JUDGMENT OF THE COURT
4 APRIL 1968[1]

Firma Milch-, Fett- und Eierkontor GmbH v Hauptzollamt Saarbrücken[2] (Reference for a preliminary ruling by the Finanzgericht of the Saarland)

Case 25/67

Summary

1. *Policy of the EEC — Common rules — Tax provisions — Cumulative multi-stage tax — Average rates for imported products within the meaning of the first paragraph of Article 97 — No individual rights*

2. *Policy of the EEC — Common rules — Tax provisions Cumulative multi-stage tax — Average rates for imported products or groups or imported products — Establishment by Member States — Validity*
(EEC Treaty, Article 97)

3. *Customs duties and internal taxation — Joint applicability to the same case of provisions relating thereto — Impossibility of such joint application*
(EEC Treaty, Article 12, 13 and 95)

4. *Policy of the EEC — Common rules — Tax provisions — Taxation intended to put national products and imported products in a comparable tax position — Nature of internal taxation*
(EEC Treaty, Article 95)

1. Cf. paragraph 4, summary, Case 28/67.
2. Cf. paragraph 5, summary, Case 28/67.
3. Cf. paragraph 4, summary, Case 57/65, Rec. 1966, p. 295.
4. A tax which is levied within the framework of turnover tax legislation and is designed to place all categories of products both domestic and imported in a comparable tax situation constitutes 'internal taxation' within the meaning of Article 95.

In Case 25/67[3]

Reference to the Court under Article 177 of the Treaty establishing the European Economic Community by the Finanzgericht (Finance Court) (the competent court in taxation matters) of the Saarland for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.
2 — CMLR.
3 — In this case the Court on 16 May 1968 made an order similar to that in Case 13/67 (see p. 187).

FIRMA MILCH-, FETT- UND EIERKONTOR GMBH. Hamburg,

and

HAUPTZOLLAMT (Principal Customs Office) SAARBRÜCKEN,

on the interpretation of Articles 95 and 97 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and W. Strauß (Rapporteur), Presidents of Chambers, A. Trabucchi, R. Monaco, J. Mertens de Wilmars and P. Pescatore, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

1. *Summary*

In March 1967 the undertaking Milch-, Fett- und Eierkontor GmbH, (hereinafter referred to as 'Milchkontor') obtained customs clearance for poultry from the Netherlands.
The relevant customs office levied a turnover equalization tax (hereinafter referred to as 'equalization tax') on this import, in accordance with German law. Milchkontor brought an action before the Finanzgericht (Finance Court) of the Saarland, pointing out in particular that similar national products are either not subject to turnover tax of pay only an insignificant amount.

2. *Contents of the order referring the matter: arguments of the Finanzgericht*

A — On 19 June 1967, the Finanzgericht of the Saarland decided to ask the Court of Justice to give a preliminary ruling on the following questions:

'(1) What must be understood by "average rate" within the meaning of Article 97 of the EEC Treaty?
(2) Can a general rate of taxation which was imposed in 1951 and which has remained unchanged since that date be regarded as an average rate within the meaning of Article 97 of the EEC Treaty?
(3) Is Article 97 of the EEC Treaty an independent legislative provision or a special case of Article 95 which goes no further than altering the procedure by which the Commission is to ensure observance of the Treaty?
(4) To the extent to which Article 97 is a special case of Article 95, is the national court entitled and required to consider whether the turnover equalization tax is compatible with Article 95 of the EEC Treaty when the disputed rate of tax is an average rate within the meaning of Article 97?
(5) To the extent to which Article 97 of the EEC Treaty is an independent legislat-

ive provision, does the first paragraph thereof produce direct effects and does it create individual rights which national courts are bound to uphold, or does Article 97 only give to the Commission the right to address appropriate directives or decisions to the State concerned in accordance with the second paragraph thereof?

(6) To the extent to which Article 97 alone or in conjunction with Article 95 of the EEC Treaty creates individual rights, is there not a legal average rate, in particular
   (a) When the total burden of the turnover tax on national products of the same types has not been calculated on the basis of firm statistics, but has been the subject of an estimate;
   (b) When calculations have in fact been made on the basis of statistics, but for periods prior to 31 December 1961;
   (c) When the national products in respect of which the system of production and of distribution varies or for which the total burden of turnover tax varies by more than 0.5%, or which are not similar, have been combined in a single group of products?

