OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 2 OCTOBER 1974 [1]

Mr President,

Members of the Court,

In the Autumn of 1968 there was a large balance of payments surplus in the Federal Republic of Germany. It was traceable — as was explained in the proceedings — to the different increase in prices on the one hand in the Federal Republic of Germany and on the other hand in those of the most important purchasing countries, which led to a large balance of trade surplus; it was also caused in part by extensive speculative capital movements, which arose in anticipation of a revaluation of the German mark and a devaluation of the French franc.

In this situation it was obvious to think of the application of the Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft (Law for encouraging stability and growth of trade) of 8 June 1967, in Article 4 of which it is stated: 'Where there are external trade disturbances of the whole economic equilibrium, which it is not possible to counteract by internal economic measures, or only by prejudicing the objects listed in Article 1, the Federal Government shall make use of all the possibilities of international co-ordination. In so far as this does not suffice, it shall apply the means of economic policy available to it for the preservation of the external trade equilibrium'. Thus it came about that on 29 November 1968 there was issued the *Gesetz über Maßnahmen zur außenwirtschaftlichen Absicherung* (Law concerning protective measures in external trade) which entered into force on 1 December 1968 and was made under Article 4 of the *Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft*. To make imports easier Article 1 provides that an import refund in the form of a reduction in tax would be granted in respect of all import turnover tax obligations between 20 November 1968 and 31 March 1970. As regards exports — which are now of particular interest — Article 2 provides that the export of goods by companies shall be subject to a special turnover tax between 29 November 1968 and 21 March 1970. It stood as a rule at the rate of 4 % of the computation basis (that is practically the sale price) and for certain goods it was 2 %, but goods subject to the organizations of the market were completely exempted. For the levying of this tax the companies concerned had within ten days of the expiration of each calendar month (the so-called notification period) to give notice of relevant transactions and to compute the tax for this period. The law provided that the tax debt arose on the expiration of the period of notification in which the export was effected

Before the expiration of the period for which it was originally provided that the law should be effective, the Federal Government issued a regulation that with effect from 11 October 1969 the refund and tax rates should be reduced to nil. After the resolution to revalue the DM by 9·3 % on 27 October 1969, the Federal Government repealed Articles 1 and 2 of the Absicherungsgesetz by regulation dated 28 October 1969.

The Commission of the European Communities was informed of the contents of the draft law of 22 November 1968 in a Note Verbale from the Permanent Representative of the Federal Republic of Germany on 25 November 1968. The Commission immediately considered the matter and

1 — Translated from the German.

came to the view that there was no violation of Community law at that time. It is of interest that the measures intended by the Federal Republic of Germany were discussed at the conference in Bonn from 20 to 22 November 1968 of the Ministers and Governors of the issuing banks of the ten countries participating in the general credit agreements (including all the then Member States except Luxembourg). The Federal Government's intention was approved on this occasion as well.

The aforementioned Absicherungsgesetz was important for the plaintiff in the main action. The plaintiff's business is the production and sale of plant for machine construction, which it had exported during the period in which the Absicherungsgesetz applied. Accordingly it had to make prepayments of the special turnover tax for December 1968 and January to September 1969. In so far as exports to the Member States of the EEC are concerned, the plaintiff considers that having regard to the provisions of the EEC Treaty such taxation is inadmissible. It therefore objected to the notices and, meeting with no success, brought the matter before the Finanzgericht Düsseldorf. The plaintiff takes the view that the special turnover tax is a charge having an effect equivalent to customs duties and is therefore not valid — in so far as exports to the EEC Member States are concerned — by virtue of Article 12 of the EEC Treaty which is directly applicable and has precedence. The defendant Customs Office on the other hand — referring to a view of the Bundesfinanzhof — takes the view that it cannot be said to be a charge having an effect equivalent to customs duties but is part of the national turnover tax system, and viewed in this light cannot be objected to under the tax provisions of the EEC Treaty.

