2. **Article 95 is intended to ensure that the application of internal taxation in one Member State does not have the effect of imposing on products originating in other Member States taxation in excess of that imposed on similar domestic products and it is therefore irrelevant that the taxation is also imposed on the same conditions on national products which are exported and on imported products.**

3. **In order to compare the tax on goods moving within the national territory with that on the imported product for the purposes of the application of Article 95, account must be taken of both the basis of assessment of the tax and also of the advantages or exemptions which each tax carries with it.**

4. **The minor and incidental nature of the obstacle created by a national tax and the fact that it could only have been avoided in practice by abolishing the tax are not sufficient to prevent Article 95 from being applicable.**

Kutscher Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 16 February 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 18 JANUARY 1977 [1]

Mr President,
Members of the Court,

1. The Court has, on several occasions, had to interpret the first paragraph of Article 95 of the Treaty of Rome which, as we all know, prohibits Member States from imposing, 'directly or indirectly', any internal taxation *of any kind* in excess of that imposed directly or indirectly on similar domestic products. The essential issue in the present case is

1 — Translated from the Italian.

whether this prohibition also covers a tax applied to the carriage of goods by road and which, in specified circumstances, falls more heavily on products coming from other Member States than on similar products transported over the same distances wholly within the State imposing it.

In 1968, the Government of the Federal Republic of Germany adopted a policy programme for transport for the period 1968 to 1972 for the purpose of disposing of certain difficulties in that sector. It regarded it as necessary to encourage the use of the railways by reducing transport by road and accordingly decided to subject the latter to temporary fiscal measures. Thus, on 28 December 1968, a Law was enacted relating to the tax on the carriage of goods by road (Gesetz über die Besteuerung des Straßengüterverkehrs), which was intended to affect, in particular, the transport by road of loads over long distances within German territory. Specifically, under that Law, there was exemption from tax only in the case of the internal transport of goods effected within the confines of a circle with a radius of 50 kilometres as the crow flies from a centre which consists of the place where the transport undertaking has its registered offices or place of business (the circle, which is called a 'Nahzone', was already provided for in Paragraph 2 (2) of the Law of 17 October 1952 on the Carriage of Goods by Road). In the case of journeys outside the confines of the free zone, there is a tax of DM 0·01 per km on every tonne carried but if the carrier transports goods which are his own property, as in the case of the plaintiff in the main action, the rate of tax increases when the permitted load is in excess of 4 tonnes and goes up to DM 0·05 per km per tonne actually carried when the load capacity of the vehicle is greater than 6 tonnes.

The said Law introduced different regulations to cover cases in which transport by road involves crossing the German frontier in either direction. Transport coming from another State or proceeding to another State is exempt from the tax only if, in the first case, the unloading point and, in the second case, the loading point is situated in Germany at a distance not greater than 50 km from the point at which the frontier is crossed (Paragraph 3 (5)). In that case, the place where the transport undertaking has its premises is ignored and the fiscal question is settled as though the registered office of the undertaking, whether German or foreign, is situated at the place where the vehicle crosses the frontier of the Federal Republic. The consequence of this is that the distance which can be travelled free of tax cannot reach the maximum kilometrage, which is equivalent to the diameter of a 'Nahzone' lying wholly in German territory, but is restricted to the 50 km between the frontier and the point at which the goods are loaded or unloaded. In this way, in cases where, taking into account the actual premises of the transport undertaking and the distance travelled from the loading point to the unloading point, international traffic could come within the concept of 'local traffic' which is free of tax, it is nevertheless treated as long-distance traffic simply owing to the fact of crossing the frontier and on each occasion is unable to benefit from the limited tax-exemption provided for in the above mentioned Paragraph 3 (5) of the 1968 Law.