(7) On whom does the duty of setting out the claims and the burden of proof fall when the proceedings are concerned with the question whether a rate of tax constitutes an average rate within the meaning of Article 97 of the EEC Treaty?

(8) Is it necessary to classify among the comparable taxes referred to by Article 95 of the EEC Treaty which are imposed indirectly on similar domestic products:
   (a) Only those amounts of turnover tax levied upon similar products at one or more prior stages of distribution; or
   (b) Also the amounts of turnover tax imposed on raw materials or semi-finished products which have been used in the manufacture of similar domestic products; or
   (c) Also the amounts of turnover tax imposed on accessory products, for example packaging materials, or auxiliary materials, that is to say, those which are destroyed during the manufacture of the product or absorbed by the latter without themselves being the subject of manufacture; or
   (d) Amounts of turnover tax charged upon the means of production, transport costs and sales costs?

(9) (a) Does the expression "imposed directly" appearing in the first paragraph of Article 95 of the EEC Treaty mean that account must be taken only of the first of the previous stage through which the similar domestic product has passed; or possibly
   (b) Include several stages of distribution (if so, how many); or
   (c) Include several stages of production, (if so, how many)?

(10) (a) In the event of Question 8(d) and 9(c) receiving an affirmative answer, is it lawful to take into account the indirect incidence of the tax going back as far as the primary product only; or
   (b) Is it necessary also to take into account the turnover tax levied upon the earlier stages of the primary products for raw materials (for example hatching eggs for poultry, and seeds for plants); or even
   (c) Is it also necessary to take into account turnover tax imposed on the means of production used to obtain the primary products, for example incubators or brood hens?

(11) To the extent to which Article 97 alone or in conjunction with Article 95 creates no direct individual right, is the turnover equalization tax in whole or in part a charge having an effect equivalent to that of a customs duty within the meaning of Article 11 [of Regulation No 22 of the Council of the EEC on the progressive establishment of a common organization of the markets in poultry meat (Official Journal of 20 April 1962, pp. 959/62 et

seq; hereinafter referred to as 'Regulation No 22')]?

(12) If so, does Article 11 of the aforementioned regulation create direct individual rights which national courts are obliged to respect?'

B — With regard to the grounds of the order referring the to the various questions which it contains, the statement of Finanzgericht include the following in particular:

On the second question

The disputed rate was introduced in 1951, that is to say long before the entry into force of the Treaty. For that reason the Finanzgericht hesitates to regard it as an average rate. Furthermore, the determining factors for the calculation of the comparable charge in respect of turnover tax have varied considerably since then.

On the third and fifth questions

The fact that Article 97 is a particular case of Article 95 may be inferred from the judgment of the Court of Justice in Case 57/65 (Rec. 1966, p. 303), according to which 'this situation is peculiar to Article 97 and can in no circumstances influence the interpretation of Article 95'. But even if it is considered that Article 97 is not a special case of Article 95, strong reasons based on the principle of the state of the law favour the idea that the first of these provisions must be regarded as 'self executing'.

On the sixth question

It appears from the principles and objectives of the Treaty, particularly from the fact that Article 97 refers expressly to the principles set out in Article 95, that a lawful average rate 'may only be obtained by means of a concrete comparison of charges for periods close in time'. It is not possible to regard this reference as merely an indication of 'the general guidelines' which the national legislature should use as a factor in its considerations.

It is not known either how the disputed rate was calculated and above all 'on the basis of what suppositions and what facts' it was assessed. It may thus be presumed that the comparable tax levied on the domestic products, and consequently also the rate in accordance with which it was calculated, have not in general been established with the help of calculations which are capable of being checked.

The mere fact that the disputed rate applies to a great number of different products raises doubts as to its nature as an average rate. However that may be, it must be assumed that, although it is true that the legislature decides which products are to be formed into a group, it is nevertheless required to calculate a uniform tax, so that this rate corresponds to the charge imposed on the lowest taxed domestic product.

The fact that this theory would require wide and lengthy inquiries and estimates cannot exempt the administration from fulfilling the obligations which the Treaty imposes upon it.

On the seventh question

No doubt, according to the rules of procedure applicable in Germany, the court which makes the order referring the matter must consider the facts of its own motion, so that it is not possible to speak of a burden of proof properly so-called, but only of a requirement to set out claims. Nevertheless, the question whether a rate is justified 'does not depend on an examination of facts'; it is a matter rather of 'supervising a measure adopted by the legislature, the competence of which is limited by Articles 95 and 97 and which, in that respect and in that respect only, is subject to review by the national court'. The main burden of setting out claims can here devolve only upon the administration which must state in particular on which bases, and how, an average rate has been established.

