# OPINION OF ADVOCATE GENERAL COSMAS

## delivered on 4 February 1999 *

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## I — Introduction

1. In this reference for a preliminary ruling under Article 177 of the EC Treaty, the Tribunal administratif (Administrative Court), Dijon (France), submitted to the Court a question on the interpretation of Articles 9, 12 and 95 of the Treaty. Specifically the Court is asked to rule whether a charge to tax, such as that imposed under Article 302 *bis* (X) of the French General Tax Code, on supplies in France of transmitting-receiving sets, known as CB sets, constitutes a charge having equivalent effect to a customs duty, or is to be regarded as internal taxation within the meaning of Article 95 of the Treaty.

* Original language: Greek.

## II — Legal background

### A — *Community legislation*

2. Article 9 of the Treaty provides:

'1. The community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between member states of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. The provisions of Chapter 1, Section 1, and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.'

3. Article 12 of the Treaty provides:

'Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.'

4. Moreover, under Article 95 of the Treaty:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this treaty enters into force which conflict with the preceding rules.'

5. Furthermore, under Article 113(1) of the Treaty the common commercial policy is to be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the attainment of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

6. Finally, under Article 30 of the Treaty:

'Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.'

B — *National legislation*

7. Article 302 *bis* (X) of the French General Tax Code codifying the provisions of Article 83 of Law No 92-1476 of 31 December 1992, which entered into force on 1 January 1993, [1] provided [2]

'I. Supplies in France of transmitting-receiving sets operating on two-way channels, known as CB sets, shall be subject to payment of a tax.

CB sets with a maximum of 40 channels, operating exclusively by angular modulation with a peak modulation power of not more than 4 watts, shall not be subject to that tax.

1 — The ministerial directive of 3 February 1993 on the application of the above law laid down transitional provisions concerning contracts pending as at 1 January 1993. Under the directive the charge to tax was not to be imposed on supplies of CB sets to be made prior to 31 March 1993 under agreements fixing the price in writing before 7 January 1993.

2 — As is apparent from the file and from the observations submitted to the Court, the historical background to the regime governing the tax on transmitting-receiving sets known as CB sets is as follows:
Originally and until 31 December 1991 that regime was governed by Article 45(II)(6) of Finance law no 86-1317 of 30 December 1986. Use of CB sets was subject to the issue of a five-year licence by the commercial department of France Télécom or by the post office. On the issue of the licence there was a one-off charge to tax of FRF 190 which users paid by purchasing card stamps. That tax was originally collected by accounts officials of the posts and telecommunications and subsequently by officials of the Ministry of Finance for the account of the State's general budget.
Subsequently, the regime was altered by Article 40 of the 1991 amending finance law (No 91-1323 of 30 December 1991). On the basis of that amendment Article 45(III) of abovementioned law no 86-1317 thenceforth provided that the first acquisition of a CB set was to give rise to a charge to tax of FRF 250. However, CB sets with a maximum of 40 channels, operating exclusively by angular modulation with a peak modulation power of not more than 4 watts, were not to be subject to that tax.
As a result of that amendment the charge to tax was raised, continued to be imposed on users but there was no longer a requirement for renewal every five years. That was due, as both the French Government and the Commission pointed out in their written observations without being contradicted, to the fact that the licence requirement for the use of CB sets was abolished following the recommendations of the European Conference on posts and telecommunications in connection with the free movement of sets complying with ETS 300/135 specifications.
The above regime was further amended by the abovementioned Article 83(I0) and (IV) of law no 92-1476 of 31 December 1992 which was codified by Article 302 *bis* (X) of the General Tax Code. As a result of that amendment it is the first supply and not the first acquisition of a CB set which gives rise to the charge to tax; that charge is now imposed on the manufacturers, importers or persons engaged in intra-Community marketing and not on the users any more. The fundamental objective of that amendment, which did not alter the amount of the tax, was to simplify the method of payment of the tax by bringing the system into line with the VAT system.
Finally, the regime was amended by Article 27(I) and (II) of law no 93-1353 of 30 December 1993. That amendment concerned two points: first, the amount of the tax was fixed at 30% of the sales price less VAT of the CB sets, but cannot be less than FRF 150 or more than FRF 350 per set. Secondly, the tax becomes payable in the month following supply. Following that amendment Article 302 *bis* (X) of the General Tax Code reads as follows:
'I — Supplies in France of transmitting-receiving sets operating on two-way channels, known as CB sets, shall be subject to payment of a tax.
CB sets with a maximum of 40 channels, operating exclusively by angular modulation with a peak modulation power of not more than 4 watts, shall not be subject to that tax.
II — The tax shall be payable by manufacturers, importers or persons effecting intra-Community purchases within the meaning of Article 256 *bis* (I) (3), on the basis of the operations referred to in I above and carried out by them.
The rate of tax shall be 30% of the sales price less value added tax of the CB sets, but the amount of tax may not be less than FRF 150 or greater than FRF 350 per device.
The tax shall be due in the month following supply of the CB sets.
III — The tax shall be determined, collected and checked under the same procedures and subject to the same penalties, safeguards and privileges as value added tax. Objections shall be submitted, examined and adjudicated upon under the rules applicable to that tax.'

II. The tax shall be payable by manufacturers, importers or persons effecting intra-Community purchases within the meaning of Article 256 *bis* (I) (3), on the basis of the operations referred to in I above and carried out by them.

The rate of tax shall be 30% of the sales price less value added tax of the CB sets, but the amount of tax may not be less than FRF 150 or greater than FRF 350 per device.

The tax shall be due in the month following supply of the CB sets.

III. The tax shall be determined, collected and checked under the same procedures and subject to the same penalties, safeguards and privileges as value added tax. Objections shall be submitted, examined and adjudicated upon under the rules applicable to that tax.'

## III — Facts

8. CRT France International ('CRT') imports into France telecommunications equipment including CB sets.

9. Following accounting checks on CRT the competent tax authority sent amended notices to it on 25 October 1993 which dealt, *inter alia*, with the charge to tax on the supply of CB sets, as provided for under abovementioned Article 302 *bis* (X) of the General Tax Code. Following dismissal of the doubts expressed by CRT and after fruitless attempts at a settlement, on 18 October 1996 the competent tax authority issued CRT with a demand for FRF 25 127 160.

10. On 18 August 1997 CRT, calling in question the abovementioned amended notices, brought proceedings before the court making the reference against the decision demanding payment of the above amount. In its action CRT claimed, *inter alia*, that the charge to tax on CB sets was contrary to Community law inasmuch as it constituted a charge having equivalent effect to a customs duty contrary to Article 12 of the EC Treaty. Conversely, it was contended on behalf of the competent authority that the charge constituted internal taxation within the meaning of Article 95 of the EC Treaty.

## IV — The preliminary question

11. In its decision of 24 March 1998, the Tribunal administratif, Dijon, considering that an interpretation on the above matter was essential in order to enable it to resolve the dispute in the main proceedings, stayed the proceedings pending before it and referred the following question to the Court:

'Do Articles 9, 12 and 95 of the Treaty of 25 March 1957 establishing the European Economic Community preclude the national authorities from imposing on manufacturers, importers and suppliers in France of transmitting-receiving sets operating on two-way channels a charge to tax under the rules laid down in Article 302 *bis* (X) of the General Tax Code?'

## V — The reply to the preliminary question

### A — *Admissibility of the preliminary question*

12. In its question the national court is essentially asking the Court to interpret the Treaty and, more specifically, to provide it with elucidation of the legal classification in regard to Articles 9, 12 and 95 of the Treaty of the charge to tax under Article 302 *bis* (X) aforementioned of the General Tax Code and, if appropriate, on the compatibility of that tax with those provisions. [3]

I shall examine the substance of that preliminary question (B) but I first wish to allow myself certain preliminary observations concerning the admissibility of its submission (A).