Since the Finanzgericht has doubts as to the correctness of this last view, it has, at the plaintiff's request, by order dated 8 March 1974 stayed the proceedings and referred the following two questions for a preliminary ruling under Article 177 of the EEC Treaty:

1. Does the prohibition against the introduction of charges having an effect equivalent to customs duties under Article 12 of the EEC Treaty include the introduction of a charge
   (a) which subjects industrial exports to other Member States of the Community to a financial charge of 4 %, alternatively 2 %;
   (b) which is disguised by the national legislator as a 'Sonderumsatzsteuer' (special turnover tax);
   (c) which refers back to concepts of national law on turnover tax;
   (d) which has the purpose of subjecting domestic exports to a special charge not otherwise existing in this form within the territory of the EEC in order to prejudice their ability to compete with the products of the other Member States, and
   (e) which has as a consequence that the products exported are thereupon subject to taxation by both the country of origin and that of destination.
2. Can the possible infringement by such a charge of Article 12 of the EEC Treaty be justified by the argument that the purpose of its introduction was to avoid a currency revaluation? Can there be deduced from the power reserved to Member States by Article 107 of the EEC Treaty to alter rates of exchange an authority also to introduce charges having an effect equivalent to customs duties that are to take the place of a revaluation? Under what conditions might the introduction of such a charge be justified as a protective measure within the meaning of Article 109 (1)? Where the conditions of Article 109 (1) of the EEC Treaty are not present, can the introduction of a charge

having an effect equivalent to customs duty and taking the place of a revaluation be justified by the argument that the tasks of the Community under Article 2 of the Treaty include an increase in stability and thus also the maintenance of the external value of currency and under Article 3 (g) of the Treaty the remedy of disequilibria in the balances of payments of Member States?

These questions must be examined in the light of the observations made during the proceedings by the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission of The European Communities.

The first question from the court making the reference, seeking an interpretation of the concept 'charges having an effect equivalent to customs duties' within the meaning of Article 12 of the EEC Treaty, includes a description of the special turnover tax introduced for exports in 1968. After what we have heard in the proceedings the preliminary question arises whether this description suffices. It seems at least useful to mention some additional characteristics, as is done in the opinion from Professor Zuleeg, which is among the papers.

It should be borne in mind — this was partly touched upon in the outline of the facts — that the Absicherungsgesetz, under which exports were liable to a special turnover tax, was passed with monetary and short-term economic policy objectives, namely to prevent disequilibrium in the balance of payments and to damp down the domestic rise in prices. Accordingly there was the fact that it was a double-edged measure which applied to both exports and imports and the computation basis and the rates of refund and charge coincided.

It is important moreover that it mainly related to industrial imports and exports and to a certain extent services, whereas goods which were subject to EEC market regulations were excepted.

It should also be mentioned that the export charge was described as a special turnover tax and was related to the concepts of internal taxation law. The charge presupposed companies within the meaning of the turnover tax law; the turnover tax debt arose as a result of turnover within the meaning of the turnover tax law, or as a result of export whereby of course the goods must arrive abroad for use or processing by someone else. Finally the procedure for levying the tax is subject to the provisions of the turnover tax law; it is associated with the levying of the normal turnover tax, just as the import refund was granted in the first place within the context of the turnover tax law.

The court making the reference — as I have already stated — is primarily concerned with an interpretation of the concept 'charges having an effect equivalent to customs duties'.

In view of the objectives of the Absicherungsgesetz and the arguments of some of those involved in the proceedings for a reference, it may however be asked whether that is the best approach to the problem with which the court making the reference has to deal, namely the general question whether the Absicherungsgesetz is compatible with Community law.

It is conceivable — at least the arguments of the Federal Government proceed on this basis — that the Absicherungsgesetz is to be regarded as a measure of monetary and short-term economic policy and judged primarily according to the provisions of the Treaty which apply thereto. It is also conceivable that an examination of these provisions may lead to the conclusion that the Member States, in this context, had room to manoeuvre, which permitted them to override general provisions of the Treaty, including those on the levying of customs duties and charges having an effect equivalent to customs duties, so that it is not necessary to judge the measures taken in the light of the provisions of the Treaty on customs

law. Since from the case law of the Court it is clear that this Court is not bound to follow the order of questions adopted by the court making the reference and that in the interests of an exhaustive and relevant settlement of the proceedings for a preliminary ruling it can have regard to all provisions which are relevant to the facts brought to its notice, we may take a look at the provisions of the Treaty on monetary and short-term economic policy to see how the Absicherungsgesetz is to be assessed in the light of them.

