OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 24 JANUARY 1973 [1]

Mr President,
Members of the Court,

The undertaking Fonderie Officine Riunite 'FOR', of Biella (Italy), plaintiffs in the national proceedings, that have led to the application for a preliminary ruling that is before us today, produces machinery for the textile industry. It has exported such machinery to the Federal German Republic during the years 1962 to 1967. In the course of such dealings it was agreed that Biella was to be the place of delivery and of payment and that the purchasers were to discharge the taxes and duties payable at the frontier on importation. This happened in the sense, that the turnover equalization tax due under the German Umsatzsteuergesetz (Law on Turnover tax) of 1 September 1951 amounting to 6 per cent of the value of the machinery was paid by the purchasers.

After importation the machines were erected with the aid of FOR 's technical personnel and transformed into installations ready to operate. The German Steuerbehörde (Tax authority) (in this case the tax office at Bentheim) sees in this event the occurence of a so-called supply of goods and provision of services ('Werklieferung') by FOR in the Federal German Republic within the meaning of paragraph 3 of the German turnover tax, i.e. they take the view that the act of installation gave rise to a new marketable entity in respect of which FOR had on the basis of contractual obligations provided the main component. For that reason the Finanzamt in Bentheim considered itself obliged to demand from FOR turnover tax of an amount of 4 per cent of the total value of the erected installations (i.e. of machinery plus costs of installation) and to do so in a manner that did not permit the deduction of turnover equalization tax paid at the time of importation on the basis of the value of the machinery. This was done by tax assessments for the years 1963, 1964, 1965, 1966, 1967 and 1968 which were sent by the Finanzamt Bentheim to FOR under cover of a letter dated 21 December 1970.

Protests by FOR against this action had no success. Indeed, the tax authority not only assessed additional charges for late payment but it also implemented its threat to attach moneys due to FOR from its German customers for the purpose of recovering the tax due. In consequence there were amongst others, Vereinigte Kammgarn-Spinnereien AG of Delmenhorst, the defendants in the national proceedings, who in response to a request by the Finanzamt in Bentheim paid to the tax authorities a sum owed to the plaintiffs in the national proceedings under a contract of sale and requested from the latter a corresponding allowance.

FOR however would not agree to this. They are convinced that the German tax authorities are wrong in demanding payment of turnover tax on the basis of the total value of the erected installation, that as far as FOR was concerned there was no such tax due. They therefore brought the matter before the President of the Tribunale in Biella and pursuant to Article 633 et seq. of the Italian code of civil procedure applied for the issue of a Zahlungsbefehl (order to pay) against Vereinigte Kammgarn-Spinnereien in order thus to obtain payment of their claim for the price of goods to which they claimed to be entitled and which had been attached by the German tax authorities. In support of their point of view they maintain that since the imported machinery had already been

1 — Translated from the German.

subjected to turnover equalization tax, one has to regard the imposition of turnover tax on the value of the total installation as double taxation. This could not be reconciled with Community law; to be more precise, with Article 95 of the EEC Treaty which was directly applicable. Furthermore, one ought to regard the fact that the applicants had been subjected to German turnover tax proceedings as an infringement of Articles 30 and 31 of the EEC Treaty. Finally, they argue that to levy tax on the foreign supplier in respect of the works of installation is likewise not permissible under the Umsatzsteuergesetz (Law on turnover tax) 1967 which introduced value-added tax in the German Federal Republic with effect from 1 January 1968, since it infringes Council directives 67/227 and 67/228 of 11. 4. 1967 (OJ No 71, 14. 4. 1967) on the harmonization of legislation of Member States concerning turnover taxes.

