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 tons/kilometres 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 9/70

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht München for a preliminary ruling in the action pending before that court between

FRANZ GRAD, Linz-Urfahr (Austria),

and

FINANZAMT TRAUNSTEIN

on the interpretation of Article 4 of Council Decision No 65/271/EEC of 13 May 1965 and of Article 1 of Council Directive No 67/227/EEC of 11 April 1967, and, in the alternative, of Articles 5, 74, 80, 92 and 93 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner (Rapporteur), A. Trabucchi, W. Strauß and J. Mertens de Wilmars, 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 (62/227/EEC) on the harmonization of legislation of Member States concerning turnover taxes was made on 11 April 1967 (OJ Special Edition, 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 flat-rate equalization of turnover taxes on importation or exportation in trade between Member States.'

The Third Council Directive No 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 Umsatzsteuergesetz (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 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/kilometre 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 kilometres (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 examintion 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.).

Mr Franz Grad (hereinafter referred to as 'the plaintiff') transported 25.3 metric tons of preserved fruit which came from Hamburg and exported it from Germany to Austria on 1 March 1969 through the border checkpoint at Schwarzbach-Autobahn.

Under the Law of 28 December 1968 the German customs office imposed a tax of DM 179.35 in respect of the carriage of these goods. Therefore the plaintiff brought a direct action before the Finanzgericht München (Munich Finance Court).

He claims that, both by virtue of its tenor and of certain of its individual provisions, this law infringes the EEC Treaty and some of the provisions contained in implementing rules made under the Treaty especially Article 4 of Council Decision No 65/271/EEC of 13 May 1965 in conjunction with Article 1 of Council Directive No 56/227/EEC of 11 April 1967. He relies in particular on the following arguments in support of this view:

He says that the second paragraph of Article 4 of the Decision of 13 May 1965 imposes an obligation on Member States not only to abolish specific taxes which were in existence until then, but moreover not to introduce new taxes of the same kind after the introduction of the system of value-added tax. He claims that the Federal Republic has contravened this paragraph since the tax on the carriage of goods by road corresponds, on all essential points as to its structure and completely as to its effects, to the former transport tax. It is immaterial that the system of value-added tax has not yetbeen introduced in all Member States. As regards Member States which have already amended their system of turnover tax in accordance with the Council Directives, Article 4 of the Decision of 13 May 1965 becomes binding as from the date when their new legislation enters into force.

The plaintiff claims that the Commission of the European Communities for its part adopted this point of view in its recommendation to the Federal Republic of Germany of 31 January 1968 and that it stressed that the law on the taxation of the carriage of goods by road constitutes an infringement of Communit ylaw.

Although the Decision of 13 May 1965 is addressed to Member States, an individual citizen is at liberty to plead in proceedings in a court of law that it has or has not been complied with. The decisive question is whether primary and secondary Com-

munity law which takes precedence over national law imposes an obligation on a Member State which allows of no qualification. He claims that this is the case with regard to the second paragraph of Article 4 of the Decision of 13 May 1965. According to the plaintiff, the law further infringes the provisions of the second paragraph of Article 5 and Article 74 of the EEC Treaty. He maintains that this law is incompatible with the common transport policy which is laid down in Article 74 of the Treaty and defined in the Council Decision of 13 May 1965 and in the recommendation of the Commission of 31 January 1968. The second paragraph of Article 5 of the EEC Treaty lays down an obligation to abstain from measures which could jeopardize the attainment of the objectives of the Treaty and this has direct effect as regards individuals.

The plaintiff claims that the law also infringes Article 80 of the EEC Treaty since the tax on the carriage of goods by road must be considered as a measure which aims to redistribute traffic and that this law serves only to protect German railways. The latter must be considered as an undertaking within the meaning of Article 80 of the Treaty. The term 'conditions' also includes the German tax on the carriage of goods by road. Article 80 of the Treaty also has direct effect with regard to invididuals.