On the eighth and tenth questions

Article 95 is only intended to prevent tax measures from affecting competition between the Member States on the market of one of them. In the present case, the product in question is a 'primary product', 'so that it must clearly be established whether the comparable charge is confined to taxes imposed on the product itself or whether it

is necessary also to include therein all charges under the heading of turnover tax, which are taken into account in calculating costs when the price of the primary product is being established'. The Finanzgericht favours the second opinion.
Moreover, for poultry it is indispensable 'to include in the costs of production, in addition to the turnover tax, taxes on livestock, slaughtering, storage and marketing which enter into the calculation of costs when the selling price has to be fixed', otherwise there would be a consequent distortion of competition to the detriment of national production.

On the eleventh question

In respect of their purpose, the levies mentioned in Regulation No 22 represent a particular type of customs duty. On the other hand, the equalization tax is intended to ensure fiscal equality; it is not therefore a charge having equivalent effect. That is also the conclusion which may be drawn from the judgment given by the Court in Case 57/65.

On the twelfth question

On the basis of the reasons set out above, concerning the third and fifth questions and on the basis of Article 189 of the Treaty, the reply to this question must be in the affirmative.

II — Procedure

The order referring the matter was received at the Registry of the Court of Justice on 8 July 1967.
In accordance with Article 20 of the Statute of the Court of Justice, the Government of the Federal Republic of Germany, the Commission of the European Communities and Milchkontor submitted their written observations and delivered oral argument at the hearings on 5 and 7 December 1967. The Advocate-General delivered his reasoned, oral opinion at the hearing on 25 January 1968.
Milchkontor was represented by Messrs Dres, Wendt, and Dräger of Hamburg, the Government of the Federal Republic of Germany by Mr Everling, Ministerialrat, Mr Hahnfeld, Ministerialrat and Mr Bülow, Oberlandesgerichtsrat, and the Commission of the European Communities by Mr Thiesing, Legal Adviser.

III — Summary of the observations submitted by the parties concerned

1. *The first, second and sixth questions*

The observations of *Milchkontor may be* summarized as follows:
A rate of tax does not constitute an average rate solely because the legislature describes it thus.
The concept of 'average' implies the calculation of a weighted median value. A real average rate must be evolved from a factual comparison of taxes made with the help of correct and up-to-date statistical data. It is necessary, further, to require that the same rate must be applied to imports and to exports (Article 96). Lastly, by its very wording Article 97 applies only to rates of taxation which have been introduced after 1 January 1958, on the basis of new calculations.

The sixth question

The expressions used by the Finanzgericht, according to which it was for the legislature to decide the products which it wished to see within the constitution of a particular group, are equivocal, because the order referring the matter states later—and correctly—that the average rate must be calculated by reference to the domestic product which bears the least tax.
It is more correct to say that only products liable to turnover tax at substantially equal rates may be included in a particular group. The rate applicable in Germany for that tax, at the date in question, varied between 1% and 8%. Having regard to that system, only products for which the respective rates of turnover tax did not differ by more than 0.5% may be regarded as subjected to substantially equal charges.

The *Federal Government* makes the following observations:

The concept of 'average rates' is closely linked with the difficulties which the calculation of the charges in respect of the turnover tax on domestic products creates within a cumulative multi-stage tax system.
The first difficulty lies in the fact that it is very hard to decide with which similar products it is necessary to compare the imported product. Domestic products are often manufactured according to widely differing methods of production; the amount of the burden imposed by the turnover tax varies according to the number of trade movements to which the product is subject.
Other difficulties appear at the time of deciding what the indirect tax is. The comparison must refer to the general position and it cannot be made precisely even after lengthy calculations. Further, the facts on which the calculations are based (price, cost factors, structure of undertakings) constantly undergo changes.
Finally, in view of the multitude of products to be dealt with (more than 50 000), it follows that it is 'impossible to require of the administration' calculations which are absolutely correct, 'taking into account the time that this would take, the staff at its disposal and reasons inherent in the problem itself'. Moreover, the work required for this would be out of proportion to the result, because again, however far the examination is extended, it can only lead to approximate figures.
Consequently, the only remedy for these difficulties lies in recourse to estimated and flat rates; such is precisely the original idea adopted by the States signatories to the Treaty in adopting a concept of 'average rates' in Article 97. In these circumstances, far from being equivalent to the 'average' of rates calculated exactly, these rates can amount only to an exact median for the aggregate of a number of cases.
These reasons explain why in the States concerned all rates of equalization tax are necessarily 'average rates' except where there is in the national territory neither a similar product nor a product which may be substituted for it to be compared with the imported product. It matters little that the rate in question was laid down before or after the entry into force of the Treaty. Far from creating new powers, Article 97 envisages the existence of rules prior to entry into force of the Treaty.
It is also of little importance that the rate of the tax has not been changed for years or that it was calculated on the basis of statistical data relating to a previous period. If, for all products liable to the equalization tax, continual studies of the factors used in the calculation were made in order to take account of any slight differences, the effort would be out of proportion to the result, because, taken together, the alterations in taxes both upwards and downwards would offset one another in the end. It is in principle for the legislature to decide which are the groups of products to be brought together for the fixing of average rates. There is an average rate even in the case where an identical average rate is applied to products corresponding to different stages of production.
It is not correct that the average rate ('Durchschnittssatz') must be decided by the tax levied on the product bearing the least tax; 'average' ('Durchschnitt') means median.

The *Commission* makes the following observations:

(a) Only the rates which were fixed on the basis of a comparison made *in concreto* with the amount levied by way of turnover tax on domestic products are authentic average rates. It follows from this that this expression does not cover, for example, the rates which a Member State has introduced before the entry into force of the Treaty by putting them exactly on the level of rates levied on domestic products at the stage corresponding to that of importation. In cases of this type the application of Article 97 is not taken into account. The fact remains that in practice rates thus fixed represent in general only a minimum tax and they consequently conform to Article 95. The correctness of this argument appears from the following considerations.
The prior tax burden already imposed on comparable domestic products at an earlier stage constitutes the ceiling which average rates are allowed to reach. No doubt, in order to decide the amount of this tax it is proper to refer to estimated values and to

average values and it is necessary to do so; but that does not alter the fact that it is necessary to calculate genuine averages and decide which are *in concreto* the amounts charged on each of the categories of products. It is only permissible to 'use flat rates' ('pauschalieren') when it is a matter, within the specific framework of Article 97, of deciding the tax which may be allowed in respect of imported products.

(b) A rate calculated by estimation cannot be an average rate unless the estimate is confined to a minimal average tax which can be justified for valid reasons.

Although it is true that the calculation of the amount levied by way of a turnover tax on similar domestic products must be made on the basis of the most recent possible statistical data, the question of the reference period is only of importance where the situation has 'altered appreciably'.

On the sixth question, the Commission shares the doubts of the Finanzgericht. The gathering into a 'group of products' of products subject to very different taxes would permit manipulation with the help of which it would be easy to evade Articles 95 and 97. A 'group of products' can be constituted only when the products which comprise it bear approximately identical taxes. Nevertheless that interpretation also still leaves numerous uncertain factors and consequently a considerable area of discretion for the Member States.

2. *The third, fourth and fifth questions*

The observations of Milchkontor may be summarized as follows:

The direct applicability of Article 97 is clear from the judgment in Case 57/65.

Article 97 merely constitutes a particular instance of Article 95; thus the national courts have the power and the duty to check whether the rates of taxation which the State concerned states are average rates are in conformity with Article 95.

The fact that the calculation of the charge imposed on domestic products may present difficulties does not mean that direct applicability must be excluded. Moreover, the principal difficulties appear in connexion with the calculation of internal taxation 'imposed ... indirectly on similar domestic products' (Article 95); this applies with equal force to instances where Article 95 alone applies.

The outcome is the same when Article 97 is examined in isolation. This provision gives to the Member States a discretion only to the extent to which it leaves them free to decide whether they wish to fix average rates and form groups of products. On the other hand, there is no discretion in determining the charge under the turnover tax the calculation of the average rates and the decision as to which products may be grouped.

The second paragraph of Article 97 does not weaken this view but, on the contrary, corroborates it. It is intended to strengthen the position of the Commission as against the Member States: In fact the Commission may take immediately binding measures and has no need to begin by issuing an opinion which is not binding under Article 169. The reason is that 'with regard to the application of Article 97, the risk that Member States may indulge in operations which are contrary to the Treaty is particularly great'. This is one more proof that the observance of the objective of the Treaty, which is ensured by the Commission, must be brought about in a very special manner, in this case by the review which the national court is bound to carry out.