In this connexion it is Article 107 of the Treaty which is of most interest, that is the provision that each Member State shall treat its policy with regard to rates of exchange as a matter of common concern and paragraph 2 according to which the Member States have the power to alter their rates of exchange on observing certain criteria. To this extent such measures should be judged only under Article 107 and in the case of measures relating to rates of exchange there should be no judgment under provisions other than Articles 103 to 109, which has result that Article 12 does not apply even when there appear to be charges having an effect equivalent to customs duties. Professor Zuleeg has shown this convincingly, as I believe, in his opinion in which he makes reference to case law concerned with the effects on the Common Agricultural Market of measures relating to rates of exchange. I refer to Case 9/73 *Schlüter v Hauptzollamt Lörrach* [1973] E.C.R. 1160; Case 10/73 *Rewe-Zentral AG V Hauptzollamt Kehl* [1973] E.C.R. 1190 and 1194 and Joined Cases 9 and 11/71 *Compagnie d'approvisionnement, de transport et de crédit SA and Grands Moulins de Paris SA v the Commission of the European Communities* Rec. 1972, p. 391.

Having regard to this the Federal Government is of the opinion that if this is the view taken of the case of the revaluation of a currency or the floating of rates of exchange or the creation of different rates of exchange, the same must apply to measures which are to be regarded as in place of revaluation. The Absicherungsgesetz can be regarded as such, for it has, in relation to part of trade and the supply of services across frontiers, as a reciprocal (i.e. applying equally to export and import) measure the same effect as a partial revaluation, and it is obvious to all who know the problem that it was only passed in the manner adopted to avoid the effects of a general revaluation on the agricultural market and so as not to allow the speculation on revaluation which was noticeable at the time to make a profit.

It would be difficult to deny that this argument has something in it. In the last analysis, however, I doubt whether we can accept it so simply.

I am not thinking of the detailed criteria which according to Article 107 are to be observed, namely treating policy as a matter of common concern, regard for the objectives of Article 104 and avoiding seriously distorting conditions of competition. To that extent — I will only suggest it now — the view may be taken that there are no misgivings to be discerned, first because the other Member States and the Commission were obviously in agreement with the measures of the Federal Government but also because the measures were obviously intended to come within the objectives of Article 104 (ensuring a high level of employment, a stable level of prices, equilibrium of the overall balance of payments and confidence in the currency) and finally because it was directed to the re-establishment of undistorted conditions of competition.

In truth there are substantial objections against an extensive interpretation of Article 107, as far as measures which come into consideration under it are concerned. These objections arise from the requirement to give a narrow interpretation to the provisions of the Treaty which allow national measures having adverse effects on the structure of the Community and in particular on the

agricultural market organization. The acceptance of tacitly allowed violations of imperative provisions of the Treaty is not compatible with this, especially since Articles 108 and 109 of the EEC Treaty contain special safeguard clauses for measures of external economic and monetary policy. The objections are associated with the fact mentioned by the plaintiff in the main action that a wide interpretation of Article 107 makes it difficult to avoid the danger of wrongful manipulations. It must also not be overlooked that importance as a matter of principle is attached to joint action under the Treaty with regard to measures of monetary and short-term economic policy. Finally mention may be made — and in the present connexion it is certainly not of little weight — of the case law of the Court in Joined Cases 6 and 11/69 *Commission of the European Communities v French Republic* Rec. 1969, p. 523. It is there stated:

'Articles 108 (3) and 109 (3) give the Community institutions powers of authorization and intervention which would be pointless if the Member States, on the pretext that their action related only to monetary policy, could unilaterally, and without being subject to control by these institutions, disregard the obligations placed upon them under the provisions of the Treaty ... The exercise of powers retained by the States cannot therefore permit measures to be taken unilaterally which the Treaty prohibits.'

This finding is significant in judging the present case.

For all these reasons I cannot accept the proposal to judge the Absicherungsgesetz only on the basis of Article 107 and without regard to the general provisions of the Treaty. I much prefer to have regard to the general provisions of the Treaty in the further consideration of the case.