In the case which is now before the Court, proceedings were brought in the national court by the Schöttle undertaking, whose registered office is in Oberkollwangen, and whose business is concerned both with the transport of passengers and goods over short distances and with wholesale dealing in gravel and sand. As part of this business it transported gravel excavated direct from the Lauterbourg quarry in Alsace, and then delivered it in the Stuttgart area. If, in the case of transport over the same

distance, the vicinity of Lauterbourg were situated in Germany, it would come into the local traffic zone which would be formed if the vicinity of Oberkollwangen were taken as the centre of the circle and the Schöttle company would, in consequence, not be obliged to pay the tax provided for by the Law of 28 December 1968. However, the exemption of international traffic provided for under Paragraph 3 (5) of the Law does not enable the transport described above to escape the tax because Stuttgart is more than 50 km from the point at which the Franco-German frontier is crossed.

In the light of this situation the Finanzgericht Baden-Württemberg, before which the Schöttle company brought proceedings against the taxation decision of the national fiscal authorities, has referred to this Court for a preliminary ruling under Article 177 of the EEC Treaty four questions which I shall quote and discuss one by one.

I ought, finally, to place on record that, subsequent to the order making the reference, the German fiscal authorities waived their tax claim against the Schöttle company because they recognized that, in the particular circumstances involved, the tax had a discriminatory effect which was not intended by the legislature. It thereupon requested the Finanzgericht to withdraw the order making the reference to this Court on the ground that the proceedings had now lost their purpose. The plaintiff company opposed this request, and the Finanzgericht held that the waiver, on grounds of equity, of the amount due, did not deprive the annulment proceedings of their purpose, when account was taken, *inter alia,* of the loss which the taxation measure might have caused to the plaintiff (which claims that it had to give up its French suppliers of gravel and, in consequence, to reorganize its business at a substantial financial loss).

2. The first question submitted by the national court is as follows:

'Does a tax which is imposed on the basis of distances covered within a Member State for the carriage of goods by road across a frontier constitute taxation *on* products within the meaning of Article 95 of the EEC Treaty?'

The answer must, in my view, be in the affirmative.

Although the tax in question is directly applied not to the goods but to the transport operation, it is very closely related to the goods themselves on which the fiscal charge ultimately falls and is discharged, especially inasmuch as the amount of the tax to be paid for each journey is based not only on the distance travelled but also on the weight of the goods carried.

Moreover, the concept embodied in Article 95 of 'internal taxation ... imposed directly or indirectly on ... products', which is wide enough in itself, has also been given a wide interpretation by the Court. It is worth recalling the judgment of 3 April 1968 in the case of *Firma Molkerei-Zentrale* (Case 28/67 [1968] ECR 155) in which it was stated, *inter alia:* 'The first paragraph of Article 95 refers to all taxation which is actually and specifically imposed on the domestic product at all earlier stages of its manufacture and marketing or which corresponds to the stage at which the product is imported from other Member States'. The judgment makes the following reference to the terms used in Article 95: '... The terms "directly or indirectly", taking account of the general scheme of the said provision, must be widely interpreted.'

Article 95 could be regarded as inapplicable to the situation which gave rise to the current dispute only if the tax involved could be described as a charge having an effect equivalent to a customs duty within the meaning of Articles 9, 12