13. Although neither the French Government nor the Commission and CRT raise an issue on the admissibility of the preliminary question submitted, none the less it could be argued that at first sight the national court does not appear to have complied with the established requirement under the Court's case-law that the need to provide an interpretation of Community law which will be of use to the national court makes it incumbent on the national court to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. [4]

Indeed, in the present case the Tribunal administratif, Dijon, has not provided a detailed account of the factual and legislative context of the question it is asking. In particular, the order for reference does not explain the features of and background to the charge to tax at issue, nor is any attempt made to determine whether that charge is contrary to or compatible with Community law. Furthermore, the national court does not clarify either the origin of the CB sets or whether there is any domestic production of such sets, which, as I shall demonstrate below, are matters of

3 — In view of the terms in which the preliminary question is couched I would like at this juncture to point out that, under the terms of Article 177 of the Treaty, the Court does not rule on the interpretation or validity of national provisions or on whether those provisions are compatible with provisions of Community law but provides the national court with all the interpretative elements necessary for it to adjudge itself whether a provision of domestic law is or is not compatible with rules of Community law. Whilst stressing that its interpretation is of Community law and not national law, it indeed frequently reformulates the preliminary question along those lines. Such reformulation is revealed by use of expressions such as: 'the above question is to be construed as seeking ...' or 'accordingly, the national court must in its preliminary question be deemed essentially to be asking whether ...'. See, by way of example, judgments in Case 27/74 *Demag* [1974] ECR 437 and Case 152/79 *Kevin Lee* v *Minister of Agriculture* [1980] ECR 1495, Case 22/80 *Boussac* v *Gerstenmaier* [1980] ECR 3427, Case C-69/88 *Krantz* [1990] ECR I-583, paragraph 7 and in Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 6.
In light of the foregoing the Tribunal administratif, Dijon, must in its preliminary question be deemed to be asking in essence whether Articles 9, 12 and 95 of the Treaty are to be construed as precluding a provision of national law such as the charge to tax imposed by France on manufacturers, importers and sellers in France of transmitting-receiving sets known as CB sets under Article 302 *bis* (X) of the General Tax Code.

4 — See, by way of example, judgments in Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 26, Joined Cases C-320-322/90 *Telemarsicabruzzo* and Others [1993] ECR I-393, paragraphs 6 and 7, and also Orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4, and in Case C-386/92 *Monin Automobiles* [1993] ECR I-2049, paragraph 6.

relevance to the reply to be given to the preliminary question.

14. That matter notwithstanding, it should be pointed out that, having regard to the file of the main proceedings and the written observations submitted to it, the Court has adequate information available to it to enable it to interpret the provisions of Community law relating to the subject-matter of the main proceedings.

Moreover, as the Court has already held, provided it is not asked to rule on a hypothetical question, it is sufficient if the case-file forwarded by the national court, and the written observations submitted by the parties to the main proceedings, give the Court enough information to enable it to interpret the rules of Community law in respect of the situation which is the subject of the main proceedings, even if the national court has not given an exhaustive account of the factual and legislative context. [5]

15. In light of the foregoing clarifications I do not consider that the omissions from the order for reference are such as to render the preliminary question submitted inadmissible.

B — *Substance of the preliminary question*

(a) Legal classification of the tax in light of Articles 9, 12 and 95 of the Treaty

16. The purpose of Articles 9, 12 and 95 of the Treaty is to avoid discrimination between imported products and the Member State's domestic products in order to facilitate the free movement of goods and the establishment of a single market. Articles 9 and 12 impose a prohibition on duties and charges having equivalent effect to duties. However, since such a prohibition would have been ineffectual if it could have been defeated by the imposition of heavier domestic taxation on imported goods, it is complemented by Article 95 which prohibits national legislation which is discriminatory or protective in nature.

17. In view of the identical purpose and complementary nature of the above provisions, the distinction between charges having equivalent effect to duties prohibited by Articles 9 and 12 and internal taxation prohibited under the terms of Article 95, is a particularly fine one.

Yet, however fine that distinction may be, it is none the less the case that, as the Court has

5 — See, *inter alia*, judgments in Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 14 and in Case C-125/94 *Aprile* [1995] ECR I-2919, paragraphs 18 to 21.

consistently held, [6] the provisions on charges having equivalent effect to customs duties and the provisions on discriminatory internal taxation cannot be applied cumulatively since, under the system of the Treaty, the same tax cannot belong at the same time to both categories.

18. In seeking the criteria for the requisite distinction, in accordance with the foregoing, between a charge having equivalent effect to a duty and internal taxation within the meaning of Article 95, the Court has consistently held as follows:

(a) Any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the EEC Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and the product on which the charge is imposed is not in competition with any domestic product. [7]

(b) The essential feature of a charge having equivalent effect to a customs duty which distinguishes it from an internal tax therefore resides in the fact that the former is borne solely by an imported product as such whilst the latter is borne both by imported and domestic products. [8]

(c) Such a charge will not be so characterised if it forms part of a general system of internal dues applying systematically to categories of products according to objective criteria applied without regard to the origin of the products, in which case it falls within the scope of Article 95 of the Treaty. [9]

6 — See, by way of example, judgments in Case 57/65 *Alfons Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205, Case 148/77 *Hansen* [1978] ECR 563, paragraph 22, Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 19, Case C-347/95 *UCAL* [1997] ECR I-4911, paragraph 19, Case C-28/96 *Fricarnes* [1997] ECR I-4939, paragraph 19, and in Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 19.

7 — See, *inter alia*, judgments in Case 24/68 *Commission* v *Italy* [1969] ECR 193, paragraph 9 and Joined Cases 2/69 and 3/69 *Diamantarbeiders* [1969] ECR 211, paragraph 18, Case 77/72 *Capolongo* v *Azienda Agricole Maya* [1973] ECR 611, Case 158/82 *Commission* v *Denmark* [1983] ECR 3573, paragraph 18, and the abovementioned decisions in *UCAL* (paragraph 18), *Fricarnes* (paragraph 20), *Haahr Petroleum* (paragraph 20) and *Outukumpu* (paragraph 20). On the background to that definition see typically the Opinion of Advocate General Jacobs in the abovementioned *Haahr Petroleum* case, paragraphs 41 and 42.

8 — See, for example, judgments in Case 78/76 *Steinike and Weinlig* [1977] ECR 171, paragraph 28, Case 32/80 *Kortmann* [1981] ECR 251, paragraph 18, Case 90/79 *Commission* v *France* [1981] ECR 283, paragraph 13 and in Case 193/85 *Cooperativa Co-Frutta Srl* v *Amministrazione delle Finanze dello Stato* [1987] ECR 2085, paragraph 9.

9 — See, *inter alia*, the judgment in *Capolongo*, mentioned above at footnote 7 (paragraph 12), the judgment in *Commission* v *Denmark*, also mentioned above at footnote 7 (paragraph 19), judgments in joined Cases C-228 to C-234/90, C-339/90 and C-353/90 *Simba and Others* [1992] ECR I-3713, paragraph 7, Case C-266/91 *Celbi* [1993] ECR I-4337, paragraph 11, Case C-130/92 *Oto* [1994] ECR I-3281, paragraph 11, Case C-345/93 *Nunes Tadeu* [1995] ECR I-479, paragraphs 6 and 7, and judgments in *UCAL* (paragraph 19), *Fricarnes* (paragraph 21), *Haahr Petroleum* (paragraph 20) and *Outokumpu* (paragraph 20), all mentioned in footnote 6, and the judgment in Case C-68/96 *Grundig Haliana* [1998] ECR I-3775, paragraph 10).