The observations of the Federal Government may be summarized as follows:

Even if the Court of Justice were to confirm its case-law in connexion with Article 95, it would be impossible to deduce therefrom any consequence whatever with regard to the immediate applicability of Article 97.

(a) This provision cannot have such an effect, because it does not lay down a 'clear and unconditional obligation', as is provided for by the judgment in Case 57/65:

- it merely refers to the 'principles' of Article 95;
- — the concept of 'average' presupposes that there may be differences in one or other direction, and indicates an assessment in connexion with which there is a certain area of discretion;
- — having regard to the difficulties set out at (1) above, Article 97 must be interpreted as authorizing the usual unavoidable

estimates and calculations on a flat-rate basis.

(b) The correctness of these considerations is proved by the fact that Article 97 provides special arrangements derogating from Article 169 for the procedure which the Commission must employ if the Member States infringe the Treaty. The reason is that the assessments and estimates necessary for the application of Article 97 require Community supervision; the authors of the Treaty wished to avoid the use of the power of appraisal being directly called in question before the Court of Justice.

If the national courts were able to review the average rates directly, the Commission's power to issue directives would become pointless.

(c) It is impossible to raise against this view the objection that it gives different results in each Member State. As the legal provisions of the various Member States are dissimilar, it is inevitable that certain provisions of the Treaty will only be applied in certain States. Since all the Member States are to introduce the value added tax prior to 1 January 1970, the problems raised by Article 97 are merely transitional.

(d) Community law contains a series of provisions which are addressed exclusively to the States, which are obliged to transform them into provisions addressed directly to individuals. These principally concern matter which encroach upon the national legal systems. These legal systems constitute separate orders within which all legislative provisions are to a certain extent interdependent; this is why the Member States were left free to insert the Community rules harmoniously into their own legal systems. The equalization tax shows clearly the importance of these considerations. If the concept of direct applicability were admitted, courts would have to make far-raching investigations to decide wehther the rate of a tax were too high. This would result in too many disadvantages for all persons concerned.

(e) Article 97 is an independent provision addressed to the Member States, which levy a turnover tax calculated on an cumulative multi-stage tax system and thereby governs cases in which it is impossible to make an actual comparison of the taxes. Although it refers to Article 95, this is merely to avoid repetition. The fact that one provision refers to another does not *ipso facto* imply that it is subordinate to it. Moreover, this reference is only to the 'principles' set out in Article 95.

Similarily the special procedure provided for in the second paragraph of Article 97 makes it impossible to consider this as a 'special case' of Article 95 in that all the rules applicable to that article are also applicable to the first. It might as the most be considered as a 'lex specialis', although that theory does not take into account that fact that the cumulative multi-stage tax system is applied in five Member States.

The *Commission* in effect agrees with the opinion of the Federal Government.

It makes the following observations:

Article 97 leaves to the Member States a considerable area of discretion in authorizing them to establish 'average rates' for 'products *or* gfups of products'. The Treaty had to provide this facility, since in a cumulative multi-stage tax system it is technically impossible to calculate exactly the amount of the taxation imposed at prior stages and thus to prevent any average rates from diverging either upwards or downwards from the actual taxation imposed on the various products.

Those difficulties are further aggravated by the fact that the various Member States apply different methods of calculation to determine the average charge imposed on a product.

Moreover the Member States have a wide discretion to form groups of products, even though a more or less arbitrary grouping of products into large groups is not authorized.

Similarly the special rules of procedure provided for in the second paragraph of Article 97 tend to indicate that only the Commission is required to ensure that the provisions of this article are observed. Consequently Article 97 does not fulfil the conditions required for producing direct effects. The national courts, however, have the power to consider whether they are faced with a case for the application of Article 97, that is to say, whether they are concerned with

an equalization tax intended to replace the turnover tax charged according to a cumulative multi-stage tax system or an average rate applicable to a product or to a group of products.

