment in the case for the following reasons:

— It is not certain whether the (implied) prohibition contained in Article 4 of the Decision of the Council of 13 May 1965 on reintroducing specific taxes on transport is applicable to a Member State once it has brought into force the system of VAT or else only from the time when the system has been introduced by all the Member States. The text of Article 4 does in fact allow of both interpretations and whilst the consideration that the new system of taxation is self-sufficient and complete and does not permit the reintroduction of elements of the former system points in favour of the first interpretation, the second interpretation finds support in the fact that it is improbable that the Council wished to penalize a diligent Member State which had brought the new system into force before the compulsory date applicable to all the Member States.

— The text of Article 4 of the Decision of 13 May 1965 contains, explicitly, nothing but obligations to act. Nevertheless the obligation to abolish specific taxes on transport can be implied logically from the prohibition on bringing such taxes back into force. Whilst this factor may lead to the recognition of the 'direct applicability' of Article 4 it must be admitted that the decided cases of the Court have only been concerned with the provisions of the Treaty itself and not with a decision of the Council as in this case.

— Although the basis of the assessment to the tax on the carriage of goods by road is constituted by an amount in metric tonnes/kilometers and not the consideration for a service, which militates against the classification of the tax as a 'specific tax', on the other hand if it is borne in mind that the weight of the goods and the length of the journey are also decisive elements in the calculation of the cost of the transport effected, it is apparent that in its effects the tax in question is closer to a turnover tax than a toll charge.

The Finanzgericht dismisses the objection of the Hauptzollamt against the matter's being referred to the Court of Justice, pointing out that its questions relate to the interpretation of Community law and not to the compatibility of national law with Community law. It is true that if an affir-

mative answer is given to these questions it will establish a contradiction between Community law and national law which will raise the problem of the precedence of Community law. However the Finanzgericht points out that, whilst this problem has perhaps not yet been clearly resolved by the Court of Justice, the Bundesfinanzhof (Federal Finance Court) has on the other hand expressly recognized the precedence of Community law. Consequently the Finanzgericht believes that if necessary it is in a position to decide this question itself.

Further, the Finanzgericht dismisses the other objections against the German Law of 28 December 1968 which the plaintiff drew from Community law. Thus it states that in cases such as this (carriage of goods over long distances) there is no discrimination on the basis of nationality, which excludes an infringement of Articles 7 and 37 of the EEC Treaty. Moreover as the German Federal Railways do not have a dominant position in the field of transport the argument based on Article 86 is also without foundation. The fact that the Federal Railways are in receipt of public funds is not enough to place them in a dominant position, as the plaintiff contends.

The finanzgericht is of the opinion that the imposition of a charge on the competitors of the Federal Railways by means of a tax does not constitute an 'aid' within the meaning of Article 92 of the EEC Treaty. In fact the Treaty makes a distinction between provisions like Article 92, which prohibit Member States from favouring an undertaking, and those like Article 95, which apply to measures imposing charges on other undertakings. The Finanzgericht finds that the tax in question falls into the second category, but without being subject to the prohibition in Article 95.

Finally the German court rejects the allegation of infringement of Article 80 (by reason of the text of the article itself) and of Article 74 (because the article is expressed in terms which are too general).

The order making the reference was received at the Court Registry on 19 May 1970.

Under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC observations were submitted by the plaintiff in the main action and by the Commission of the European Communities.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided not to hold a preparatory inquiry.

The plaintiff, the German Government and the Commission of the European Communities presented oral argument at the hearing on 15 September 1970.

Messrs Deringer, Tessin, Herrmann and Sedemund of the Cologne Bar appeared for the plaintiff.

Mr Morawitz appeared for the German Government.

The Commission of the European Communities was represented by its Legal Adviser Mr Wägenbaur.