This brings us logically to the first question from the court making the reference, that is the difinition of charges having an effect equivalent to customs duties, or preferably, since this is the root of the problem, the distinction between measures equivalent to customs duties within the meaning of Article 12 and taxation measures within the meaning of Articles 95 *et seq.*

In this connection the concept 'charges having an effect equivalent to customs duties' does not require to be particularly discussed. There is extensive case law on this, which has provided a series of criteria. All the parties have referred to it; I can therefore refrain.

In the opinion of the Federal Government's expert there should be a finding with regard to the present case that the special turnover tax does not have the characteristics developed in the case law of charges having an effect equivalent to customs duties and that for this reason application of Article 12 of the EEC Treaty is ruled out. There has been no hindrance to trade, since at the same time imports into the Federal Republic of Germany were facilitated and this was inseparably associated with the special turnover tax which the legislator intended to be a single system. It could not be said to be a distortion of competition but rather a correction of the conditions of competition brought about by the fact that prices in the Federal Republic of Germany behaved differently from those in neighbouring countries.

I would like however to leave open the question whether this argument is valid. For it is more reasonable to deal with the basic problem of the question now in hand, that is to enquire whether the special turnover tax is not in truth a taxation measure which must be judged only on the basis of Articles 95 *et seq.* of the Treaty and the secondary law relating thereto, and not on the basis of Article 12. This Court has indicated the way for this in its case law on import charges (cf. Case 57/65 *Alfons Lütticke GmbH v Hauptzollamt Saarlouis* Rec. 1966, p. 293 and Case 25/67 *Milch-, Fett- und Eierkontor GmbH v Hauptzollamt Saarbrücken* Rec. 1968, p.

305). The same must apply to export charges, for which Article 96 of the Treaty contains a special provision.

According to the case law, which is, as stated, limited to import charges, a charge must be regarded as a taxation measure, if it is levied within the framework of turnover tax legislation and it is part of a general system of charges which applies without distinction to domestic and imported goods. In some judgments it is added that such charges must not have any protective purpose and that they must be mainly of a fiscal nature (Case 7/67 *Milchwerke H. Wöhrmann und Sohn KG v Hauptzollamt Bad Reichenhall* Rec. 1968 p. 261 and Case 20/67 *Kunstmühle Tivoli v Hauptzollamt Würzburg* Rec. 1968, p. 293 — in Case 25/67 there is no reference to the fiscal nature).

If the special turnover tax of the Absicherungsgesetz is judged by these criteria, it can be said that, just like the refund on import of import turnover tax, it was linked to the normal turnover tax as regards its imposition, and the same procedure was applied to it. It is true this would not be decisive in itself as regards classification, and it is expressly stressed in the case law that the determination of the position under the Treaty does not depend on the manner of the imposition (Joined Cases 2 and 3/69 *Social Fonds voor de Diamantarbeiders v SA Ch. Brachfeld and Sons and Chougol Diamond Co.* Rec. 1969, p. 211) and that the application of concepts of the taxation law of the Member States is no decisive criterion (Joined Cases 52 and 55/65 *Federal Republic of Germany v Commission of the EEC* Rec. 1966, p. 227). But other important characteristics may now be mentioned. We have seen that the special turnover tax fitted into the system of turnover tax law insofar as only companies were charged, that is only industrial exports were affected, and two situations in which the law applied presupposed turnovers with a basis of assessment in taxation law such as is unknown to customs law. One of these situations relates moreover to services, the charging of which could not be brought within the provisions of the Treaty on customs law. If on the other hand it cannot be disputed that another situation depended essentially on the bringing of goods across the frontier, it should not be overlooked that this was merely a situation attracting liability and even this showed characteristics which are unknown to customs law — the exclusive charging of industrial companies and the relation to the purpose of the movement of the goods. Moreover it should not be forgotten in this connexion that crossing the frontier is not unknown as a criterion even in turnover tax law — even in the relevant Council Directives. If these facts already point strongly to classification of the charge under Articles 95 *et seq.*, that is acceptance that the charge was part of the national system of taxation, there is the further important circumstance that there was nothing other than a reduction of the import turnover tax on import and a partial withdrawal of the relief from the tax on export, essentially matters of taxation law. As regards exports, the charging of which still remained under the level imposed on domestic goods, the chosen system was obviously created only because another conceivable possibility, the reduction of the deduction for prior taxation, would have led to considerable difficulties and to an unequal treatment of companies.