and 13 (2) of the Treaty of Rome. The Court has rightly drawn a clear distinction between the field of application of Articles 12 and 13 on the one hand and that of Article 95 on the other and declared that they cannot be applied concurrently to a single set of facts (judgment of 4 April 1968 in Case 25/67, *Milch-, Fett- und Eier-Kontor,* [1968] ECR 220; see also the judgment of 22 October 1974 in Case 27/74, *Demag,* [1974] 1045). The fact is that as regards fiscal measures which do not fall within the ambit of Article 12 *et seq.* concerning customs duties and charges having equivalent effect, the prohibition in Article 95 has a complementary role in relation to the prohibitions laid down in those articles. Ever since its first judgment, relating to fiscal matters, the Court has held that Article 95 is intended to fill in any breaches which a fiscal measure might open up in the system of prohibitions laid down in Articles 9 and 12 of the Treaty (judgment of 14 December 1962 in Joined Cases 2 and 3/62, *Commission* v *Luxembourg and Kingdom of Belgium* [1962] ECR 41; see also, to the same effect, the judgment of 1 July 1969 in Case 24/68, *Commission* v *Italian Republic,* [1969] ECR 200, and the judgment of 1 July 1969 in Joined Cases 2 and 3/69, *Sociaal Fonds voor de Diamantarbeiders,* [1969] ECR 221). But this complementary role does not exclude, but on the contrary indeed pre-supposes, the distinction between the cases to which, respectively, Articles 9 and 12, on the one hand, and Article 95, on the other, apply. As the Court pointed out in the said judgment in Joined Cases 2 and 3/69, the concept of a charge having equivalent effect does not include taxation which is imposed in the same way within a State on similar domestic products; this feature of the tax constitutes the distinguishing factor.

The distinction between the concept, on the one hand, of a charge having an effect equivalent to a customs duty and, on the other, of internal taxation, was recently underlined in the judgment of 15 December 1976 in Case 35/76, when the Court held that pecuniary charges imposed by reason of veterinary or public health inspections of goods, even on the occasion of their crossing the frontier, fall under Article 95 and not under Article *12 et seq.* when the pecuniary charges form part of a general system of internal dues applied systematically to domestic and imported products alike (Ground 22).

In the case with which we are concerned the tax on transport of goods falls both on domestic and on foreign products. As we have seen, it is applied to all products carried by road on the basis of the weight of the goods and the distance travelled in Germany, regardless of the place of manufacture or of origin. The differences referred to earlier between the fiscal arrangements for internal transport and those for international transport do not relate to the nature of the tax but only to the conditions under which exemption from taxation is granted. Even though these differences may be important from the point of view of the prohibition of discrimination, they certainly cannot alter the fact that the charge in question forms part of the general system of taxation which is systematically applied to all products circulating on the roads in Germany.

Accordingly, the tax in question undoubtedly constitutes internal taxation within the meaning of this term for the purposes of Article 95 and it does not, in consequence, come under the provision relating to charges having an effect equivalent to customs duties.

3. In its second question, which assumes that the first question has been answered in the affirmative, the German court seeks an answer from the Court of Justice on the following: 'Is the taxation of transport crossing frontiers within the area of the so-called local zone, that is, all towns and villages the centres of which lie within a 50-km radius of the centre of the town or village in which

the transport undertaking is situated, a direct imposition of higher internal taxation within the meaning of Article 95 of the EEC Treaty if, although no taxation is imposed on transport in the same area within the country, the different treatment is restricted to foreign goods which are delivered in a strip of territory running parallel to, and between approximately 50 and approximately 100 km from the border?'

It should be stated at once that this case is not concerned with the advantages or disadvantages which the fiscal system in question represents for transport undertakings. From this point of view it is clear to me that German transport undertakings which have their registered office or their place of business on German territory are to all intents and purposes treated in exactly the same way as foreign transport undertakings whose vehicles cross the German border.

The question at issue is concerned with the treatment of goods coming from other States compared with the system applied to goods circulating exclusively within German territory. In common with the questions submitted to the Court by the German court and with the provision in the Treaty for which an interpretation is being sought, the question raised is specifically concerned with the fiscal or parafiscal charges which indirectly fall on transported goods coming from abroad and eventually increase their cost. As the Court held in its judgment of 4 April 1968 in Case 31/67 *(Firma August Stier,* [1968] ECR 240 to 241), Article 95, 'is intended to ensure that the application of internal taxation in one Member State does not have the effect of imposing on products originating in other Member States taxation in excess of that imposed on similar domestic products.'