II — Summary of the observations of the parties

The observations of the parties may be summarized as follows:

1 — *The first question*

(a) The observations of the Commission

The *Commission* observes that the second paragraph of Article 4 does not set any time-limit but with regard to the date refers to the previous paragraph by using the phrase 'By the date when...'. This provision may perhaps be interpreted in several ways, since the phrase 'has been brought into force in the Member States' is capable of at least two interpretations. It claims that the relevant date is either that on which each Member State has introduced (or will introduce) value-added tax or the date by which all Member States must have introduced this tax. However, according to the Commission, the first interpretation must be rejected. On the one hand, it would 'penalize' the diligent Member State which introduced VAT before the others in that it would be bound and defenceless as against other Member States which would still enjoy freedom of action in this respect. On the other hand, the efforts to harmonize legislation which were the subject of the

Decision of 13 May 1965 can only achieve success at Community level and not through harmonization measures adopted in Member States at different dates. Therefore, having regard to the Third Directive, the second paragraph of Article 4 of the Decision of 13 May 1965 is only binding on each of the Member States as from 1 January 1972. It follows from this that the question must be answered in the negative.

(b) Observations of the plaintiff

The *plaintiff* asks the Court to give an affirmative answer to the first question.
First it maintains that there is no good foundation for the argument of the German Government in its reply to the opinion of the Commission of 23 May 1969 relating to the tax at issue, which was based on the absence of the 'manner' determined as provided in the first paragraph of Article 4 of the decision of 13 May 1965. In this respect the plaintiff argues principally that:

— this argument leads to the—unacceptable—consequence that even when all the Member States have introduced the common system of VAT, the failure to determine the manner of application will be an obstacle to the entry into force of the prohibition on specific taxes provided by the second paragraph of Article 4;

— the Second Directive relating to VAT is expressly intended to govern the structure and procedures for implementing the common system of value-added tax and although reservation is made in respect of its applicability to agricultural products, it certainly applies to transport (cf. Article 6 (2) in conjunction with Annex B);

— the German Government itself would seem to have found the manner of application thus provided sufficient since it explicitly included transport in the scope of application of the new system of VAT;

— having thus complied with the provisions of Article 4 of the Decision of 13 May 1965 it would ill become the German Government to avoid the prohibition contained in this article.

The plaintiff further states that the date set as the time-limit for the Member States to introduce the common system of VAT (1 January 1970, later replaced by 1 January 1972) cannot be regarded as the date on which the prohibition contained in Article 4 of the decision of 13 May 1965 becomes applicable, and for the following reasons:

— the text of the first paragraph of Article 4 itself refers to the eventual bringing into force of the new system of VAT in Member States and does not refer to a final timelimit for this to be done;

— furthermore, and above all, it must not be forgotten that Article 4 provides for four 'steps' which on the one hand are to be clearly distinguished one from the other but which on the other hand must follow on from each other logically and for the greater part will coincide in time. Thus, once it has introduced the new common system of VAT (step (a)) the Member State is obliged to apply it to transport as well (b) and therefore to abolish specific taxes on transport which had previously been in force (c), which implies a prohibition on bringing such taxes into force again (d). These four 'steps' together form a complete and self-sufficient system and they cannot be split up arbitrarily. Further, this point of view finds specific expression in the prohibition contained in the second[1] paragraph of Article 1 of the First Directive relating to VAT. Under this provision no Member State shall 'maintain or introduce any measure providing for flat-rate equalization of turnover taxes on importation' once it has brought into force the common system of VAT irrespective of what the other Member States do.

Consequently the fact that the Federal Republic of Germany has introduced the system of VAT necessarily implies, as from the entry into force of this system, the definitive prohibition on the re-introduction of specific taxes on transport. The view that

1 — Translator's note: the third paragraph would appear to be meant.

this prohibition only becomes effective as from the time when all the Member States introduce the new system cannot be accepted in that it would enable each Member State to make the fulfilment of its obligations dependent on the diligence of the other Member States. However, this view would be contrary to both the system and the spirit of the Treaty as well as the case-law of the Court. The plaintiff further maintains that the theory that a Member State is free to reintroduce specific taxes or even, to take it to its logical conclusion, to abolish the whole system of VAT so long as the other Member States have not all introduced VAT implies a serious threat to legal certainty for the individual.

(c) Observations of the German Government

The *German Government* maintains that in reality the 'common system' is no more than a model which will only be realized when it is incorporated in all the national systems. This applicability, which of necessity differs in time and place (because of the adoption of the system at different times in the various Member States), is incompatible with its alleged 'direct applicability'.

Moreover the Federal Government observes that the Second Directive relating to VAT has certainly not determined all the detailed rules necessary for the application of the tax.

Finally it states that whilst there is clearly a political obligation for Member States to comply as quickly as possible with the undertakings which they have given, this in no way implies an absolute legal prohibition against going back before the time-limit expires on what has in fact been achieved.