On the other hand it cannot be disputed — this became clear in the proceedings — that there could be no watertight fitting into the system of value added tax, because there was not deduction for prior taxation and because there could be said to be multiple-phase taxation with regard to the additional taxation in the country of destination. From this it is obvious that it was not a charge 'of a mainly fiscal nature', but primarily a measure of monetary and short-term economic policy, although the fiscal aspect with regard to the financing of

the import refund was not without significance. This should however not be ultimately decisive. This is certainly true of the point of view lastmentioned, which is without special significance, since today it is quite common to pursue all kinds of objectives of economic policy with clearly fiscal measures. This is likewise true of the other matters mentioned, which have led the plaintiff in the main action to see the special turnover tax as 'out of place' in the turnover tax system. In judging such border-line cases, which often contain elements from various legal spheres, it can only be a question of which classification is most indicated, and where the essence of the regulation is to be discerned. If this can be clearly found — as in the present case — and at the same time a purely formal grafting on to the taxation system is ruled out, then without hesitation there can be said to be a taxation measure within the meaning of the Treaty and accordingly the matter may be properly judged only under the provisions provided therefor and not under the provisions relating to customs law.

Having regard to the provisions of the *Treaty* this means that, in judging the compatibility of the special turnover tax with the Treaty, as regards written rules only Article 96 comes into question. It is no way limited — as the plaintiff thinks — to questions of export subsidy, but it is to be regarded as a provision of the law relating to charges, because it is concerned with how far refund of taxes on export may be made. Article 96 lays down only an upper limit for this. The Member States may stay below this limit, from which it follows that a partial taxation of exports is not open to objection under Article 96. Moreover the Treaty, even in the sphere of taxation law has in no way laid down the principle that the country of destination shall determine the matter and accordingly taxation of exports in the country of origin, as apparently happens with many consumer taxes, is in no way ruled out under the Treaty. — Accordingly there can be no doubt that the special turnover tax of the Absicherungsgesetz did not infringe the provisions of the Treaty.

It does not moreover conflict with *secondary* Community law. In this respect the two value added tax Directives of 11. 4. 1967 (OJ 1967, p. 1301 *et seq.)* were mentioned. The first of them lays down that Member States have to replace the turnover tax system by a value added tax system and that the value added tax system was to be brought into force at the latest on 1. 1. 1970. The Second Directive contains provisions as to the structure and conditions of application of value added tax. Article 10 provides — of special interest for the present purpose — that consignments of goods to places outside the sphere of application of the value added tax of the Member State concerned shall be free from value added tax.

There can be no infringement, because the Directives in their original version gave rise to obligations on the Member States, that is to free exports from taxation, only with effect from 1 January 1970. The special turnover tax was no longer applied at this date. Contrary to the opinion of the plaintiff, it cannot be inferred that a Member State, on prematurely introducing value added tax — it was introduced in the Federal Republic of Germany, as is known, on 1 January 1968 — is prohibited from amending the tax system provisionally so that certain structural elements of the former turnover tax obtain side by side with the value added tax. There is no such prohibition effect, as is clearly seen from Case 9/70 *Grad v Finanzamt Traunstein* Rec. 1970, p. 825, in which it is expressly emphasized that until the time prescribed for introducing value added tax Member States retained their freedom of action in the sphere of turnover tax.

From this it is clear that the special turnover tax of the Absicherungsgesetz is

not a charge having an effect equivalent to customs duties and that on judging it under the provisions of the Treaty on taxation law and the secondary law of the Community there is nothing which could justify the finding of incompatibility with the Treaty.

It is really not necessary to go into further questions of the court making the reference, since these were raised only in the event of a finding of infringement of Article 12. For the sake of completeness and in so far as I have not already done so, I would like nevertheless to address myself in a few words to the problems which arise under the second question, that is to enquire what other provisions of the Treaty could be relied upon to justify the special turnover tax of the Absicherungsgesetz, if it had to be classified as a charge having an effect equivalent to a customs duty.