As we have seen, the German tax with which we are concerned is applicable to the carriage by road of any product whatever. In view of the fact that it is of universal application and of the conditions laid down for exemption, the question of any discrimination which may arise from the same tax must be decided not by comparing the treatment of national products with that of foreign products but rather by comparing the system of taxing products of any kind or origin the departure and arrival points of which are situated on the national territory and that of taxing products coming from or arriving at a point which is outside the national territory. Furthermore, the fact that the tax was not designed as a means of discriminating against the products of other States and is, therefore, not intended to protect national products, is insufficient to remove it from the rule in Article 95 in so far as the tax may result in discrimination against products coming from other States and making use of motorway transport for the purposes of their importation into the State concerned.

In my view, this discrimination does, in fact, exist. It does so because a product coming from another Member State is wholly unable to reach, free from the tax, any place in Germany which is situated further than 50 km from the point at which it is transported across the frontier, whereas the domestic product, which is in the same frontier area but within the German border, can be transported free of tax to places up to a distance of 100 km from the departure point. This possibility is, of course, dependent on choosing a transport undertaking which has its registered office or place of business half way between the departure point of the goods and the point of arrival. But it is enough that this possibilty, which is denied to products crossing the border, exists, for the tax to be recognized as liable to give rise to discrimination.

The Court has had occasion to emphasize that the first paragraph of Article 95 'prohibits the placing of products originating in other Member

States in a disadvantageous position as compared with products from the importing country which are marketed in the territory of that country' (judgment of 4 April 1968 in Case 34/67, *Firma Gebrüder Lück* [1968] ECR 251). If this is correct, there can be no compatibility between the said article and a tax the effect of which, even though only in certain cases, weighs more heavily on products coming from other Member States than it does on similar products transported within the country (the overwhelming proportion of which is made up of domestic products). This means, therefore, that the second question submitted by the German court must be answered in the affirmative.

4. The third question submitted by the Finanzgericht Baden-Württemberg is in the following terms:

'Is discrimination within the meaning of Article 95 of the EEC Treaty excluded if transport of domestic goods abroad is subject to the same tax as transport of foreign goods into the country?'

In the judgment, quoted earlier, in Case 34/67, *Gebrüder Lück,* the Court of Justice held: 'It is therefore necessary to exclude from the comparison [the comparison between products originating in other Member States and those of the importing country which are marketed in its territory] any domestic production to the extent to which it is exported and does not take part in competition within the national territory.'

The provision in the first paragraph of Article 95 is in fact intended to prevent dealers on the market of the State into which they import a product in order to market it from being placed by the national system of taxation in an inferior position compared with their competitors who market local products. The existence of the discrimination which is prohibited is clear merely from a comparison between the tax treatment of domestic goods sold in the State concerned and that applied to goods coming from other States in order to be placed on the market in the said State. The fact that the home-produced goods exported are subject to the same discriminatory system of taxation (in regard to goods circulating within the national borders) as applies to imported goods may perhaps suffice, in terms of the relationships between national economies as a whole, to compensate for the damage inflicted on the exports of other States, but it could in no sense be regarded as a fact which avails to eliminate discrimination at the level of the competitive situation between the individual undertakings concerned.

In the aforementioned judgment of 3 April 1968 in Case 28/67, *Molkerei-Zentrale* ([1968] ECR 153), the Court declared: 'The first paragraph of Article 95 contains a prohibition against discrimination, constituting a clear and unconditional obligation. This obligation is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States. This prohibition is therefore complete, legally perfect and consequently capable of producing direct effects on the legal relationships between Member States and persons within their jurisdiction'.

Clearly a provision of this kind does not make it possible to rule out the discriminatory effect which the tax has on the market of the State concerned in regard to goods coming from other Member States merely because of the existence of the same discriminatory effect to the disadvantage of domestic goods exported from Germany which, for the very reason that they are exported, are not in competition on the German market with foreign goods which are there subject to a discriminatory system of taxation.

The reply to the third question submitted for a preliminary ruling must therefore be in the negative.