2 — *The second question*

(a) Observations of the Commission

The *Commission* examines first the question whether the measure adopted by the Council on 13 May 1965 was correctly described as a 'decision' within the meaning of Article 189 of the Treaty. In this respect it points out that although many of the provisions contained in this measure are in the nature of points in a programme, there are others, one of which is the second paragraph of Article 4, for the application of which no further common measures are necessary. From this the Commission concludes that it is in fact a true decision.

Therefore it asks whether there are objections in principle to acknowledging as 'directly applicable' provisions which are contained in decisions (and possibly in directives) and are addressed to Member States, provided that these provisions are clear and unconditional and do not leave Member States any real discretionary power as regards their application. In this connexion it lists the arguments which may be invoked in support of or against this 'direct applicability', first a series of arguments against this proposition:

1. Under Article 189 of the Treaty decisions addressed to Member States are only binding upon those Member States to which they are addressed. Therefore they can only have an indirect effect on citizens. They can only give rise to direct rights and duties for the citizen if an implementing measure is adopted under national law. The fact that Article 189 of the Treaty only acknowledges that regulations have direct effect can be invoked in favour of this line of argument.

2. As regards secondary Community law, the Treaty deliberately makes a distinction between legal measures which are directly applicable—regulations—and and legal measures not of this nature (directives and decisions addressed to Member States). This carefully established distinction would be destroyed if particular provisions in a decision addressed to Member States were acknowledged to be directly applicable. The result would be legal uncertainty.

3. In some sectors (for example agriculture, transport and commercial policy) the Treaty leaves open the choice of legal measure. In other sectors the only legal instrument permitted is a directive, for example as regards the right of establishment and of provision of services and harmonization of legislation. From this it can be deduced that Member States did

not wish to grant the Community any direct legislative power in these sectors.

4. Finally, under the Treaty it is not necessary for decisions to be published. Therefore it more or less depends on chance or the shrewdness of the individual whether he can invoke provisions of Community law favourable to him in the courts of his country. This leads to some degree of inequality before the law, since it cannot be assumed *a priori* that the judge is aware of legal measures which have not been published.

There follows a series of arguments in favour of the proposition:

1. According to the case-law of the Court of Justice with regard to the provisions of the Treaty which produce direct effects, the determining factor is not that Member States are named as the addressees. The only question is whether a provision is directly applicable *per se*. The considerations which the Court of Justice has put forward in this respect as regards the provisions of the Treaty may be applied to the provisions of a decision addressed to Member States.

2. It is certainly correct that Article 189 of the Treaty expressly recognizes only regulations as having direct effect in all Member States. However, the definition of a decision which is laid down in Article 189 does not in any way exclude the possibility in certain circumstances of acknowledging that even decisions addressed to Member States have this effect. A distinction must be made between 'direct applicability' within the meaning of Article 189 of the Treaty and provisions which can 'produce direct effects on the legal relationships between Member States and those subject to their jurisdiction'. 'Direct applicability', within the meaning of Article 189 means in particular that no national legislation is required to make a measure adopted under Community law effective. As to whether provisions can produce 'direct effects' as regards individuals within the meaning of the case-law of the Court, that on the other hand is a question—to extent to which obligations to perform some action are involved—whether an individual can have direct rights in spite of the absence of national implementing legislation.

3. The danger of legal uncertainty must not be exaggerated. Essentially, no problems can arise unless decisions prescribe a certain course of action to be followed by Member States and unless the period given to them for this purpose expires without that course of action having been carried out. To prevent this, periods of sufficient length could be laid down and Member States for their part could do everything to enact the necessary implementing provisions within the required time. If one adds that according to the case-law of the Court of Justice the provisions must be unequivocal and unconditional, it follows that the question of direct applicability should only arise with regard to a small number of decisions.

4. The fact that certain provisions contained in decisions addressed to Member States are acknowledged to be directly applicable does not mean that the system of legal measures of secondary Community law as laid down in Article 189 of the Treaty has been abandoned. The result of the direct applicability of some provisions is on the contrary the reinforcement of the legal protection of the personal rights of the individual, since the system in Article 189 of the Treaty is retained just as it is in other respects.