In that connection it should be pointed out that the above criterion of whether the charge forms part of a general system of internal dues is applicable also where there is no domestic production of the product charged to tax and where in practice the charge appears at first sight to be imposed only on imported products. As was stated, for example, in *Commission* v *France* 'the Court has however recognised that even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having an effect equivalent to a customs duty on imports within the meaning of Articles 9 and 12 of the EEC Treaty if it is part of a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products'. [10]

(d) Finally, for the purposes of the legal characterisation of a charge levied on domestic and imported products in accordance with identical criteria, it may be necessary to take into account the purpose for which the revenue from the charge is applied. Thus, if the revenue from such a charge is intended to finance activities for the special advantage of the taxed domestic products, it may follow that the charge imposed on the basis of the same criteria nevertheless constitutes discriminatory taxation in so far as the fiscal burden on domestic products is neutralised by the advantages which the charge is used to finance whilst the charge on the imported products constitutes a net burden. Consequently, as has been consistently held, if the advantages stemming from the use of the revenue from a charge forming part of a general system of internal charges applying systematically to domestic and imported products fully offset the burden borne by the domestic product when it is placed on the market, that charge constitutes a charge having an effect equivalent to a customs duty, contrary to Articles 9 and 12 of the Treaty. On the other hand, if the advantages accruing to the taxed domestic products from the use of the revenue from the charge only partly offset the burden borne by those products, such a charge would constitute a breach of the

10 — See *Commission* v *France* cited above in footnote 8 (paragraph 14). See also the judgment in *Steinicke* cited above in footnote 8 (paragraph 30), the *Co-Frutta* judgment cited above in footnote 8 (paragraphs 10 and 11) and judgment in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 53.
It is worth noting that in its judgment in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509 the Court pointed out that, in accordance with settled case-law, 'the aim of Article 95 as a whole is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection ... and that Article 95 must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products' (paragraph 9). That being so, it held that 'Article 95 cannot be invoked against internal taxation imposed on imported products where there is no similar or competing domestic production.'
The above decision does not mean that the absence of similar or competing domestic production of the product charged to tax — which of course precludes the above tax from being contrary to Article 95 since that would presuppose comparison between imported and domestic products — at the same time removes the possibility of classifying taxation as internal within the meaning of Article 95 of the Treaty. Moreover, in the present case, which concerned vehicle classification duties imposed by Denmark there was no doubt that that charge constituted internal taxation within the meaning of Article 95 (see judgment in *Commission* v *Denmark*, cited above, paragraph 6). As the Court also acknowledged, Article 95 of the Treaty does not 'prohibit Member States from imposing internal taxation on products imported from other Member States when there are no similar domestic products or other domestic products capable of being protected' (see judgment in Case 31/67 *Firma August Stier* v *Hauptzollamt Hamburg-Ericus* [1967] ECR 347). See also *Fink-Frucht* v *Hauptzollamt Muenchen-Landsbergerstrasse* [1968] ECR 327, paragraph 1 of the operative part, and the abovementioned judgment in *Commission* v *France*, cited above (paragraph 15). It is worth noting that the latter judgment, in pointing out that the absence of domestic production does not necessarily entail the conclusion that there is a charge having equivalent effect, particularly where it relates to a general system of internal dues, essentially denied as a general principle that there is a charge having equivalent effect to a duty where there is no domestic production. Finally, as I shall discuss below, to come under Article 95 the charge to tax must form part of a general system of internal dues, which does not necessarily require there to be domestic products the same as or similar to the imported products subject to the tax.

prohibition of discrimination laid down by Article 95 of the Treaty. [11]

19. As regards the main proceedings it is common ground that there is no French production of CB sets.

20. Further, as the French Government stated in its written observations without being contradicted, the revenue from such a charge is not used to finance activities for the special advantage of the taxed domestic products, and does not therefore entirely offset the burden borne by those products. First, the revenue from the tax contributes to the State budget and the general financing of the State's expenditure in all sectors. Secondly, the absence of domestic production of CB sets precludes the application of the abovementioned case-law in connection with the offsetting principle [12] since the Court has held that, for that principle to apply, the taxed product and the domestic product benefiting from it must be the same. [13]

21. Consequently, the issue whether, in the absence of domestic production, a charge such as that in the main proceedings only affects imported products or forms part of a general system of internal dues [14] constitutes the nub of the problem of the classification of the charge in regard to Articles 9, 12 and 95 of the Treaty. That is also reflected in the powerful arguments put forward on that point and on which the observations of not only the French Government and the Commission but also of CRT essentially focus.

22. In order to resolve that issue it is first necessary to rehearse the various criteria for determining whether a charge forms part of a general system of internal dues. A study of the relevant case-law shows that the Court considers [15] it necessary in reaching that determination to take account of the following criteria:

(a) whether the charge forms part of a group of charges governed by common tax rules; [16]

11 — See, for example, judgments in *UCAL* (paragraphs 21 and 22) and *Fricarnes* (paragraphs 23 and 24) cited in footnote 6 and the judgments mentioned there.

12 — See above paragraph 18(d) of my Opinion.

13 — See, for example, judgments in *UCAL* (paragraphs 24) and *Fricarnes* (paragraphs 26) cited in footnote 6. Indeed as Advocate General Tesauro stated in his Opinion in *UCAL* 'In order to determine whether or not the tax burden has been offset, it will obviously be necessary for the revenue from the charge to accrue, at least to some extent, to the taxed domestic product and not only for the benefit of a variety of products' (paragraph 11).

14 — See above paragraph 18(b) and (c) of my Opinion.

15 — See, for example, judgments in *Co-Frutta* (paragraphs 12 and 13) cited in footnote 8 and *Simba and Others* (paragraph 8) and the *Oto* judgment (paragraphs 11 and 12) cited in footnote 9.

16 — In connection with its inclusion in tax arrangements see *Commission* v *France* (paragraph 16) cited at footnote 8.

(b) whether those charges are imposed on categories of products in accordance with objective criteria, and whether a product belongs to such a category. [17]

(c) whether the objective criterion is applied irrespective of the origin of the product in such a way that the fact that the products subject to the charge are of domestic or foreign production has no effect either on the rate, basis or method of collection of the tax. [18] In that connection, the Court held that, in order to form part of a general system of internal dues, the charge imposed on imported products must be imposed on domestic products and imported products at the same marketing stage and the chargeable event must be identical for both classes of products. [19]

(d) whether the proceeds of the charge are specifically earmarked or constitute tax revenue like any other contributing to the financing of general State expenditure in all sectors.

23. At this juncture it should be stressed that the above criteria are always examined in connection with determination of the existence of a *system* of internal dues. That notion of a *system*, whose importance was highlighted by Advocate General Mancini in his Opinion in *Commission* v *Denmark*, [20] sets the parameters within which those criteria are to be examined.

24. Thus, the Court has held that there may be a 'general system' where the internal taxation is imposed on 'whole classes of domestic or foreign products'. [21] In that connection a very restricted number of products has been held not to come within the notion of 'whole classes of domestic or foreign products', which means a large range of products determined on the basis of general and objective criteria. [22]

25. This view of the matter concerning the existence of a system explains why the Court in *Commission* v *France* held that there is such a system even if it does not involve charges imposed on the same products but a

17 — See also in that connection judgment in *Lourenço Dias* (paragraphs 53 and 54) cited in footnote 10.

18 — See also in that connection judgment in *Kortmann* (paragraph 17) cited in footnote 8. See also judgment in *Outokumpu* cited in footnote 6 in which it was held that 'both imported electricity and electricity of domestic origin form part of the same tax system and the duty is levied by the same authorities, whatever the origin of the electricity, under procedures governed by the general legislation on excise duties' (paragraph 22).

19 — See, *inter alia*, judgment in Case 132/78 *Denkavit Loire* v *France* [1979] ECR 1923, paragraph 8. See also judgment in *Outokumpu* (paragraph 24) cited in footnote 6.

20 — See Opinion of Advocate General Mancini in *Commission* v *Denmark* (paragraphs 3 and 4) cited in footnote 7.

21 — See judgment in *Steinike* (paragraph 30) cited in footnote 8 above.