5. The fourth and final question which the German court asks the Court of Justice to answer is as follows:

'Is discrimination within the meaning of Article 95 of the EEC Treaty excluded by the fact that the taxation is of considerable national importance to an objective in the field of transport policy which is approved by Community law and that the discriminatory incidental effects are minimal and only avoidable by considerable extra administrative work and were restricted to the years 1969 to 1971?'

In the judgment of 3 April 1968 in the *Molkerei-Zentrale* case to which I have already referred on several occasions ([1968] ECR 154) the Court declared: 'The complexity of given situations in a State cannot alter the legal nature of a directly applicable Community provision, especially as the Community rule must be applied with the same force in all Member States'. Subsequently, in its judgment of 17 February 1976 in Case 45/75, *REWE* ([1976] ECR 195) the Court, which was concerned with questions relating to an excise duty, held that, even though it might be impossible to introduce the same sliding scale for the increase or reduction of taxation on both domestic and imported products, it was nevertheless possible to impose a single flat-rate or fixed charge on both products in order to observe the prohibition on discrimination laid down in Article 95. For the purposes of Article 95, therefore, what matters is that a product coming from another Member State shall not be subject, directly or indirectly, even in rare cases, to a charge in excess of that on the domestic product.

In the present case, although it proved too complicated and unduly burdensome to adapt the system of taxation introduced by the German Law of 28 December 1968 to the requirements of Community law, it is difficult to believe that there was no possibility of replacing that system by a different one which could achieve the same objectives by other means.

It is certainly not for the Court, in this context, to pronounce on the suitability of a particular system of taxation in relation to certain principles of national transport policy, or to go into alternative possibilities of achieving the objectives of such a policy by other means which are compatible with the EEC treaty. I make only the passing comment that the EEC Treaty contains an appropriate title on transport and that the problems which individual Member States may have in this field, especially those which cannot be tackled without interfering with traffic between States, could in all probability be more suitably solved if it were found possible to lay down a more comprehensive definition of Community policy on transport.

What the Court must do, however, is to reiterate that the essential requirements of a given national policy can have no bearing on the interpretation of Article 95 of the Treaty. The general and absolute character of the prohibition in the first paragraph of Article 95, the nature of that article as a directly applicable provision, and the need to protect the rights which are thereby conferred on individuals make it impossible for the degree of strictness with which the prohibition is applied to depend on considerations of expediency, based on wholly subjective judgments. This is what would happen if account were taken of the degree of importance, in the context of a specific national policy, of the aim pursued by a given system of taxation and of the insignificance, in general economic terms, of the discriminatory effect of the provision. The fourth question from the German court must, therefore, be answered in the negative.

6. Having regard to all the foregoing considerations I recommend that the Court should give the following replies to the questions referred to it by the Finanzgericht Baden-Württemberg for a preliminary ruling:

(1) A tax imposed on the carriage by road of all goods, regardless of their origin, point of departure and destination, the amount of which is determined on the basis not only of the distance travelled in the national territory but also of the weight of the goods, must be regarded as internal taxation which, however indirectly, is imposed on the products carried within the meaning of Article 95 of the EEC Treaty.

(2) An internal tax on the carriage of goods so devised as to enable transport undertaken entirely within the territory of the State imposing it to be completed tax-free for distances in excess of those allowed for a similar product transported from places beyond the frontier is, whether the excess is great or small, incompatible with the first paragraph of Article 95 of the EEC Treaty.

(3) The discriminatory nature, within the meaning of Article 95 of the EEC Treaty, of a tax of the kind considered above, cannot be ruled out even if the carriage of national products to other States is subject to the tax on the same conditions as foreign products carried into the State applying it.

(4) Neither the importance of the object of the taxation in question, nor the fact that the incidence of the tax may be insignificant, nor the practical difficulties involved in the application of a system calculated to avoid discrimination, nor the fact that the system in question has been applied for only a few years can avail to exclude the application of the prohibition laid down in Article 95 of the EEC Treaty.