5. It is customary for the institutions of the Community, apart from very rare exceptions, to publish for information purposes decisions addressed to Member States in the Official Journal. The argument based on the fact that the publication of decisions addressed to Member States is not compulsory is thus shown to be of little weight inasmuch as the institutions of the Community go beyond the duty of publication laid down in Article 191 of the Treaty and also publish decisions addressed to Member States.

6. The case-law of the Court seems to provide arguments in favour of direct applicability of decisions and not reasons for opposing it. Thus, in its judgment of 18 February 1970 in Case 83169, the Court of Justice expresses itself in the following terms about the so-called 'Acceleration Decision' of 26 July 1966 (OJ 1966, p. 297):

'Although formally addressed to the Member States alone this decision is intended to have repercussions on the Common Market as a whole and it conditions or prepares for the implementation of measures which are directly applicable within the Member States as a consequence of Article 9 (1) of the Treaty and, as regards relations with third countries in particular, of Regulation No 950/68/EEC of the Council of 28 June 1968 concerning the Common Customs Tariff (OJ L 172 of 22. 7.1968, p. 1) ...'. ([1970] E.C.R.).

It may be concluded from this statement that the Court of Justice is prepared to acknowledge that the Acceleration Decision has a direct effect just as it did with regard to the provisions on the Common Customs Tariff 'although formally addressed to the Member States alone'.

In the light of all these arguments, by emphasizing in particular the aspect of the legal protection of the individual, the Commission considers that there is no decisive argument for denying that provisions of Community law are directly applicable only because they form part of a decision addressed to Member States.

Then, by applying the criteria formulated by the Court in relation to the provisions of the Treaty to the second paragraph of Article 4 of the Council Decision of 13 May 1965, the Commission reaches the conclusion that it is in fact a clear obligation which comprises an order to abolish 'specific taxes' and a prohibition on introducing new taxes of the same kind, but that on the other hand this obligation only becomes definitively effective as from 1 January 1972. Consequently before that date the provision cannot create direct rights in favour of individuals.

(b) Observations of the plaintiff

The *plaintiff* considers that it is not possible to deny the direct applicability of provisions of Community law solely because they form part of a decision addressed to Member States. To this end it relies essentially on arguments identical to those advanced by the Commission in favour of this view.

It further lays particular stress on the fact that as regards the direct applicability of a Community measure it is the content which is decisive rather than the form. In addition it observes that the Decision of the Council of 13 May 1965 was published. In view of the fact that Article 191 of the EEC Treaty provides that decisions shall be notified to those to whom they are addressed, one could deduce that as a matter of fact this measure was intended to be capable of creating direct rights for individuals, to whom publication in the Official Journal is 'addressed'.

As to Article 4 of the Council Decision of 13 May 1965, the plaintiff states that it is a clear and unambiguous obligation. Furthermore it refers to the case-law of the Court of Justice—Cases 57/65 ([1966] E.C.R. 205) and 13/68 ([1968] E.C.R. 453) as a basis for stating that the mere fact that the obligation is subject to a time-limit does not prevent it from being capable of creating direct rights for individuals. Therefore it argues that this question should be answered in the affirmative.

3 — *The third question*

(a) Observations of the Commission

The *Commission* observes that the obligation contained in the second paragraph of Article 4 of the Decision of 13 May 1965 to abolish 'specific taxes'—and therefore the prohibition on reintroducing them—are intended to avoid double taxation of transport after the introduction of VAT. Consequently the said provision does not prohibit taxes which supplement VAT rather than replace it, on condition however that the newly introduced taxes are not in the nature of a turnover tax. The Commission considers that the tax at issue complies with this condition. Indeed the object of the tax (reorganization in the transport sector) its manner of application (its basis of assess-

ment is the amount of metric tonnes/kilometers and not the consideration for the service) and the large number of exceptions it provides, all militate against its being described as a 'specific tax'.