22 — See judgment in *Commission* v *Denmark*, cited in footnote 7, which concerned a charge imposed in Denmark for carrying out hygiene controls on imports of groundnuts and groundnut products (paragraph 24).

range of very different machines which are moreover classified under various customs headings. [23] The stance thus taken by the Court, which appears to have moved on from its earlier view that 'whole classes of products' must contain products 'which are all in the same position', [24] is more in keeping, on the one hand, with the view that applicability of Article 95 of the Treaty does not necessarily require the existence of the same or similar domestic products [25] and, on the other, with the notion of a system of internal taxation which appears to require not so much the existence of similar products bearing the charge as the existence of an overall number of taxes which together perform one or more functions. In that connection, it is not without significance that in *Commission* v *France*, notwithstanding the fact that the charge at issue was borne by a range of apparatus of very different kinds but which had in common the fact that they were all intended to be used for reprographic purposes in addition to more specific uses, [26] the Court, in determining whether the charge at issue formed part of a general system of internal dues, attached particular significance to the ***background*** to the imposition of the charge and to its ***objective***, and found that it formed part of taxation arrangements which owed their origin to the breach made in copyright laws by the increased use of reprography and sought, albeit indirectly, to impose on users of those processes a charge in substitution of the charge to which they would otherwise have been subject. [27]

26. On the basis of the Court's case-law which I have cited, I shall endeavour to analyse the arguments of the French Government and the Commission, on the one hand, and of CRT, on the other.

27. The French Government, whose views are substantially shared by the Commission, [28] refers to the criteria laid down in the *Co-frutta* judgment [29] and seeks to justify the charge as internal taxation within the meaning of Article 95 of the Treaty. In its view the charge at issue does not specifically concern imported CB sets but forms part of a general system of internal dues. That is to be inferred, the French Government says, from the following matters:

— First, the charge at issue forms part of tax arrangements intended to cover the expenditure necessarily incurred by the State in maintaining the spectrum of Hertzian waves within which various kinds of apparatus function, including CB sets.

23 — See *Commission* v *France* (paragraph 17), cited in footnote 8, which concerned a French tax imposed on reprographic machines.

24 — See judgment in *Steinike* (paragraph 30) cited in footnote 8.

25 — See footnote 10 above.

26 — See likewise judgment in *Outokumpu* cited in footnote 6 in which the Court held that the charge at issue in that case formed 'part of a general system of taxation which is levied not only on electrical energy as such but also on several primary energy sources such as coal products, peat, natural gas and pine oil' (paragraph 21).

27 — Cf. judgment in *Commission* v *France* (paragraph 16) cited in footnote 8.

28 — The Commission also pointed out that complaints were made about the charge in question in 1993 and 1994 which, however, were filed. In general the Commission states, without offering a detailed analysis, that, in regard to those complaints, it concluded that the charge at issue constituted internal taxation within the meaning of Article 95 of the Treaty. It also stated that it is taking part in a working group set up to study the burdens imposed by the Member States in connection with the operation of telecommunications frequencies and networks.

29 — Cited in footnote 8.

— Secondly, the charging provision at issue forms part of a group of similar imposts on a category of products of the same or similar nature. In that connection, the French Government refers generally to corresponding national provisions and states that the radio and telecommunications installations, and the GSM networks, or private taxi or ambulance networks, operate on a licence and are subject to contributions for availability and operation in order to offset the burdens entailed by use of the Hertzian network. It also states that persons tuned into radio-electric frequencies pay an annual contribution for the availability and use of the frequencies. The French Government maintains, then, that the charge at issue forms part of a series of contributions, whilst at the same time pointing out that, for purposes of simplification and in accordance with the recommendations of the European Conference on Posts and Telecommunications, the previous licence for use of CB sets was abolished with effect from 1 January 1992 and, as from 1 January 1993, the charge was transferred from the users to the manufacturers, importers and persons engaged in intra-Community marketing of CB sets.

— Thirdly, the charge is levied on the basis of objective criteria, regardless of the origin of the product. In actual fact, the charge is imposed on all sets complying with the French rules, whilst neither the rate, the basis of assessment or the method of collection of the charge is dependent on the characteristics (even where they are combined 'radio and CB sets'), price or origin of the product.

— Fourthly, the charge is not specifically earmarked for any particular budgetary allocation; the proceeds from it constitute public revenue which, like any other, contributes generally to the financing of State expenditure in all sectors.

28. Of the above points only the first and second are in essence called in question. Thus, CRT submits that the charge at issue does not meet the same criteria and is not governed by the same rules as the contributions to which the users of radio-electric networks are subject. Specifically, CRT states that CB sets are the only telecommunications equipment to be specially charged to tax. The importation, sale or manufacture of mobile telephones, radiotelephones used within private networks by taxi companies or ambulances, cordless telephones, or even walkie-talkies is not subject to any particular charge to tax. Only persons operating telecommunications networks pay special contributions. CRT refers generally to national legislation as regards the amount of such contributions and states that those are either contributions on the establishment of a

dossier payable by persons seeking or holding authorisations in regard to the networks and telecommunications services or an annual contribution proportionate to the frequency which persons operating radio-electric networks are authorised to use for the availability and use of the frequencies conferred on them. Conversely, as CRT states, neither the use of walkie-talkie sets, mobile telephones or of their frequencies is subject to any charge to tax, in the same way as their users do not occupy any specific frequency but like users of CB sets and other medical, industrial and academic applications operating on the same frequencies, are exercising the general right to use things in the public domain belonging to everyone. Accordingly, CRT maintains, the charge to tax on CB sets is not akin to any other charge. Nor, moreover, is it in the final analysis associated with use of the Hertzian network because, first, it is not imposed on the user but on the importer, secondly, being based on the number of sets and not calculated on the basis of frequencies made available, it is not imposed according to the same criteria applicable to the tax treatment of other apparatus and, thirdly, CB sets not intended for use in France, though supplied in France, are not exempt from the charge.

29. In fact, the relevant question as to whether the charge at issue forms part of a general system of internal dues appears to be whether the method of charging the CB sets to tax in relation to other apparatus operating on the radio-electric telecommunications networks results in that charge falling outside the general system of internal dues for the use of the radio-electric spectrum of frequencies. [30]

30. As the Commission has stated, France, like any Member State, may impose on users of the telecommunications networks a contribution to offset network-operating charges. Contrary to what appears to be CRT's assertions, that right may in my view subsist even where use of the network is not subject to prior authorisation because the charge is justified by the general need for maintenance and to deal with any disruptions to the network; that need continues to exist even where the user is availing himself of his right of free use of things in the public domain. Consequently, on the basis of the *historical background and the purpose* of the charge at issue, [31] the latter would indeed appear to form part of a general system of internal dues for the use of the telecommunications networks whose application is uncontestedly governed by criteria which are objective,

30 — Plainly, and this is not called in question by the parties to the main proceedings, whether the charge comes within a general system of internal dues falls to be determined on the basis of a comparison between the charge to tax on CB sets and the charge imposed on other apparatus, since by themselves CB sets cannot constitute a 'whole class of products', as required by the case-law (see above at paragraph 24 of my Opinion).

31 — See the criterion laid down in *Commission* v *France*, cited above in footnote 8.

that is to say unaffected by the origin of the sets.

31. None the less, if we turn to examine the method by which the charge to tax on CB sets is imposed, we find that not only does it differ from the method of imposing a charge to tax for the use of other apparatus, inasmuch as it is the supply of CB sets which is charged to tax, as CRT has stated without being contradicted, whilst in the case of other apparatus it is the use which is charged to tax, but such differentiation is also difficult to justify in light of its objective, on the one hand, and in view of the specific manner in which CB sets are used, on the other. Indeed, I am unswayed by the French Government's argument that abolition of the previous requirement for authorisation to use CB sets justifies altering the chargeable event and imposing the charge on manufacturers or importers of the sets rather than their users. [32] First, the alteration in the method by which the charge is imposed and the chargeable event does not appear to be necessary. For example, since users of CB sets no longer require authorisation to use them, in order to ensure payment of the charge, the payment could be linked not to the supply of the apparatus but to a declaration of use for tax purposes only. Secondly, the above alteration does not appear appropriate in order to achieve its purpose. In actual fact, it is difficult to accept that, for purposes of simplification of procedure and its assimilation to the procedure for collection of VAT, that it is the commercial supply of the apparatus which should be chargeable to tax and not the use thereof. Likewise it is difficult to uphold the arguments put forward at the hearing by the French Government in order to justify the alteration in the method by which the charge to tax on CB sets is imposed. First, it was argued that the alteration is based on the educative idea that persons selling the sets would draw attention to the new charge by informing their customers that no one can use the apparatus cost-free and that their use impacts on all users of the frequency range; the second argument was that, in practice, as a consequence of the increase in the sales price of the apparatus in question, the charge is passed on to the end purchaser/user. On the one hand, as CRT observed, from a sales point of view it is one thing for a customer to buy apparatus and, subsequently to pay a charge for its use, and quite another matter to buy the apparatus at a price directly increased by the amount of the charge. On the other hand, in the present case it is undisputed that the charge is payable even where the apparatus is supplied in France on a wholesale basis, is re-exported and used by the end purchaser outside France. In such a case there is no longer any causal link between the charge to tax and use of the apparatus in France, which also negates the French Government's argument concerning the passing on of the charge to the end user of the apparatus.