Finally, the plaintiff continues, the law infringes Article 93 (3) of the EEC Treaty which prohibits any Member State from granting aid which distorts competition without the previous consent of the Commission. He claims that the Commission has not however given its opinion. Therefore the indirect subsidy given to the German railways which this law represents constitutes a breach of the prohibition on aids. Article 93 (3) of the Treaty also produces direct effects as regards the legal relationships between Member States and individuals.

The result of the infringements which have been mentioned above, the plaintiff concludes, is that the law on the taxation of the carriage of goods by road is void or at least inapplicable. Therefore, the notice of assessment to tax on the carriage of goods by road must be revoked.

By an order of 23 February 1970, the Finanzgericht München stayed the proceedings and referred to the Court of Justice pursuant to Article 177 of the EEC Treaty the following questions for a preliminary ruling:

'1. Does 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 (65/271/EEC) in conjunction with Article 1 of the First Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (67/227/EEC) produce direct effects as regards the legal relationships between Member States and individuals and do these provisions create individual rights which Member States must protect?

2. Does Article 4 of the Council Decision of 13 May 1965 (65/271/EEC) in conjunction with the First Council Directive of 11 April 1967 (67/227/EEC) prohibit a Member State which has already put into force the common system of value-added tax and abolished specific taxes on the carriage of goods from reintroducing specific taxes which were imposed on the carriage of goods instead of turnover taxes before 1 January 1970, even if at that date not all the other Member States have implemented these measures?

3. Must the German tax on the carriage of goods by road (Bundesgesetzblatt 1968, Volume I, p. 1461) which is imposed on an activity and not on an exchange of services (see Para. 1 of the Gesetz über die Besteuerung des Straßengüterverkehrs [Law on the taxation of the carriage of goods by road]) and the basis of assessment of which, moreover, is not the consideration for the performance of a contractual obligation but the product in terms of metric tons/kilometres of the performance of the contract (Leistungsprodukt), be considered as a specific tax within the meaning of Article 4 of the Council Decision of 13 May 1965 (65/271/EEC) to which the

carriage of goods is subject instead of to the turnover tax?'

Alternatively, if the Court of Justice replies to Questions 1 to 3 in the negative, it is requested to give a preliminary ruling on the following questions:

'4. Does the second paragraph of Article 5 of the EEC Treaty in conjunction with Article 74 of the EEC Treaty and Article 4 of Council Decision No 65/271/EEC of 13 May 1965 and Article 1 of the First Council Directive of 11 April 1967 (67/227/EEC) produce direct effects in the legal relationships between Member States and individuals which individuals may invoke even before the courts of those Member States?

5. Must taxes which are specifically imposed on the carriage of goods also be held to come within the 'conditions' mentioned in Article 80 (1) of the EEC Treaty?

6. Does Article 80 (1) of the EEC Treaty also prohibit the protection of railway undertakings which are run by Member States as public services?

7. Does Article 80 (1) of the EEC Treaty produce direct effects in the legal relationships between Member States and individuals which individuals may invoke before the courts of those States?

8. Does the material scope of application of the prohibition on subsidies contained in Article 92 et seq. of the EEC Treaty also extend to the field of transport?

9. Do Article 92 et seq. of the EEC Treaty also prohibit the protection of railway undertakings which are run by Member States as public services?

10. Is it impossible to regard an aid as incompatible with the Common Market if the Commission, being aware of the relevant facts, has not taken a decision in accordance with Article 92 (2) of the EEC Treaty?

11. Does Article 92 of the EEC Treaty produce direct effects in the legal relationships between Member States and individuals which individuals may invoke before the courts of Member States?'

The Finanzgericht considers that the Court's replies to these questions are necessary to enable it to give judgment in this case and that the plaintiff has put forward arguable grounds in support of his point of view. The court itself has doubts as to the compatibility of the Law on the taxation of the carriage of goods by road with the law of the European Communities. Besides, the court considers that the plaintiff, although not a national of a Member State, can plead the incompatibility of the said Law with Community law since the said Law is purely territorial and its effects are derived directly and only from the carriage of goods on the territory of the Federal Republic of Germany.

The order making the reference was lodged at the Court Registry on 16 March 1970.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, the Finanzamt (Tax Office), Traunstein, (the defendant in the main action), the German Government and the Commission of the European Communities submitted their observations.