(b) Observations of the plaintiff

The *plaintiff* believes that for the definition of the concept of 'specific taxes' within the meaning of the second paragraph of Article 4 of the Council Decision of 13 May 1965 the following criteria should be excluded:

— the comparability, in respect of its structure and manner of application, of the tax at issue with the new system of VAT, as the former specific transport taxes to which Article 4 is obviously directed are clearly different—at least in the Federal Republic of Germany—from the new common system;

— the classification as 'specific taxes' only of taxes abolished upon the introduction of VAT, since the prohibition contained in Article 4 would then be too easily avoided;

— the classification as 'specific taxes' solely of the taxes which replaced the former turnover tax since then nothing would prevent the Member States from reintroducing the former taxes in addition to the new system. In its opinion of 23 May 1969 addressed to the Federal Republic of Germany the Commission moreover stated that the common system of VAT does not allow for additional taxes which directly or indirectly relate to turnover.

On the contrary the plaintiff maintains that the decisive criterion should be whether the tax in question has effects equivalent to those of the former specific taxes abolished when VAT was introduced. This criterion is derived in particular from the sense and the object of the second paragraph of Article 4 of the Decision of the Council of 13 May 1965. Indeed one of the main obstacles to the realization of the Common Market in the transport sector was the distortions of competition as a result of the different systems of taxation on transport in the various countries since in almost all the Member States transport is subject to specific taxes which take the place of turnover tax. Relying on the documents relating to the preparation of the Decision of the Council of 13 May 1965 the plaintiff asserts that the aim of Article 4 was to procure the abolition of all the specific taxes and to substitute for them the common system of VAT. It is thus obvious that the main aim of the prohibition in Article 4 is to prevent the reintroduction of the former system and therefore it applies to any tax, irrespective of its manner of application or structure, the effect of which, as regards transport undertakings, is equivalent to that of the former taxes.

The plaintiff relies on the alleged intention of applying the common system of VAT to any provision of services which could affect the price of goods which are the subject of intra-Community trade and considers that there should be regarded as a 'specific tax' any tax which results in an increase in price of transport services. In this respect it observes that the burden of the tax imposed under the German Law of 28 December 1968 on the price of transport is almost identical to that of the former tax on transport which, as a 'specific tax', was abolished when VAT was introduced in the Federal Republic of Germany.

Moreover the proposed criterion is in accordance with a general principle of the EEC Treaty which does not merely consider the principal concept (customs duties, taxes etc.) in order to achieve its objectives effectively but also has regard to measures having equivalent effect or merely producing indirect effects.

In addition the plaintiff also recalls that in its letter to the German Government of 23 May 1969 the Commission thought that the tax at issue was incompatible with the common system of VAT as 'this system does not allow for an additional tax based directly or indirectly on turnover'.

In conclusion the plaintiff maintains that the third question should be answered as follows:

'Specific taxes' include all taxes on transport which have an effect equivalent to that of a tax on turnover or taxes which were replaced by the common system of

turnover tax and which are directly or indirectly charged on turnover. In this respect it is irrelevant whether the criterion for taxation is the activity or the exchange of services and whether the basis of assessment to the tax is the service itself or the consideration for it.

(c) Observations of the German Government

The *German Government* states in particular, in agreement with the Commission in this respect, that the objections raised by the Commission against the draft law relating to the tax at issue were concerned with the advisability, from the point of view of transport policy, of the proposed measures and not with their legality.

Grounds of judgment

1 By an order dated 29 April 1970 received at the Court on 19 May 1970 the Finanzgericht Baden-Württemberg (Freiburg), has referred to the Court, pursuant to Article 177 of the Treaty establishing the European Economic Community, several questions on the interpretation of Article 4 of the Council Decision of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway (OJ Special Edition 1965, p. 67) and of Article 1 of the First Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (OJ Special Edition 1967, p. 14). From the first two questions and from the file submitted by the Finanzgericht it is clear that the Court is basically asked to rule whether the prohibition on specific taxes contained in Article 4 of the decision has direct effects in the relationships between Member States and individuals and to state if necessary as from what date this prohibition entered into force. Therefore the second question should be examined first.

The second question

2 In its second question, the Finanzgericht asks the Court for a ruling on whether the second paragraph of Article 4 of the decision in conjunction with Article 1 of the directive produces direct effects in the legal relationships between the Member States and those subject to their jurisdiction in such a way that these provisions create rights for individuals which the national courts must protect.

3 The question concerns the combined effect of provisions contained in a decision and a directive. According to Article 189 of the EEC Treaty a decision is binding in its entirety upon those to whom it is addressed. Furthermore, according to this article a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods.