Having regard to these arguments which arise under Community law, the President of the Tribunale in Biella following upon a suggestion by the plaintiffs suspended the proceedings and referred the following question for a preliminary ruling:

1. Whether Article 95 of the Treaty prohibits the levy of turnover tax upon an imported industrial installation which after erection is regarded as a new and separate entity if there has already at the time of importation been paid upon the individual items of machinery constituting the installation a turnover equalization tax in which is comprised the turnover tax that is to be assessed upon the erected installation (obviously excluding the pure costs of installation).
2. Whether in the event of importation of an industrial installation made up of several items of machinery upon which value-added tax has already been paid by the importing undertaking there is to be treated as the chargeable event pursuant to Articles 2, 5, 7, 8 and 10 of the Council Directive, not the introduction of the individual items of machinery into the territory of the State but its erection on the territory of the importing State so that the exporting undertaking resident wihin the Community is subjected to value-added tax assessed upon the value of the erected installation.
3. If the answer to question 2 be in the affirmative: whether subjecting a foreign exporting undertaking (which pursuant to the contract only exports 'free-at-frontier') to the tax procedures of the importing country constitutes an infringement of the prohibited measures contained in Articles 30 and 31 of the Treaty of Rome amounting to a limitation of the movement of goods within the Common Market.

I shall now examine what there is to be said on these questions having been acquainted with the legal arguments in the course of the proceedings on the part of the plaintiffs in the national proceedings, the government of the Italian Republic, the Government of the Federal German Republic and the Commission of the European Communities.

1. On the first question.

If one adheres strictly to the wording in which it has been couched, then there is clearly no difficulty in replying to the first question. It has long been known from other cases that the meaning of Article 95 lies in the prohibition of discrimination: pursuant to the Article, imported goods should not have to bear higher domestic duties than similar domestic products (cf. Case 31/67, Rec. 1968, p. 351). Looked at in this way, the assumption lies close at hand that this provision excludes the possibility that after levying a charge which *inter alia* is to be an equivalent of the domestic turnover tax, one should thereafter, consequent upon the installation of the

machinery permit once again the levy of turnover tax based upon the value of the machinery and the costs of installation. Proceeding from the wording of the question, one feels constrained to reply that such double taxation cannot be reconciled with Article 95.

One could furthermore not argue against it that circumstances within a country itself might be imagined in which such machines are first delivered by the manufacturer to an intermediate dealer and then on to the final customer; circumstances therefore which on the basis of the system of cumulative multi-stage tax might likewise result in a twice-over levy of tax. This objection is likely to be of little importance because for reasons of avoiding unnecessary taxation such dealings are only rarely met, because they are not typical. As the Commission has rightly stressed, not least by referring to Article 97 of the EEC Treaty (i.e. the possibility of establishing average rates on levying turnover equalization tax) only typical marketing procedures can be considered in the present context, i.e. we shall have to base ourselves on the national tax at the stage of the manufacturer selling directly to the final customer. Since however under these circumstances turnover tax is certainly only payable once, the conclusion does indeed lie close at hand that one ought to treat as unlawful under Article 95 of the EEC Treaty the facts which, as described by Italian judge look at first sight like double taxation.

And yet, examined closely, the solution of the problem posed may not be quite so simple; this by reason of the arguments put forward by the Federal German government. As you know the Federal Government emphatically denies that turnover tax was already contained within the turnover equalization tax. They maintain that tax comparisons were only valid in relation to individual cases. If such a test were correctly applied to the goods under discussion, if therefore one tried to ascertain what turnover tax applied to similar installations manufactured and erected within the country itself, then we would find not only a charge to 4 per cent turnover tax on supply of goods and provision of services but having regard to the system of multi-stage turnover tax, likewise taxes on the preliminary stages of manufacture, i.e. taxes on the preliminary deliveries of basic materials and semi-finished products. It is said that this prior taxation amounted to more than 6 per cent in the case of most capital goods and that in the case of special carding machines, the products with which we are here concerned, they had reached a level of 5·71 per cent. In this way one would however have reached a total tax of around 10 per cent and that this therefore demonstrates — especially if one considers that the level of 6 per cent turnover equalization tax is but an average level — that notwithstanding double taxation on imported industrial installations, there was no case for alleging discrimination against foreign products.

We are therefore bound to ask ourselves, can we just ignore these points, as the plaintiffs in the national proceedings and the Commission apparently consider they ought to be? To me that does not seem free from objection, even if one cannot avoid agreeing that some of the arguments presented by them are certainly not without substance.