The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate-General, decided not to institute 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.

The Advocate-General delivered his opinion at the hearing on 17 September 1970.

The plaintiff was represented by Messrs Möhring, Beisswingert, Reimer, Pohle, Wunderlich, Zimmermann and Risse, Advocates at the Munich Bar.

The German Government was represented by Mr Morawitz.

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:

### A — *Admissibility*

Without expressing specific objections to the admissibility of the questions submitted, the *German Government* suggests that the Court should examine the question of admissibility.
On the other hand, the *Commission* considers that the Court may reply to the questions submitted to it without exceeding the powers conferred on it under Article 177 of the Treaty provided that it limits itself to dealing with questions of interpretation, especially as regards the third question. It feels that the fact that the plaintiff in the main action is not a national of a Member State is no bar either to the admissibility of a request for a preliminary ruling.

### B — *Replies to be given to the request for a preliminary ruling*

#### 1 — The first 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 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 Staets 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 produced 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 the 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 rare exceptions, to publish in the Official Journal for information purposes decisions addressed to Member States. 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 the direct applicability of decisions and not reasons for opposing it. Thus, in its judgment of 18 February 1970 in Case 38/69, 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 July 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 an absolute obligation which has no need of further legal measures on the part of the Community and which comprises an order to abolish 'specific taxes' and a prohibition on introducing new taxes of the same kind.

(b) *Observations of the German Government*

The *German Government* suggests that the first question be answered in the negative. It claims that it is impossible to accept that a provision contained in a decision addressed to a Member State can be considered to be directly applicable. Even supposing that this were possible, Article 4 of the Council Decision of 13 May 1968 is not capable of direct application.

In order to justify rejecting the very principle of the direct applicability of provisions contained in decisions or directives, the German Government relies in particular on the arguments which have already been put forward by the Commission against this principle. Moreover, it puts forward a different interpretation from that advanced by the Commission on the judgment of the Court in Case 38/69. It says that in fact it was by describing the Acceleration Decision as an independent supplement to the Treaty (in accordance with Article 235) and not as a decision within the meaning of Article 189 that the Court acknowledged that this 'decision' was directly applicable. Therefore the principles established by the Court in this case cannot be applied to decisions in the strict sense.

As for the provision which is now at issue, the German Government states that it is merely a Council working programme. In this respect it alleges that the adoption of the manner of application referred to in the first paragraph is also a prerequisite for the entry into force of the obligations laid down in the second paragraph. In any case, no obligation exists before 1 January 1972, which is the date fixed in the Third Directive of 9 December 1969.

2 — The second question

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 second question must be answered in the negative.

(b) *Observations of the German Government and the Finanzamt Traunstein*

Relying basically on the same arguments as those put forward by the Commission, the *German Government* and the *Finanzamt Traunstein* claim that the second question should be answered in the negative.

3 — The third question

Both the *German Government* and the *Commission* consider that the 'tax on the carriage of goods by road' cannot be described as a 'specific tax instead of ... turnover tax' within the meaning of Article 4 of the Decision of 13 May 1965 nor, *a fortiori*, as a 'turnover tax' in the strict sense. In fact both its objective (re-distribution of traffic in the transport sector) and its mode of application (since its basis of assessment is the number of 'metric tons/kilometres' and not the consideration for the service rendered) are inconsistent with this description.

4 — The fourth question

The *three statements* of observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice agree that the obligation contained in the second paragraph of Article 5 of the Treaty is worded too generally and too imprecisely to have direct effects as it stands. At the most it could bring about such an effect in conjunction with other Community provisions provided that the latter were themselves precise and unconditional. But Article 74 lacks precisely these characteristics, and merely states the principle of a common transport policy. In other resepcts the prohibition contained in the second paragraph of Article 5 cannot add anything to the (possible) direct effect of the provisions of Article 4 of the Decision of 13 May 1968 which has already been discussed in the context of the previous questions.