4 Mention was made, in the observations of the parties, of the opinion that by distinguishing between the effects of regulations on the one hand and of decisions and directives on the other, Article 189 precludes the possibility of decisions and directives producing the effects mentioned in the question, which are reserved to regulations.

5 However, although it is true that by virtue of Article 189 regulations are directly applicable and therefore by virtue of their nature capable of producing direct effects, it does not follow from this that other categories of legal measures mentioned in that article can never produce similar effects. In particular, the provision according to which decisions are binding in their entirety on those to whom they are addressed enables the question to be put whether the obligation created by the decision can only be invoked by the Community institutions against the addressee or whether such a right may possibly be exercised by all those who have an interest in the fulfilment of this obligation. It would be incompatible with the binding effect attributed to(decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the Community authorities have by means of a decision imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness ('l'effet utile') of such a measure would be weakened if the nationals of that state could not invoke it in the courts and the national courts could not take it into consideration as part of Community law. Although the effects of a decision may not be identical with those of a provision contained in a regulation this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the courts, may be the same as that of a directly applicable provision of a regulation.

6 Article 177, whereby the national courts are empowered to refer to the Court all questions regarding the validity and interpretation of all acts of the institutions without distinction, also implies that individuals may invoke such acts before the national courts. Therefore, in each particular case, it must be ascertained whether the nature, background and wording of the provision in question are capable of producing direct effects in the legal relationships between the addressee of the act and third parties.

7 The Council Decision of 13 May 1965 addressed to all the Member States is based in particular on Article 75 of the Treaty which empowers the Council to lay down 'common rules', 'the conditions under which non-resident carriers may operate' and 'any other appropriate provisions' to implement a common transport policy. The Council therefore has extensive freedom in the choice of the measures to adopt. The decision in question, taken as a whole, lays down the objectives to be achieved within the context of a policy of harmonizing national provisions and the timetable for their realization. In view of these objectives the first paragraph of Article 4 of

the decision provides that once a common system of turnover tax has been adopted by the Council and brought into force in the Member States, the latter shall apply that system, in a manner to be determined, to the carriage of goods by rail, road and inland waterway. The second paragraph of that article provides that this common system of turnover tax shall, in so far as the carriage of goods by road, by rail and by inland waterway is subject to specific taxes instead of to the turnover tax, replace such specific taxes.

8 Thus this provision imposes two obligations on the Member States: first, to apply the common system of turnover tax to the carriage of goods by rail, road and inland waterway by a given date, and secondly, to replace the specific taxes referred to by the second paragraph by this system no later than the date when it has been brought into force. This second obligation obviously implies a prohibition on introducing or reintroducing such taxes so as to prevent the common system of turnover tax from applying concurrently in the field of transport with additional tax systems of the like nature.

9 It is apparent from the file submitted by the Finanzgericht that the question relates in particular to the second obligation. This second obligation is by its nature mandatory and general, although the provision leaves open the determination of the date on which it becomes effective. It thus expressly prohibits the Member States from applying the common system of turnover tax concurrently with specific taxes levied instead of turnover taxes. This obligation is unconditional and sufficiently clear and precise to be capable of producing direct effects in the legal relationships between the Member States and those subject to their jurisdiction.

10 The date on which this obligation becomes effective was laid down by the Council directives on the harmonization of the legislation concerning turnover taxes which fixed the latest date by which the Member States must introduce into their legislation the common system of value-added tax. The fact that this date was fixed by a directive does not deprive this provision of any of its binding force. Thus the obligation created by the second paragraph of Article 4 of the Decision of 13 May 1965 was perfected by the First Directive. Therefore this provision imposes on the Member States obligations—in particular the obligation not to apply as from a certain date the common system of value-added tax concurrently with the specific taxes mentioned—which are capable of producing direct effects in the legal relationships between the Member States and those subject to their jurisdiction and of creating the right for the latter to invoke these obligations before the courts.

The first question

11 In its first question, the Finanzgericht asks the Court to rule whether the provisions

of Article 4 of the Decision in conjunction with Article 1 of the directive prohibits a Member State, which has brought into force in its territory the common system of value-added tax and abolished specific taxes on transport, from reintroducing before 1 January 1970 the said taxes if by this date the Member States have not all introduced these measures.

12 This question is obviously aimed at Article 1 of the First Directive as amended by the Third Council Directive of 9 December 1969 on the same subject (OJ Special Edition 1969, p. 551) which substituted the date of 1 January 1972 for that of 1 January 1970.