Thus it is doubtless correct to assume that in general the turnover equalization tax had the purpose of bringing out equal treatment for imported goods from the point of view of turnover tax and that in two respects: firstly, having regard to the fact that imported goods were not subject to turnover tax on leaving the country of origin (compensation in respect of liability to indirect turnover tax) and secondly having regard to the fact that a refund of prior taxation was granted (compensation in respect of liability to direct turnover tax). Looked at in this way, the conclusion cannot be rejected that the turnover tax is already 'comprised' within the turnover equalization tax.

This, by the way, accords with opinions expressed in relevant legal text and in support of this one might last but not least point to the Federal Government's declaration to the Commission on 12 March 1963, according to which the turnover equalization tax rate of 6 per cent comprise the general turnover tax of 4 per cent and that only the remaining 2 per cent are to be treated as the actual turnover equalization tax, i.e. as a turnover equalization measure in respect of prior tax. One is further given food for thought, when in this connection it is said that the Federal Government's argument implies that a full measure of turnover equalization tax only occurs in the relatively few cases of delivery of goods coupled with erection whilst in the far greater number of ordinary imports such turnover equalization does not occur.

On the other hand (and this can be adduced in support against the Commission's view that is to be *assumed* that the turnover equalization tax is equal in amount to the national taxation), we can likewise not escape from what is expressly stressed in the relevant text books, viz. that full measure of turnover equalization of the prior taxation would not have been achieved with a rate of 2% (cf. 'Kommentar zum Umsatzsteuergesetz' by Hübschmann, Grabower, Beck, v Wallis, Schwarz, Schmidt; note 4 on paragraph 7, subparagraphs 4-7). Particularly noteworthy is what Schwarz says in this connection (vide his 'Kommentar zur Umsatzausgleichsteuer', note 14 on paragraph 7 of the Umsatzsteuergesetz) viz. the realization that at the stage of discussion of the Umsatzsteueränderungsgesetz (law amending the turnover tax) importance had been attached not raising the turnover equalization tax in every case, in which a rate of turnover equalization tax had remained below the turnover tax assessed on comparable nationally produced goods, but only then when the divergence had led to such far-reaching restraint on competition that structural effects made their appearance in the relevant sectors of the economy. We also discover a similar view in the declaration made by the Federal Government to the Commission, which indeed states that most products had to bear a prior taxation of *over* 50 per cent of the normal rate and that in the view of the 'Bundesverband der deutschen Industrie' this prior turnover tax even amounts to 4% in the case of 96 per cent of all products. Furthermore, there is the significant fact that the rates of refund applicable to *exports* (of which by the way, it is said in a comment by the Federal German Minister of Finance to the Commission dated 13 November 1959, that they were too low and not a sufficient equalization of the prior taxation) of an amount of 3 per cent had been fixed which would certainly not have been tolerated, had one been obliged to proceed from the fact that the proportion of 2 per cent in the turnover equalization tax had as its purpose a complete equalization of the prior taxation.

What are we then to conclude from all these views in relation to which the Federal Government has adduced what in my view are convincing reasons from a viewpoint of trade policy? Surely it can only be this: that in relation to the application of Article 95 of the EEC Treaty it is just not feasible to concentrate only on the process of taxation, i.e. on the fact that in a given case (as indeed happened in the national proceedings) imported goods were repeatedly subjected to turnover tax. In the light of the Federal Government's attempt by means of exact figures and the calling upon 'experts' opinions, to bring forward proof of equality of treatment of imported products, it is rather necessary to undertake a comparison of taxation in the individual case. Only this comparison will then show whether Article 95 has been infringed in the circumstances which are of interest in the national proceedings. Such a comparison cannot of course be undertaken in the present case, since this would no longer constitute interpreta-

tion but application of the law, a course which the Court is only able to adopt in a case under Article 169. In the framework of the present proceedings it is rather a matter for the national judge alone, who in solving this difficult problem, will if necessary have to call upon the assistance of experts.

With this I can conclude my reply to the first question — and if one wishes to reply to the question in a meaningful way one had best not keep too closely to the strict wording — and I shall now turn to the second question in the preliminary case submitted.