32. In light of the foregoing I consider that the gap between the objective and the method of collection of a charge such as the gap characterising the charge at issue, results in that charge no longer forming part of a general system of internal dues. Does that not lead to the charge at issue being classified in law as a charge having effect equivalent to a customs duty?

32 — On the burden of proof of whether a charge comes within a general system of internal dues and, incidentally, with whether a charge is contrary to the Treaty, see below at paragraph 47 of my Opinion.

33. At the outset I would recall that the gap between objective and method of collection, as in the present case, cannot justify the existence of a charge having equivalent effect to a customs duty; where it constitutes a charge which falls outside the system of internal dues, and is in the end imposed solely on imported products, it thus impedes — irrespective of discrimination or any protective policy in favour of domestic products contrary to Article 95 of the Treaty — the free movement of goods and the establishment of the single market. [33]

In fact, as CRT has observed, since the charge at issue solely affects supply of CB sets and not necessarily their use, it may affect the free movement within the Community of the product in question. In actual fact, it is not disputed that the charge at issue is also imposed on CB sets imported into France and supplied not with the purpose that the person taking delivery of them from the exporter should use them in France but that they should, for example, be re-exported.

Moreover, in the absence of domestic production, the proceeds of the charge at issue would appear, as the Commission has also observed, to be collected solely on imports of the CB sets.

34. It should be said that it has been held that a charge does not have equivalent effect to a customs duty where it represents payment for a service rendered to the importer of a sum in proportion to that service. [34] As CRT stated in its written observations without being contradicted, the charge to tax at issue in the main proceedings is not used to finance the provision of any service to importers of CB sets. Moreover, as CRT has correctly observed, availability for use of frequencies of the Hertzian spectrum does not constitute a service within the meaning of the Court's case-law cited above and, in any event, it is not the importers who use those frequencies.

35. Finally, a charge has been held not to have equivalent effect to a customs duty where it is levied on account of inspections carried out for the purpose of fulfilling obligations imposed by Community law. [35] However, the conclusion to be drawn from the file and particularly from the written observations of the French Government is that the charge at issue in the main proceedings plainly constitutes an amendment to an existing charge which was intended to offset the burden of maintaining the telecommunications networks; accordingly, it is not imposed on account of inspections carried out for the purpose of fulfilling obligations imposed by Community law and, therefore, is not on all fours with the aforementioned Court judgment.

33 — See above paragraph 14 of my Opinion.

34 — See, *inter alia*, judgment in Case 158/82 *Commission* v *Denmark* (paragraph 19) cited above in footnote 7.

35 — See, *inter alia*, judgment in Case C-130/93 *Lamaire* [1994] ECR I-3215, paragraph 14.

36. Accordingly, even if there cannot be acknowledged to be a general principle whereby the absence of domestic production of the goods chargeable to tax leads to the conclusion that the charge to tax constitutes a charge having equivalent effect to a customs duty, [36] that absence together with the fact that the charge, first, does not form part of a general system of internal dues, secondly does not represent payment for a service rendered to the importer or is not levied on account of inspections carried out for the purpose of fulfilling obligations imposed by Community law and, thirdly, may restrict the free movement of goods within the Community, militates in favour of the view that the charge at issue, however great or small and whatever its designation and method of collection, constitutes a charge to tax having equivalent effect to a customs duty.

37. In light of the foregoing I consider that a charge to tax such as that in the main proceedings must be classified as a charge having equivalent effect to a customs duty within the meaning of Articles 9 and 12 of the Treaty.

(b) Compatibility of the charge with Articles 9, 12 and 95 of the Treaty

38. If a charge to tax such as that in the main proceedings constitutes a charge having equivalent effect to a customs duty within the meaning of Articles 9 and 12 of the Treaty, it then falls to examine whether such a charge is compatible with those provisions.

39. In that connection it should be pointed out that under the Court's case-law the prohibition on charges having equivalent effect to a customs duty extends to include any such charge. [37]

I would also point out that the prohibition on charges having equivalent effect to customs duties under Articles 9 and 12 of the Treaty is quite apart from the existence of discrimination, protectionism and the strengthening of the competitive position of domestic production against products originating in other countries. [38] Accordingly, that prohibition is not dependent on the existence of domestic production.

It should also be emphasised that the above prohibition applies both to products from the other Member States or from non-Member States but which are in free circulation within the Member States, as expressly mentioned in Article 9(2) of the Treaty and as a matter of

36 — See footnote 10 above.

37 — Given that the cases mentioned above at paragraphs 34 and 35 do not under the case-law constitute exceptions from the prohibition on charges having equivalent effect to a customs duty but cases in which such charges do not exist, the prohibition in Articles 9 and 12 of the Treaty could, then, be classified as an absolute prohibition on charges having equivalent effect to a customs duty.

38 — See above paragraph 18.

principle to products coming directly from non-Member States.

In fact, under Article 9(1) of the Treaty, the Community is based on a customs union which covers all trade in goods and includes the adoption of a common customs tariff 'intended to achieve an equalisation of customs charges levied at the frontiers of the Community on products imported from non-member countries, in order to avoid any distortion of free internal circulation or of competitive conditions'. Secondly, under Article 113(1) of the Treaty introducing the common commercial policy 'definition of the uniform principles on which the common commercial policy is based involves, as does the Common Customs Tariff itself, the elimination of national disparities, whether in the field of taxation or of commerce, affecting trade with non-member countries' and that 'accordingly ... Member States may not, after 1 July 1968, unilaterally introduce new charges on goods imported directly from non-member countries or raise the level of those in existence at that time'. [39]

Likewise, the Court has held that the prohibition as regards trade with non-Member States is not absolute and that when they impose that prohibition the Community institutions may make exceptions or derogations from it provided that the intrinsic effect of such charges on the relevant trade with third countries must be uniform in all the Member States. [40]

Finally, the Court has acknowledged that 'where the prohibition of such charges is contained in bilateral or multilateral agreements concluded by the Community with one or more non-member countries with a view to eliminating obstacles to trade ... the scope of that prohibition is the same as in the case of intra-Community trade'. [41]

The inference to be drawn from the judgments referred to above, then, is that, subject to any contract terms or special Community provisions in connection with certain kinds of products or certain non-Member States, which provisions must be aimed at ensuring uniformity of the common commercial policy, the prohibition on charges having equivalent effect to a customs duty applies also in regard to trade directly with non-Member States.

40. As is apparent from the file, the CB sets supplied in France are not manufactured in France, [42] but are either imported directly from the Far East where they are made or, as

39 — See, *inter alia*, judgment in Case C-126/94 *Cadi Surgelés and Others* [1996] ECR I-5647, paragraphs 13 to 19.

40 — See judgment in Case 70/77 *Simmenthal* [1978] ECR 455, paragraphs 26 and 27.

41 — See judgment in *Aprile* (paragraph 42) cited above in footnote 5.

42 — See also paragraph 19 above.