— I shall begin, as did the plaintiff in the oral procedure, with the provisions mentioned last in the order of reference, namely Articles 2 and 3 (g) of the Treaty. All parties are agreed that the following, in brief, is established with regard to them:

The said Articles are provisions laying down the objectives of the Community and describing its activities. Their significance for the interpretation of the Treaty can scarcely be over-estimated. They contain however certainly no rules as to powers or safeguard clauses, certainly none for the Member States. Justification of national measures, which infringe certain provisions of the Treaty, can certainly not be derived from the programme clauses laid down in them, which moreover in various ways describe conflicting objectives for which a solution has to be sought in accordance with the specific provisions of the Treaty with their rules relating to powers.

— Since it was dealt with in the proceedings, Article 108 and in particular paragraph 3 thereof must be considered in relation to its connection with the provisions on monetary policy, although this Article is not mentioned in the order of reference.

Under Article 108 (1) where a Member State is in difficulties or seriously threatened with difficulties as regards its balance of payments, and where such difficulties are liable to jeopardize the functioning of the Common Market or the progressive implementation of the common commercial policy, the Member State in question may take action under Article 104. In this connexion recommendations by the Commission are spoken of, and in paragraph 2 the granting of mutual assistance by the Council. In paragraph 3 it is stated:

'If the mutual assistance recommended by the Commission is not granted by the Council or if the mutual assistance granted and the measures taken are insufficient, the Commission shall authorize the State which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine.'

This last, in agreement with the case law, is to be understood as meaning that national measures which conflict with other imperative provisions of the Treaty are possible only with the authority of the Commission. Assuming the special turnover tax of the Absicherungsgesetz were to be regarded as a charge having an equivalent effect to a customs duty, and disregarding other questions which arise from Article 108 (such as the appropriateness of the measures taken to achieve the objectives pursued, which the plaintiff particularly questions), it would be necessary to investigate whether the measures of the Absicherungsgesetz were covered by authority from the Commission.

On this the Federal Government relies on the fact that it informed the Commission in due time — namely by the Note Verbale which has already been mentioned and also at the conference of the Club of Ten at which the Commission was represented by two members — and that after considering the measures the Commission approved

them, as appears from a declaration published in the 1969 Bulletin No 1, p. 41. It takes the view, moreover, that authority from the Commission requires no special form and may be given tacitly, as is shown by the judgment in Joined Cases 73 and 74/63 NV *Internationale Crediet — en Handelsvereniging 'Rotterdam' and Coöperatieve Suikerfabriek en Raffinaderij GA 'Puttershoek' v Minister of Agriculture and Fisheries at The Hague* Rec. 1964, p. 1.

I cannot agree with the view of the Federal Government on this point — as also on that of the interpretation of Article 107. An authority within the meaning of Article 108 (3) is certainly a decision under Article 189 of the Treaty, which exhaustively lists the kinds of legal act which come into consideration by the Commission for the fulfilment of the Community tasks. Accordingly, it is scarcely conceivable that such an act could be done tacitly, for it is stated in Article 189 that it shall be binding upon those to whom it is *addressed*. In the same way it is significant that in Article 108 (3) it is stated that the Commission shall determine the conditions and details of the protective measures, which it is scarcely possible to do tacitly. Finally it must not be overlooked that in the aforementioned Joined Cases 73 and 74/63 there was indeed a formal act by the Commission and all that was to be clarified by interpretation and having regard to all the circumstances was the significance it had and whether it was directed 'tacitly' to other Member States as well.

I am therefore of the opinion that as regards Article 108 (3) — should the German measures require authority from the Commission — there was in fact none, especially since the Commission — as is now clear — obviously judged the matter on the basis not of Article 108 but of Article 95 *et seq*.

— Finally Article 109 of the EEC Treaty remains to be discussed. It provides for the case of a sudden crisis in the balance of payments where a decision within the meaning of Article 108 (2), that is on mutual assistance, is not immediately taken, that the Member State concerned may unilaterally, as a precaution, take the necessary protective measures. Such measures — as is stated — 'must cause the least possible disturbance in the functioning of the Common Market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen'. The Commission and the other Member States are to be informed of such protective measures not later than when they enter into force. The Council may then decide whether the protective measures are to be amended, suspended or abolished.

All parties are agreed that this provision allows the provisions of the Treaty to be unilaterally broken, that is they permit the provisions relating to customs duties and charges having an effect equivalent to customs duties to be temporarily disregarded. It could, should it be necessary, come into question as regards justification of the Absicherungsgesetz. Whether this is so, depends obviously on various circumstances which — as was rightly stressed — require strict examination.