2. The second question relates to an explanation of the Council's Directive 67/228 for the purpose of the harmonization of legislation of Member States concerning turnover tax. In this connection we are asked to decide, what are the decisive fiscal factors on the importation of an industrial installation made up of different machines: the importing into the country (on which occasion value-added tax has to be paid by the importing undertaking) or perhaps the erection of the machinery in the importing state (on which occasion the exporting undertaking would have to discharge value-added tax in relation to the value of the erected installation with the possibility of deducting value-added tax paid at the time of importation). This question is based on the fact that in the Federal German Republic the old system of turnover tax had been replaced with effect from 1 January 1968 and that in a letter of the Finanzamt Bentheim of 17 August 1971 one also finds certain remarks concerning the application of the new law to supply of goods and provisions of services by foreign undertakings within a country's national territory.

On this question, the Commission already beforehand expressed the opinion that it lacked relevance for the decision of the national court and it therefore did not define its position at all in the written proceedings and only did so briefly and as a subsidiary matter in the course of the oral proceedings. On the other hand the plaintiffs in the national proceedings disapproved of this attitude. They take the view that the national judge has a discretion, to decide what questions are relevant to his decision. It was therefore not within the power of this Court, concerned with a reference for a preliminary ruling, to examine whether the question is necessary for the decision of the national Court, rather that the Court was limited to answering the questions submitted to it.

Let us therefore first of all consider this aspect.

As regards the question of principle, i.e. whether the Court can examine whether a question is relevant for the decision of the national court, I have earlier tended towards the view that the Court could not in every case be obliged to adopt the views of the national judge in this connection. In this respect I would refer you to my Opinion in Case 26/62 (Rec. 1963, p. 1). The Court has meanwhile at least partially adopted this view as its own, in finding (in the Salgoil judgment, 13/68 (Rec. 1968, p. 661) that it could dispense with the interpretation of a provision if this was adduced by a national judge for the purpose of determining a legal dispute *in an obviously erroneous manner*. Even after the plaintiff's comments in the national proceedings, there is in my view no reason to depart from this legal interpretation. Indeed, the procedure created by Article 177 of the EEC Treaty has after all the sole object of ensuring a uniform *application* of Community law within the Member States and to give interpretive assistance in this connection. It can therefore only be used in so far as an application of Community law will arise at all. If on the other hand, such an application clearly does not arise and if it is possible to find in this sense without doing violence to deductions based upon national law (which obviously remain the preserve of the national judge) then one can refrain from replying to such questions since it is not the task of the

Court to prepare treatises of purely academic interest.

In applying this principle which, as I have already said, the plaintiffs were unable to shake with their arguments, I arrived, in relation to the facts of the present case, at the following conclusions:

Admittedly, it emerges from the file forwarded to us by the President of the Tribunale in Biella, that there was issued by the Finanzamt in Bentheim on 18 January 1971, apart from tax demands for the years 1963 to 1967 (which clearly refer to the old German law on turnover tax) also a '*1968* tax demand'. On closer inspection however, it becomes clear that this too only deals with a tax debt according to the *old* law on turnover tax; after all, no entry was made in the column reserved for the new law on turnover tax. It is further clear that the case before the Italian judge was only concerned with tax debts arising from the tax demands mentioned, in respect of which attachments took place, for the plaintiffs, in denying the admissibility of the attachment, demand payment of their claim to the price of goods. If admittedly in a letter from the Finanzamt in Bentheim there appear certain remarks concerning the application of the new law on turnover tax, they will have to remain outside consideration because they contain only information and requests to deliver tax returns under the new law on turnover tax, without the matter reaching the stage of tax assessments and especially attachment proceedings which, as I have said, would alone have been relevant in relation to the national proceedings. One can therefore say with certainty that in the national proceedings the question of tax assessment under the new German law on turnover tax is of no significance. On the other hand, one can also conclude from this that there is at present no necessity to enter into an interpretation of the aforementioned Council's Directive, since it only refers to the new law, that is to say the value-added tax, which came into force on 1 January 1968.