5 — The fifth, sixth and seventh questions

Both the *German Government* and the *Commission* have grouped these questions together in their observations because they consider that the way in which the fifth and sixth questions are answered depends on the reply to be given to Question 7.

(a) *The seventh question*

Although the *Commission* and the *German Government* agree that the prohibition contained in Article 80 (1) could, taken by itself, lead to the conclusion that this provision is directly applicable, their opinions differ as to the effect in this respect of the phrase 'unless authorized by the Commission'.
On the one hand the *Commission* 'is inclined to reply to the seventh question in the affirmative' because it claims in particular that the discretionary power conferred upon it by Article 80 leaves intact the basic prohibition contained in this provision.
On the other hand, the *German Government* considers that the possibility of obtaining an authorization in respect of which the Commission moreover has a certain discretion (cf. Judgment in Case 1/69, [1969] E.C.R. 227 et seq.) is precisely the factor which prevents the prohibition from being absolute. It follows that in the present case there is no question of any direct effect.

(b) *The fifth question*

Both the *German Government* and the *Commission* suggest that the answer to this question should be in the negative. They claim that having regard to the spirit and aim of Article 80, it is in fact evident that the word 'conditions' must be understood to mean all the other relevant provisions concerning the carriage of goods by this method of transport with the exception of transport costs. Therefore this expression does not cover tax provisions which concern another method of transport.

(c) *The sixth question*

The *German Government* and the *Commission* state that the prohibition contained in this provision does not apply to a system of taxation like the one in question, and they continue to insist on the fact that the term 'undertakings' in Article 80 (1) only refers in their opinion to undertakings which use transport.

6 — The eighth, ninth, tenth and eleventh questions

The *German Government* and the *Commission* have grouped these four questions together and changed their order in their observations. To begin with, they examine the question whether a tax such as the German tax in question is covered by the concept of 'aid' within the meaning of Article 92 et seq. They claim that this provision only refers to cases in which an undertaking receives payments financed out of public funds without giving consideration in return or else in which it is exempted from a charge, but not to cases where competitors are taxed and the benefit is derived only from the fact that the undertaking concerned is not subjected to the charge. It is subject to this reservation that they submit their observations on Questions 8 to 11.

On the other hand, the *plaintiff* considers that the concept of 'aid' does not only include direct subsidies and exemptions but also any measure which aims to direct economic activity by unequal taxation of certain activities or groups. He claims that it follows that the tax in question is certainly an 'aid' within the meaning of Article 92 et seq.

The *German Government*, which is in agreement with the *Commission*, replies to this that such an interpretation would deprive the concept of 'aid' of any specific meaning and would render superfluous the provisions of Articles 101 and 102 of the EEC Treaty.

(a) *The eighth question*

The Commission states that the provisions of the Treaty on aid are equally valid in the sector of transport, without prejudice however to the special provisions concerning this sector. To substantiate this view, it relies in particular upon the following arguments:

— The section of the Treaty concerning 'aid' does not contain any provisions which exclude transport from the scope of application of this section, such as Article 61 (1) does expressly with regard to the chapter on services.

— The authorization of certain 'aids' relating to transport laid down in Article 77 only makes sense in conjunction with a prohibition. As the title on transport does not contain such a prohibition, it is necessary to refer to the one contained in Article 92.

— Any doubts in this respect seem to be ruled out by Article 9 (2) of the Council Decision of 13 May 1965, whereby Articles 92 to 94 of the Treaty are to apply to the transport sector.

The *German Government* reaches the same conclusion.

(b) *The eleventh question*

The *German Government* and the *Commission* consider that there are too many exceptions to the basic prohibition contained in Article 92, exceptions which, moreover, give the Commission a margin of discretion, for this prohibition to be regarded as directly applicable. The German Government observes moreover that the judgment of the Court in Case 6/64 ([1964] E.C.R. 585), which acknowledges that the third sentence of Article 93 (3) has a direct effect, does not invalidate this conclusion because the effect of this decision is strictly limited to the situation referred to by this provision which is a situation which has not arisen in the present case.

On the other hand, the *plaintiff* states that although in fact the Treaty has provided for exceptions to the basic prohibitions laid down in Article 92, this prohibition is nevertheless directly applicable in cases which are not covered by such exceptions.