Thus, it is material whether there can be said to be a balance of payments crisis, which is more than the difficulties mentioned in Article 108, where there are balance of payments *surpluses*. This can probably be agreed, for even with excessive inflows of currency the objectives of Article 2 can be endangered and protective measures of other Member States, which jeopardize the functioning of the Common Market, are not ruled out.

It is also important that there should be a *sudden* crisis, that is not a development which stretches over a fairly long period. This could be said to arise if difficulties, such as in the event of an international wave of speculation, arose so suddenly that there was no time to pursue the procedure under Article 108.

Mutual assistance is also important. It should primarily be of concern where there are deficits in the balance of payments and hardly where there are balance of payments surpluses, and therefore in such a case appropriate proceedings do not appear necessary.

As regards the protective measures it is further provided that they must cause the least possible disturbances in the functioning of the Common Market and must not be wider in scope than is strictly necessary to remedy the difficulties. In this respect the fact is significant in the present case that the special turnover tax was levied only on industrial exports and that goods subject to the market organizations were exempted.

Finally it is necessary for the Commission and the other Member States to be informed of the protective measures not later than when they enter into force. In the case law it has already been shown that there must be express reference to Article 109 (cf. Joined Cases 6 and 11/69 *Commission v French Republic* Rec. 1969, p. 523). From this doubts could arise in the present case as to the validity of the measures taken. It is true that it may be accepted that the Commission was duly informed and that the informing of the other Member States in the context of the conference of the Club of Ten sufficed, even as regards the Grand Duchy of Luxembourg by reason especially of the Belgo-Luxembourg economic union, although the Grand Duchy was not represented; but there was obviously failure to make express reference to Article 109. If it is considered sufficient — and I incline thereto, since I see no good purpose in exaggerating formality — that all parties (Commission and the other Member States) were clearly informed of the situation and the intended measures, that is they were put in a position to draw the necessary conclusions within the meaning of the judgement in Joined Cases 6 and 11/69, I see no serious objection even on account of this lastmentioned point.

With this all that is necessary has been said on the second question, as shortly as is required by the fact that the matter is perfectly clear when judged under Article 95 *et seq.*

I see no reason for further observations. I do not intend to discuss the additional question raised by the plaintiff in the oral procedure as to infringement of basic rights of Community law by encompassing so-called existing contracts under the special turnover tax. The court making the reference has asked no questions on this. This has not been as a result of oversight, but obviously because by reason of the thorough investigation of the relative questions by the Bundesverfassungsgericht (Federal Constitutional Court), to which there can scarcely be anything added from the point of view of Community law, they are superfluous.

To summarize, I can accordingly propose that the Finanzgericht should be answered as follows:

1. A charge which subjects industrial exports to other Member States of the Community to a financial burden in such a way that the exemption from domestic charges is partially removed, and which is accordingly closely related to the domestic turnover tax law, is not a charge having effects equivalent to customs duties within the meaning of Article 12 of the EEC Treaty.

The introduction of charges of this kind does not infringe the provisions on taxation law of the EEC Treaty and is not ruled out even after the introduction of the value added tax in a Member State before the coming into force of the obligatory value added tax system under the Council Directive of 11 April 1967.

2. The powers to vary rates of exchange reserved to the Member States in Article 107 of the EEC Treaty do not comprise the authority to introduce charges having an effect equivalent to customs duties in place of a revaluation.

3. Authorization by the Commission to take protective measures under Article 108 (3) must be given expressly.

4. A sudden crisis in the balance of payments within the meaning of Article 109 can also arise where there are balance of payments surpluses, which occur so suddenly that there is no time to carry through the procedure under Article 108. In such cases a Member State can take the necessary protective measures at variance with the general provisions of the Treaty on customs duties if the Council does not grant the currency assistance in time or if this is not possible. It is a condition for the validity of the protective measures that the Commission and the other Member States are clearly informed not later than when the protective measures enter into force.

5. Articles 2 and 3 (g) of the EEC Treaty contain no safeguard clause and confer no powers on the Member States which would allow the general provisions of the Treaty to be disregarded.