3. *The seventh question*

Milchkontor points out that national rules of procedure include no detailed rules concerning the burden of proof; this question is governed expressly or by implication by the basic provisions; the question must therefore be considered on the basis of Article 97. Here, as elsewhere, the principle is that whoever invokes a rule must prove that the conditions for its applicability are fulfilled; consequently, the administration must prove that an average rate actually exists and that the necessary calculations have actually been made and have been correctly made; the tax-payer can hardly ever succeed in proving the contrary because he is prevented from discovering the actions taken by the authorities.

The *Federal Government* states that the question is inadmissible, since it can only be resolved under national rules of procedure. Independently of that, within the framework of a cumulative multi-stage tax, any rate of equalization tax is an 'average rate', so that the question—which is, furthermore, purely legal—whether a rate of tax comes within this definition cannot be disputed.

The *Commission* has doubts also as to the admissibility of that question, on the substance of which it states that it shares the opinion of the Finanzgericht.

4. *The eighth, ninth and tenth questions*

Milchkontor states that an indirect tax on domestic products must be understood as involving a direct tax burden on the earlier stages of the product (raw materials, semi-finished and added finished products); on the other hand, there is no reason to take into account the burden on accessory materials, auxiliary materials, the means of production, transport costs or sales costs.

The reply to be given to the ninth question is that it is possible to go back *one* single stage and the reply to the tenth question is that it is not possible to follow the taxation back beyond the primary product.

The *Federal Government* argues that in principle the object of the equalization tax, which is recognized by the Treaty, is to compensate for the burden of the turnover tax on comparable domestic products; this goal can only be achieved by taking as the starting point the whole burden on domestic products; it is therefore proper to give to questions 8(b) to (d), 9(b) and (c) and 10(b) and (c) the widest possible affirmative answers; however there exist *a priori* 'natural barriers' since the incidence of turnover tax on the final price of a product becomes less, the greater the number of stages taken into account for taxation; for that reason the Member States have fixed a flat rate for taxation at the earlier stages of the primary products and auxiliary materials.

The *Commission* states that, if their general structure and object are considered, Article 95 et seq. are concerned only with 'taxes imposed on products' which in almost all modern tax systems are governed by the principle of the country of destination; and on the other hand the expression 'indirectly' must be interpreted widely, having regard to the fact that the logical application of this principle requires that the tax on domestic products be entirely offset; nothing indicates that the authors of the Treaty had the intention of restricting that application; it 'is therefore necessary to understand internal taxation indirectly levied on a product as including not only taxation imposed by taxes levied on products at all stages of production on raw materials, semi-finished products and possibly finished products still present in the final product, but also the taxation levied by way of taxes applied to products—to which auxiliary materials, the means of production and services (relating to production, such as transport of goods, for example) used in all the previous stages have been subjected at the time of production of the raw materials, of the semi-finished and of the finished products'.

5. *The eleventh and twelfth questions*

The observations of *Milchkontor* may be summarized as follows:

The concept of a charge having equivalent

effect must be interpreted differently in Regulation No 22 and in the EEC Treaty. As opposed to the Treaty, the regulation also prohibits the charging of taxes on imports from third countries. Article 95 of the Treaty does not apply to these imports and that is the reason for which it cannot fulfil, in respect of Article 9 et seq. of the Treaty, the functions of a *lex specialis* which it would have within the framework of intra-community trade.

When it has attempted to define the concept of a charge having an effect equivalent to customs duties, the Court has always considered *the effect* of that tax as a decisive criterion. It follows that the equalization tax levied in Germany is still a charge having an effect equivalent to a customs duty and is authorized only for special reasons on the basis of Article 95. To the extent to which this article is inapplicable, the equalization tax therefore also falls under the prohibition of charges having an effect equivalent to customs duties.

It is not a matter, within the framework of Regulation No 22, of avoiding discrimination by third countries or of eliminating certain protective effects; it is a question on the contrary of giving the assurance that such measures are applied exclusively by the Community. That argument is equally valid for 'internal taxation'. When it fulfils the same purpose as Community taxes, there is a double 'offsetting'.

That is what happens in the case of collection of a levy and of an equalization tax.

It follows that, within the sphere of the market organization of the European Economic Community, the equalization tax comes entirely within the prohibition against taxes having equivalent effect every time and to the extent to which they increase the price of a product beyond the increase caused by the levy.

As to the second question, the answer is given by the second paragraph of Article 189 of the Treaty.

The *Federal Government* points out that the Court has clearly stated many times that the equalization tax is not a charge having an effect equivalent to a customs duty.