CRT stated without being substantively contradicted, [43] are traded in the context of intra-Community marketing. However, it is not clear from the file whether there is any Community production of such apparatus, [44] or under what circumstances there is intra-Community marketing in CB sets or, finally, whether the sets at issue, if they do form the subject-matter of intra-Community marketing, meet the preconditions of Article 10 of the Treaty so as to be classified as products in free circulation within the Member States, as is maintained on behalf of CRT. Consequently, it is for the national court to shed light on the matters of fact raised above and to decide, after perhaps submitting a fresh question to the Court for a preliminary ruling, on the classification of certain CB sets as products in free circulation within the Member States.

However, that classification does not alter the fact that the charge at issue is contrary to the Treaty if — the sets in question being deemed to have been imported directly from non-Member States — there are no special contractual or unilateral Community provisions in connection with trade in CB sets or trade with the non-Member States from which they are imported, which provisions must be intended to aim at uniformity of the common commercial policy, thus allowing charges having equivalent effect to customs duty to be imposed on those sets.

With regard to the present case, there are, as far as I can tell, no special Community provisions, whether bilateral or unilateral which, for the sake of uniformity of the common commercial policy, would allow the French Government to impose or maintain in force charges having equivalent effect to customs duties on imported CB sets generally originating in non-Member States. Moreover, neither the French Government nor the Commission mentioned any such provisions in their observations.

Furthermore, notwithstanding the fact that it is undisputed that the majority of CB sets are imported into France from the Far East and that CRT states that Malaysia and Thailand in particular are the countries of origin of the sets, there are no precise details in the file of all the countries from which those products are imported. Therefore, it will be for the national court to clarify the exact origin of the imported CB sets in order that it may be determined whether for each one of the countries of origin of the sets there are any relevant special Community provisions.

43 — In its written observations the French Government accepted that the majority of the CB sets are imported into France from the Far East, whilst however not excluding that there may be intracommunity marketing of apparatus originating in other Member States (see written observations of the French Government, paragraphs 16 and 17).

44 — None the less, notwithstanding the fact that it is not clear from the file that there is no Community production of CB sets it should be pointed out that if the CB sets imported into France were found to be of Community origin, there could be doubt as to the application of the prohibitions contained in Articles 9 and 12 of the Treaty.

41. CRT also points out in its written observations that the imposition of the charge at issue has had severe consequences on the market for CBs in France and a major impact on intra-Community trade. Indeed it adduces statistical evidence showing the fall in turnover recorded by importers of CB sets in connection with the reduction in sales of CB sets in France, as well as in connection with the fall in turnover of Italian producers of aerials and accessories of CB sets. It also points out that, as in the case of all charges which have a deterrent effect, the charge at issue has caused distortion of competition and deflection of trade within the Community. In fact, it states that, since a French user of a CB set who is supplied the apparatus abroad is not liable to pay the charge at issue, a certain number of Belgian and Luxembourg undertakings have since 1993 been offering to French users CB sets approved by the Posts and Telecommunications Administration and supplied tax-free, whilst French undertakings are entirely without protection against such competition.

As regards the above points, it should be recalled that, apart from the fact that it is for the national court, which is best acquainted with the nature of the French market and the legal regime applicable to approved CB sets, to review their correctness, the, as it were, absolute prohibition on charges having equivalent effect to a customs duty under Articles 9, 12 and 113(1) of the Treaty is not dependent on the amount in each case of the charge having equivalent effect to a customs duty. [45] At the same time, whilst the prohibition in question is justified by the need for protection of the free movement of goods within the Community [46] and in particular, as regards the imposition of charges having equivalent effect to customs duties in trade with non-Member States, by the need for a uniform commercial policy and the avoidance of any distortion of the free circulation of goods within the Community or of competitive conditions, [47] it is not essential under the case-law to show, for the purposes of application of that prohibition, a given level of restriction of free trade or any specific degree of distortion of competitive conditions. Moreover, that is in keeping with the, as it were, absolute nature of the prohibition in question which is a prohibition in principle not dependent on the degree of severity of the unfair consequences of the charge on Community trade or the common commercial policy.

42. In light of the foregoing I consider that Articles 9, 12 and 113(1) [48] of the Treaty are to be interpreted as precluding a charge having equivalent effect to a customs duty, such as the national measure at issue in the main proceedings, subject to the reservation that there are no contractual or unilateral special Community provisions intended to secure uniform-

45 — See above paragraph 18.

46 — See above paragraph 16.

47 — See above paragraph 39.

48 — On the ability of the Court to interpret provisions of Community law not referred to in the order for reference by the national court see below at footnote 74.

ity of the common commercial policy and, on that basis, allowing such charges having equivalent effect to customs duty to be imposed in the context of the direct trade carried on by the Member State with the non-Member States from which the products subject to the charge may be imported.

43. If notwithstanding these matters the Court should rule that the charge to tax at issue does not constitute a charge having equivalent effect to a customs duty but internal taxation within the meaning of Article 95 of the Treaty, I consider it useful for the sake of completeness to formulate in what follows certain points concerning the compatibility or otherwise of such a charge with the relevant Treaty article.

44. First, it is settled case-law that Article 95 of the Treaty seeks to secure the free movement of goods between the Member States under normal competitive conditions by eliminating all forms of protection resulting from the application of internal taxation which discriminates against products from other Member States. [49] Accordingly, a system of taxation can be considered compatible with Article 95 of the Treaty only if it is so arranged as to exclude any possibility of imported products being taxed more heavily than domestic products. [50]

Indeed, in order to determine whether or not discrimination is inherent in a tax system it is necessary to take into consideration not only the rates of tax but also the basis of assessment and the detailed rules for collecting the various charges. [51] In fact, the decisive criterion for purposes of comparison with a view to the application of Article 95 is the actual effect of each tax on domestic production, on the one hand, and on imported products, on the other. Even where the rate is the same, the effect of the tax may vary according to the detailed rules for the assessment and collection thereof applied to domestic production and imported products. [52]

It has also been consistently held [53] that, in its present state of development, Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article 95 of the Treaty, on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law, however, only if it pursues objectives which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or

49 — See, for example, judgment in *Grundig* (paragraph 11) cited above in footnote 9.

50 — See, *inter alia*, judgments in Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3141, paragraph 21, and *Grundig* (paragraph 12) cited above in footnote 9.

51 — Case 55/79 *Commission* v *Ireland* [1980] ECR 481, paragraph 8.

52 — See judgment in *Grundig* (paragraph 13) cited above in footnote 9.

53 — See, *inter alia*, judgments in Case 196/85 *Commission* v *France* [1987] ECR 1597, paragraph 6, and in *Haahr Petroleum* (paragraph 29) and *Outokumpu* (paragraph 30), both cited above in footnote 6.

indirect, against imports from other Member States or any form of protection of competing domestic products.

Moreover, the Court has already ruled that a criterion for the charging of higher taxation, which by definition can never be fulfilled by domestic products similar to or in competition with products imported from other Member States as described above, cannot be considered to be compatible with the prohibition of discrimination laid down in that provision. Such a system has the effect of excluding domestic products in advance from the heaviest taxation. [54] Likewise, the Court has held that such differential taxation is incompatible with Community law if the products most heavily taxed are, by their very nature, imported products. [55]

Finally, the Court has held that internal taxation infringes Article 95 of the Treaty when it indirectly imposes a heavier burden on products from other Member States than on domestic products, if it is used exclusively or principally to finance aids for the sole benefit of domestic products. [56] In the present case, however, that criterion is not fulfilled since, as the French Government observed without being contradicted, the proceeds of the charge at issue are wholly earmarked for the State general budget.

45. Secondly, it has been consistently held that, contrary to the prohibitions under Articles 9 and 12 of the Treaty, 'Article 95 applies only to goods imported from other Member States and, where appropriate, to goods originating in non-member countries which are in free circulation in the Member States. It follows that that provision is not applicable to products imported directly from non-member countries.' [57] It has also been held that 'so far as concerns the possibility of applying Article 113 of the Treaty, it is important to note that the Treaty does not contain any provision similar to Article 95 regarding domestic taxation in respect of trade with non-member countries, subject, however, to any Treaty provisions which may be in force between the Community and the country of origin of a given product ... and that although Article 113 confers upon the Community powers which enable it to take any appropriate measure concerning the common commercial policy, it nevertheless does not in itself contain any legal criterion which is sufficiently precise to enable an assessment of the contested national rules to be made'. [58]

54 — Judgment in Case 319/81 *Commission* v *Italy* [1983] ECR 601, paragraph 17.