Because of *clear lack of relevance* one can therefore refrain from replying to the second question and one can do so without it mattering for the solutions of the problem at what date the Council's Directive had legal effect, i.e. whether this was already from the effective introduction of the system of value-added tax within the Federal Republic, or only as from 1 January 1972, i.e. the latest date on which pursuant to Council's Directive 463/69 (OJ L 230, 20. 12. 1969) the value-added tax had to be introduced in all Member States.

3. Finally, coming now to the third question, one could really take the view that one need not go into this either since the question is only submitted for answer in the event of an affirmative answer to the second question and such affirmative answer — as we have seen — does not result. From the wording of the question and from the arguments of the plaintiffs, one might on the other hand gain the impression that it refers not only to the time after introduction of the value-added tax but also to the period during which the old German law on turnover tax was in force. Subject to this reservation it therefore seems right also to deal with the third question; that is to test whether an infringement of Articles 30 and 31 of the EEC Treaty can be seen in the fact that a foreign undertaking, exporting free-at-factory or free-at-frontier i.e. which effects a transfer of property abroad becomes subject to the tax procedures of the importing country.

In reply to this, one can in my view make the following observations:

First of all, it requires a certain modification of the way the question has been put. If I see it correctly, the contracts which were concluded between the plaintiffs and their foreign customers do not limit themselves to delivery free-at-factory or free-at-frontier; what was agreed was likewise the installation

within the importing country, i. e. the supply of services in that country.

Looked at in this way however, one cannot find it objectionable that the plaintiffs were also subjected to the tax procedure of the importing country (we are now only concerned with those, not with the actual *amount* of the tax). It may be conceded that this involves a certain burden on the exporter, since in a foreign country, with a foreign language he has to submit to what can be rather strange procedures. But where tax advisors are available for consultation and are indeed just as necessary for national undertakings, such difficulties ought not really in the case of trade across borders lead to impairment of trade such as is involved in quantitative restrictions.

If therefore one sees in Article 30 of the EEC Treaty only a special way of expressing the prohibition on discrimination, (this is the Federal Government's view on the matter) then it is furthermore crucial that in relation to foreign undertakings, there did not apply some special complicated tax procedure but rather that just like national manufacturers they were subjected to the normal tax procedures.

Finally one also ought to bear in mind that if one accepts the thesis that subjecting someone to foreign tax procedures in respect of services completed within another Member State, was not reconcileable with Article 30, then the realization of free movement of services a matter with which the Treaty is crucially concerned, would have been difficult to implement. For that reason after all the aforementioned Directive on turnover tax, which we shall not now be obliged further to consider, does not appear to exclude that services accomplished in another Member State are subjected to value-added tax in the relevant country (cf. Article 2 (a) of Directive 67/228 of 11 April 1967).

I should therefore think that to bring the services rendered by the plaintiffs, by way of erection of the machinery, within the ambit of the earlier German tax procedures (the special features and complications of the new law on value-added tax are not now relevant) would hardly have justified speaking of an infringement of Article 40 of the EEC Treaty.

With these comments I think I have also said everything that is relevant on the third question, insofar as that question might be considered relevant to the national proceedings.

4. Allow me now once again to summarize my opinion. I suggest that the questions submitted by the President of the Tribunale in Biella be answered in the following terms:

(a) Article 95 of the EEC Treaty prohibits the imposition of taxation on imported products. Its application presupposes in the individual case a comparison of taxes, having due regard to the prior taxation levied on domestic products. In order to bring this prohibition into play however, it is not sufficient to find that turnover tax on the value of an industrial installation had to be paid after erection, when previously on importation of individual machines turnover equalization tax became due which likewise has the object of taking into account national turnover tax.

(b) A reply to the second question, which refers to problems of value-added taxation, is clearly not required for the purpose of deciding the issues in

the national proceedings since we are in the national proceedings only dealing with a tax debt assessed according to the old German law on turnover tax. To this extent therefore the Court can refrain from taking a position on this point.

(c) Articles 30 and 31 of the EEC Treaty do not exclude the possibility that an exporting undertaking resident in one Member State might on meeting the conditions for liability to domestic taxation of another Member State be subjected to tax procedures there applicable, in the same manner as they are applied to national undertakings.