13 It is true that a literal interpretation of the second paragraph of Article 4 of the Decision might lead to the view that this provision refers to the date on which the Member State concerned has brought the common system into force in its own territory.

14 However, such an interpretation would not correspond to the aim of the directives in question. The aim of the directives is to ensure that the system of value-added tax is applied throughout the Common Market from a certain date onwards. As long as this date has not yet been reached the Member States retain their freedom of action in this respect.

15 Moreover, the objective of the Decision of 13 May 1965 can only be achieved at the Community level and therefore cannot be brought about solely by the introduction of harmonization measures on the part of Member States individually at different dates and according to different timetables.

16 The answer to the question put must therefore be that the prohibition contained in the second paragraph of Article 4 of the Decision can only come into effect as from 1 January 1972.

The third question

17 In its third question, the Finanzgericht asks the Court to rule whether the federal tax on the carriage of goods by road (Straßengüterverkehrsteuer), the basis of assessment of which is not the price for a service rendered, but the product of the factors making up the service (the product of the weight of the goods carried and the distance covered—the number of metric tonnes/kilometers), must be considered a specific tax within the meaning of the second paragraph of Article 4 of the Decision of 13 May 1965.

18 It is not for the Court in these proceedings to assess from the point of view of Community law the features of a tax introduced by one of the Member States. On the other hand, it is within its jurisdiction to interpret the relevant provision of Community law in order to enable the national court to apply it correctly to the tax at issue.

19 Article 4 provides for the abolition of 'specific taxes' in order to ensure a common and consistent system of taxation of turnover. By favouring in this way the transparency of the market in the field of transport this provision contributes to the approximation of the conditions of competition and must be regarded as an essential measure for the harmonization of the tax laws of the Member States in the field of transport. This objective does not prohibit the imposition on transport services of other taxes which are of a different nature and have aims different from those pursued by the common system of turnover tax.

20 A tax with the features described by the Finanzgericht which is not imposed on commercial transactions but on a specific activity, without distinguishing, moreover, between activities on one's own account and those on the account of others, and the basis of assessment of which is not the consideration for a service but the physical load expressed in metric tonnes/kilometers to which their roads are exposed through the activity taxed, does not correspond to the usual form of turnover tax. Furthermore the fact that it is intended to effect a redistribution of traffic is also capable of distinguishing it from the 'specific taxes' referred to in the second paragraph of Article 4. The question must therefore be answered to this effect.

Costs

21 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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 Baden-Württemberg (Freiburg), the decision on costs is a matter for that court.

On those grounds,

Upon hearing the pleadings;
Upon hearing the report of the Judge-Rapporteur;

Upon hearing the oral observations of the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 75, 177 and 189;
Having regard to the Council Decision of 13 May 1965, especially Article 4;
Having regard to the Council Directives of 11 April 1967 and 9 December 1969 on the harmonization of legislation of the Member States concerning turnover taxes;
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 Baden-Württemberg (Freiburg), by order of that court of 29 April 1970, hereby rules:

1. **The second paragraph of Article 4 of the Council Decision of 13 May 1965, which prohibits the Member States from applying the common system of turnover tax concurrently with specific taxes levied instead of turnover tax, is capable, in conjunction with the provisions of the Council Directives of 11 April 1967 and 9 December 1969, of producing direct effects in the legal relationships between the Member States to which the decision is addressed and those subject to their jurisdiction and of creating for the latter the right to invoke these provisions before the courts;**

2. **The prohibition on applying the common system of turnover tax concurrently with specific taxes becomes effective on the date laid down in the Third Council Directive of 9 December 1969, namely on 1 January 1972;**

3. **A tax with the features described by the Finanzgericht which is not imposed upon commercial transactions but merely because goods are carried by road and the basis of assessment of which is not consideration for a service but the physical load expressed in metric tonnes/kilometres to which the roads are subjected through the activity taxed, does not correspond to the usual form**

of turnover tax within the meaning of the second paragraph of Article 4 of the Decision of 13 May 1965.

Lecourt Donner Trabucchi

Strauß Monaco Mertens de Wilmars Pescatore

Delivered in open court in Luxembourg on 21 October 1970.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL ROEMER

(See Case 9/70, p. 842)