55 — Judgment in Case 106/84 *Commission* v *Denmark* [1986] ECR 833, paragraph 21, and *Haahr Petroleum* (paragraph 30) cited above in footnote 6.

56 — Judgment in Case 73/79 *Commission* v *Italy* [1980] ECR 1533.

57 — Judgments in Case C-284/96 *Tabouillot* [1997] ECR I-7471, paragraph 21), Joined Cases C-114/95 and C-115/95 *Texaco* [1997] ECR I-4263, paragraph 35, and in *Oto* (paragraph 18) and *Haahr Petroleum* (paragraph 26) cited above in footnote 6.

58 — Judgment in *Oto* (paragraph 20) cited above in footnote 9.

It follows from the foregoing that the prohibitions under Article 95 of the Treaty apply in the present case to CB sets imported into France from other Member States and to sets manufactured in non-Member States which are in free circulation in the Member States. However, it is for the national court to determine precisely whether there are sets in free circulation in the Community and from which non-Member States they are imported directly into France so that a finding may be made as to whether there are agreements between the Community and those countries negating the principle that the prohibition under Article 95 of the Treaty does not apply to products imported directly from non-Member States. [59] It is worth pointing out that it is for the national court, after seeking, if necessary, a preliminary ruling from the Court on the interpretation of the provisions of the international agreements, to determine whether those provisions are of a nature effectively to prohibit a Member State from levying internal taxation on products imported directly from non-member States. [60]

46. Thirdly, as has already been stated, the Court has held that 'Article 95 cannot be invoked against internal taxation imposed on imported products where there is no similar or competing domestic production'. [61]

As regards interpretation of the similarity of products on which the prohibition in the first paragraph of Article 95 is based, it has been consistently held that in order to determine whether products are similar, the test is not whether they are strictly identical but whether their use is similar and comparable. In fact, even though there are no domestic products subject to the charge which are entirely identical to imported taxable products, it must always be examined whether there are other domestic products which have similar characteristics and meet the same needs from the point of view of consumers. [62]

As regards interpretation of competing products under the second paragraph of Article 95, it has been held that imported products, even though not similar, within the meaning of the first paragraph of Article 95, to domestic products, may nevertheless be in a competitive relationship with some of them, even if only partially, indirectly or potentially. [63] The Court has also consistently held that the assessment of the compatibility of a fiscal charge with the second paragraph of Article 95 must take account of the impact of that charge on the competitive relationships between the products concerned. The essential question is therefore whether or not the charge is of such a kind as to have the effect, on the market in question, of reducing potential consumption of the imported products to the advantage of competing domestic

59 — See above paragraph 40.

60 — Judgment in *Simba* (paragraph 22) cited above in footnote 9.

61 — Judgment in *Commission* v *Denmark* (paragraph 10) cited above in footnote 10.

62 — See, for example, judgments in Case 243/84 *John Walker* [1986] ECR 875, paragraph 11, and Joined Cases C-367/93 and C-377/93 *Roders and Others* [1995] ECR I-2229, paragraph 27.

63 — See, for example, judgments in Case C-230/89 *Commission* v *Greece* [1991] ECR I-1909, paragraph 8 and judgments there cited, and *Roders and Others* (paragraph 38) cited above in footnote 62.

products (see the judgment in Case 356/85, paragraph 15). In that connection, the national court must have regard to the difference between the selling prices of the products in question and the impact of that difference on the consumer's choice, as well as to changes in the consumption of those products. [64]

Moreover, it has also been held that, whilst the criterion indicated in the first paragraph of Article 95 consists in the comparison of tax burdens, whether in terms of the rate, the mode of assessment or other detailed rules for the application thereof, in view of the difficulty of making sufficiently precise comparisons between the products in question, the second paragraph of that Article is based upon a more general criterion, in other words the protective nature of the system of internal taxation. [65]

In my view, inasmuch as recourse to the criterion of the general system of internal taxation constitutes, as in the present case, an essential precondition for bringing the charge within the terms of Article 95, recourse must similarly be had to that criterion in order to assess whether there are any similar domestic products and, if so, whether they are discriminated against within the meaning of the first paragraph of Article 95. In other words, not only products competing with imported CB sets as defined in the second paragraph of Article 95, but domestic products similar to them must be identified in the context of products coming within the general system of internal taxation on the use of the telecommunications networks. [66] In that connection, contrary to the French Government's assertions, [67] it is not a correct view of the matter to say that whether there is discrimination between imported and similar products or whether the charge is protectionist falls to be determined solely in regard to the charge at issue. I consider that that matter must be determined against the overall context of a comparison between the charge on CB sets at issue and the charges on other apparatus using the networks, so long as they may be described as 'domestic products' 'similar' to or 'competing' with CB sets.

In actual fact, just as in the present case it is undisputed that there is no French production of CB sets, so there is no question of doubt either that there are other products more of less similar to CB sets which also operate within the telecommunications networks and that the method of subjecting those products to taxation is different from the method applied in the case of CB sets. Cer-

64 — Judgment in *Roders and Others* (paragraph 39) cited above in footnote 62.

65 — Judgment in Case 169/78 *Commission* v *France* [1980] ECR 385, paragraph 7.

66 — On this point I should stress that my view of this matter does not conflict with the earlier finding that the fact that a charge forms part of a general system of internal taxation giving rise to the application of Article 95 of the Treaty does not necessarily presuppose the existence of the same or similar domestic products (see above at footnote 10 and paragraph 25). It simply means that once a charge is found to form part of a general system, thus bringing the charge under Article 95 of the Treaty, the national court must look within that system for any similar of competing products within the meaning of Article 95.

67 — According to the French Government, it is sufficient to establish that there is no discrimination in regard to CB sets where certain of them originate in other Member States. And indeed, as the French Government said without being contradicted, there is no such discrimination. Under the charge to tax on CB sets the only discrimination is that concerning exemption from the charge for sets complying with European Standard ETS 300/135. However, as the French Government correctly observed without being contradicted, that discrimination is based on an objective criterion (high-powered sets which, in accordance with the European Standard, do not overall cause severe disruption) unconnected with the origin of the sets in question.

tainly, in its written observations the French Government states generally that there are no products competing with imported CB sets, owing to their particular features. However, owing to the general terms in which it is couched that contention, even though it was not expressly called in question, is not sufficient to rule out the possibility that there may be competing products amongst apparatus similar to CB sets. In fact, it is not precisely clear from the file which kinds of apparatus may compete with CB sets, [68] what their characteristic features may be in comparison with CB sets, [69] what their origin may be, what specific consumer needs they serve or, finally, whether they are in a competitive relationship with CB sets, even if only partially, indirectly or potentially. It is therefore for the national court to reach a determination on the above matters and to judge, in light of the case-law citations set out above, whether and if so which of the kinds of apparatus in question may be described as 'similar or competing domestic products' for the purposes of Article 95 of the Treaty and, secondly, whether the charge to tax on imported CB sets compared with charges on the other kinds of apparatus mentioned above come within the terms of the prohibitions under that article. Thereupon, it is again for the national court to judge whether, in light of those interim findings, the justification put forward by the French Government for the different method of subjecting CB sets to taxation on account of their particular characteristics may be regarded as sufficient to satisfy Article 95 of the Treaty and the Court's relevant case-law. [70]

47. Fourthly, it should be pointed out that, if in the end there is found to be a system of internal taxation which is lacking in transparency — a matter which would only become clear after elucidation of the above matters by the national court — it has been held that the *onus* is on the government of the Member State to prove that system cannot have any discriminatory effect and thus is not contrary to Article 95 of the Treaty. [71]

48. Fifthly, in the event that there is found to be no similar or competing domestic production, it is not permissible to impose on products which, in the absence of comparable domestic production, escape the application of the prohibitions contained in Article 95 charges of such an amount that the free movement of goods within the common market would be impeded as far as those imported

68 — The file shows that the parties in the main proceedings mention radio-telephone and telecommunications networks, such as the GSM networks, or private networks operated by taxi companies or ambulance services, mobile telephones, cordless telephones, and walkie-talkies, but also apparatus for use in connection with academic, industrial and medical applications, without its being clear that it is only such apparatus which can be regarded as 'competing' (see above paragraphs 27 and 28).