(c) *The ninth question*

The *German Government* and the *Commis-*

*sion* consider that it is unimportant with regard to the application of Article 92 et seq. whether the undertaking which receives aid is a railway undertaking which is run as a public service, except as regards possible exceptions under Article 90 (2) of the Treaty.

(d) *The tenth question*

The *German Government*, whilst accepting in principle that aid may exist even if the Commission has not taken a decision pursuant to Article 93 (2), considers that having regard to the principle of legitimate expectation (Vertrauensgrundsatz) it cannot be considered that aid exists which is incompatible with the Common Market when the Commission has not raised objections although it was aware of the situation.

Although the *Commission* is of the same opinion as the Federal Government the *plaintiff* observes that the fact that the Commission has not expressly criticized a national measure does not amount to an authorization.

## Grounds of judgment

1 By an order dated 23 February 1970, received at the Court on 16 March 1970, the Finanzgericht München 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). Alternatively, in case the Court should give a negative answer to these questions, the Finanzgericht has submitted further questions on the interpretation in particular of Articles 90 and 92 of the EEC Treaty.

### The first question

2 In its first 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 decison 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 The German Government in its observations defends the view 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 by means of a decision have 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 provision' to implement a common transport policy. The Council therefore has extensive freedom in the choice of the measures to adopt. The decison 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. The 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 second question

11 The second question of the Finanzgericht asks the Court to rule whether Article 4 of the Decision in conjunction with Article 1 of the Directive prohibits a Member State, which has already brought the common system of value-added tax into force and abolished specific taxes on the carriage of goods, before 1 January 1970 from reintroducing specific taxes which are levied on the carriage of goods instead of turnover tax. 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.

12 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.

13 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.

14 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.

15 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

16 In its third question the Finanzgericht asks the Court to rule whether the federal tax on the carriage of goods by road (Straßengüter verkehrsteuer) must be con-

sidered as a specific tax levied on the carriage of goods instead of turnover tax and whether it therefore comes under the prohibition in the second paragraph of Article 4 of the Decision of 13 May 1965.

17 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.

18 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 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.

19 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/kilometres to which the roads are subjected 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 capable of distinguishing it from the 'specific taxes' referred to in the second paragraph of Article 4. The question put must therefore be answered to this effect.

## Questions 4 to 11

20 The Finanzgericht has merely put these questions as alternatives in case the first three questions should be answered in the negative. Since this is not the case particularly with regard to the first question, there is no reason to answer Questions 4 to 11.

## 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 München, 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 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 on 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 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 München, by order of 23 February 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 Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 6 October 1970.

A. Van Houtte R. Lecourt

Registrar President

## OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 17 SEPTEMBER 1970[1]

*Mr President,*
*Members of the Court,*

The three references for preliminary rulings (Cases 9/70, 20/70 and 23/70) with which we are concerned today have essentially the same subject-matter. Therefore I can deal with them in a single opinion. I must firstly say the following with regard to the facts.

The plaintiffs in the main actions, which I shall call the first, second and third plaintiffs, following the order in which the references for preliminary rulings were lodged, are long-distance haulage contractors. The first plaintiff's business address is in Austria, the second plaintiff's in France and the third plaintiff's in the Federal Republic of Germany. They complain that they have been assessed to tax under the German Gesetz über die Besteuerung des Straßengüterverkehrs (Law on the taxation of the carriage of goods by road) of 28 December 1968 (Bundesgesetzblatt 1, p. 1461) which came into force on 1 January 1969 and will remain in force until 31 December 1970. The details are that the first plaintiff received a notice of assessment to tax on the carriage of goods by road from the Schwarzbach/Autobahn Customs Office which was imposed because he had transported a certain quantity of goods from Hamburg through the Federal Republic of Germany to Linz on 1 March 1969 in his lorry which was registered in Austria. In the case of the second plaintiff, which runs an international long-distance haulage service between France and Germany, 9 notices of assessment to tax issued by the Neuenburg/Rhein-

1 — Translated from the German.