69 — At the hearing CRT in summary stated, and their statement was not challenged, that Citizen Band sets are high-powered transmitting-receiving sets operating on 40 channels, as determined under the applicable rules, which chiefly permit communication between correspondents within a narrow circumference. Such apparatus, CRT explained further, is used chiefly by lorry drivers who wish to communicate amongst themselves in random manner, and thus are not seeking to be connected to a specific correspondent, as happens with the telephone, but are seeking out at random any interlocutor who happens to be nearby. In CRT's view, such apparatus does not enjoy a good reputation with the French administrative authorities because it is suspected of being used either by the abovementioned drivers in order to circumvent official checks or radar controls or by protesters.

70 — See above paragraph 44.

71 — See, *inter alia*, judgment in Case C-327/90 *Commission* v *Greece* [1992] ECR I-3033, paragraph 20.

products are concerned. [72] On that point the Court, in regard to the relationship, as defined in its case-law, as between Article 95 and Article 30 et seq. of the Treaty, has held that where it is not a case in which the prohibitions under Article 95 apply and the internal taxation, owing to its considerable extent, is likely to have an adverse effect on the free movement of goods 'the only possibility of appraising an adverse effect of that kind ... is by reference to the general rules contained in Article 30 et seq. of the Treaty ...'. [73] In the event of its being applied by the national court it may not be superfluous for some clarification to be provided concerning Article 30 of the Treaty, notwithstanding the fact that the national court has made no request for its interpretation. [74]

49. At the outset it should be pointed out that Article 30 of the Treaty, which prohibits all measures having equivalent effect to quantitative restrictions on imports, applies, on the one hand, to products imported from other Member States and, on the other, to products originating in non-Member States in free circulation within the Community, except where the Member State has been authorised by the Commission under Article 115 of the Treaty not to apply Community treatment to the products in question. [75] Conversely, measures having equivalent effect to quantitative restrictions affecting imported products originating directly in non-Member States do not come within Article 30 but form part of the common commercial policy under Articles 113 and 115 of the Treaty and under the special unilateral or contractual arrangements made by the Community under those provisions. [76] However, it is for the Court, as I have already stated, [77] to determine as a matter of fact the precise origin of the imported CB sets in order also to reach a decision as to the extent of any application of Article 30 of the Treaty on the basis of the matters set out above.

50. I should also point out that it has been consistently held, starting with the Court's judgment of 11 July 1974 *Dassonville*, [78] that any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade is to be deemed to be a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty.

72 — See *Stier* judgment and *Commission* v *Denmark* (paragraphs 12 and 13) both cited in footnote 10.

73 — Judgment in *Commission* v *Denmark* (paragraph 13) cited above in footnote 10.

74 — The Court has held that, as part of its mission, which is to assist in the administration of justice in the Member States, and in order to provide the national court with a useful answer, it is its duty to interpret all provisions of Community law which national courts need in order to decide the actions pending before them. For that reason it may indeed need to give consideration to provisions not expressly indicated in the questions referred to the Court of Justice by those courts. See, for example, judgments in Case C-280/91 *Viessmann* [1993] ECR I-971, paragraph 17, Case C-114/91 *Claeys* [1992] ECR I-6559, paragraphs 10 and 11 and Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9.
It is also worth noting that there is nothing in the pleadings to support the inference that the national court intended to request a preliminary ruling only on the interpretation of Articles 9, 12 and 95 of the Treaty. See to the opposite effect judgment in Case 247/86 *Alsatel* [1988] ECR 5987 in which the national court was ruled to have tacitly refused to put a question to the Court on the interpretation of a provision on which the order for reference was silent (paragraph 8).

75 — See judgments in Case 212/88 *Levy* [1989] ECR 3511, paragraph 17 and Case C-131/93 *Commission* v *Germany* [1994] ECR I-3303, paragraph 10.

76 — Judgment in Joined Cases 51/71 and 54/71 *International Fruit Company* [1971] ECR 1107, paragraph 10.

77 — See above paragraph 40.

78 — Case 8/74 *Dassonville* [1974] ECR 411.

In light of that case-law a judgment will have to be made, then, as to whether the charge at issue on imported CB sets is of such an amount as to restrict the possibility of imports of those products and in general terms the free movement thereof in the sphere of intra-Community trade. [79]

According to CRT's observations, [80] the amount of that charge was of such an amount as to have doubled the price of CB sets, significantly reduced sales and severely affected both domestic — French — and Community trade, with the result that the conclusion to be drawn is that the charge at issue is capable of restricting imports.

The correctness of the matters relied on by CRT and the resulting effect which they are likely to have on intra-Community trade must in my view be adjudged after the criterion as to the charge of *such an amount* has been applied. For I consider that the answer on that point is provided by the judgment in *Stier* according to which 'a restraint on the free movement of goods cannot however be presumed to exist when the rate of taxation remains within the general framework of the national system of taxation of which the tax in question is an integral part'. [81]

Thus, in the present case, the amount of the charge on CB sets will have to be deemed to be of such an amount as to cause the adverse effects on intra-Community trade mentioned above, if the rate of the tax charge goes beyond the general framework of the national system of taxation of which the charge at issue is presumed to form part such as to give it the character of an internal due. [82]

In that connection, since, apart from certain general references to the relevant national provisions, the pleadings in the case do not contain all the essential elements, it is for the national court, which knows best and in greatest detail the national provisions concerning the various charges imposed on the use of the telecommunications network or on the apparatus operating within them, to clarify the general context as regards rates charged within the system of internal taxation of which the charge at issue forms part and whether the rate of tax as regards the charge at issue goes beyond that framework or departs from that norm.

79 — I consider that, in light of the decision in *Commission* v *Denmark* (see paragraph 48 above) only the issue of the restriction of free circulation as a result of the amount of the charge can be raised here and not other issues such as discrimination between domestic and Community products; those issues which presuppose that there is domestic production fall to be determined, if there is such production, in the light of the provisions of Article 95 of the Treaty.

80 — See above paragraph 41.

81 — Cited above in footnote 10.

82 — See above paragraphs 21 et seq.
However, it is worth pointing out on this point the difficulty that exists in the present case in comparing the rate of the charge at issue with rates charged on the use of other kinds of apparatus operating within the telecommunications network, inasmuch as the charge at issue relates to the value of the apparatus whilst in other cases the charge appears to be dependent upon the breadth of frequencies granted. That difficulty is not without significance as regards the preliminary issue as to whether in the final analysis the charge at issue forms part of a general system of internal taxation. Conversely it makes apparent the difficulty in accepting such a view (see above paragraphs 29 and 32).

## VI — Conclusion

51. In light of the foregoing I propose that the Court should reply as follows to the questions submitted by the Tribunal administratif, Dijon, for a preliminary ruling:

— In light of Articles 9, 12 and 95 of the Treaty a national provision, such as the charge to tax imposed by France on the manufacturers, importers and sellers within the Member State in question of transmitting-receiving sets operating on citizen-band frequencies under Article 302 *bis* (X) of the General Tax Code, constitutes a charge having equivalent effect to a customs duty within the meaning of Articles 9 and 12 of the Treaty.

— Articles 9, 12 and 113(1) of the Treaty preclude a national provision imposing a charge to tax having equivalent effect to a customs duty, such as the above-mentioned charge, provided that there are no special contractual or unilateral Community provisions seeking uniformity of the common commercial policy, thus allowing charges having equivalent effect to customs duty to be imposed in the sphere of the Member State's direct trade with the non-Member States from which the products charged to tax are imported.