The *Commission* points out on the subject of the eleventh question that taxes such as the equalization tax levied in Germany must in general be regarded as internal taxation; the application of the prohibition of charges having equivalent effect must however be reserved for cases where goods which are not produced in a Member State and which are not in competition with another domestic product are subject to a tax with a prohibitive effect; moreover, the equalization tax amounts to a legal entity; to the extent to which in a particular case it exceeds the tax borne by similar domestic products, the part of that tax exceeding the tax in question cannot consequently be regarded as a charge having an effect equivalent to a customs duty.

With regard to the twelfth question, the principles to be deduced from the case-law of the Court allow the inference that an individual may rely upon an infringement of Article 11 or Regulation No 22 before national courts.

Grounds of judgment

By an order of 19 June 1967, received at the Court the following 8 July, the Finanzgericht of the Saarland under Article 177 of the Treaty establishing the EEC, put to the Court several preliminary questions concerning the interpretation of Articles 95 and 97 of the said Treaty as well as Article 11 of Regulation No 22 of the Council on the progressive establishment of a common organization of the market in poultry meat. The purpose of the third, fourth and fifth questions is to establish whether, and if so in what circumstances, Article 97 produces direct effects and creates individual rights which national courts must protect.

It appears appropriate to deal with these questions first and then to go on to the others.

I — The effects of Article 97 (third to fifth questions)

In its third question the Finanzgericht of the Saarland asks the Court to rule whether Article 97 'is an independent legislative provision or a special case of Article 95 which goes no further than altering the procedure by which the Commission is to ensure observance of the Treaty'.

The fourth question seeks to establish whether 'to the extent to which Article 97 is a special case of Article 95, the national court is entitled and required to consider whether the turnover equalization tax' levied on imports from Member States of the EEC 'is compatible with Article 95 of the EEC Treaty when the disputed rate of tax is an average rate within the meaning of Article 97'.

The fifth question of the Finanzgericht seeks to establish whether 'to the extent to which Article 97 of the EEC Treaty is an independent legislative provision, the first paragraph thereof produces direct effects and creates individual rights which national courts are bound to uphold' or whether 'Article 97 of the Treaty only gives to the Commission the right to address appropriate directives or decisions to the State concerned, in accordance with the second paragraph thereof'.

It has been suggested that the Court in its judgment of 16 June 1966 in Case 57/65 has already decided by implication in favour of the direct effect of Article 97.

However as the court was not on that occasion questioned either in respect of Article 97 or concerning the relationships between that article and Article 95 it confined itself to holding that the special situation of Article 97 cannot in any event affect the interpretation of Article 95.

By its judgment of 3 April 1968 in Case 28/67 on a reference from the Bundesfinanzhof, the Court ruled that Article 97 does not produce direct effects and does not create individual rights which national courts must protect.

Reference should therefore be made to that judgment.

II — The concept of 'average rates' and the taxation referred to in Article 95 (first, second and sixth to tenth questions)

(1) In its first question the court making the reference asks the Court of Justice to state in a general manner 'what must be understood by "average rate" within the meaning of Article 97 of the EEG Treaty'.

The second, sixth and seventh questions raised by the said court concern problems relating to the application of Article 97 by national courts and in particular the concept of 'average rate' mentioned above.

For the purpose of any legal review of the compatibility of the said average rates with the principles of the first paragraph of Article 95 the Finanzgericht of the Saarland asks in its eighth, ninth and tenth questions whether the taxation of certain transactions which it enumerates is covered by the expression 'internal taxation... imposed... indirectly on similar domestic products' appearing in the said first paragraph.

(2) As to the first and second questions, by virtue of the first paragraph of Article 97 it is for the Member States to establish average rates, with the Commission alone having power to intervene pursuant to the provisions of the second paragraph of Article 97, and in certain circumstances of Article 169, against the failure to conform to the principles set out in Article 95, without prejudice to the rights conferred by Article 170 on the other Member States.

In these circumstances, it is not for the national courts to appraise whether average rates have been established in accordance with the principles of Article 95, although it does not follow that those courts may not in any case be required to decide whether they are faced with an average rate coming under Article 97 or with a taxation coming under Article 95.

According to the wording of Article 97 its application is subject to a double condition: first that the Member State levies a turnover tax based on the cumulative multi-stage tax ysstem and secondly, that it has in fact exercised the power made available to it by the said provision and established average rates.

Consequently according to Community legislation currently in force, in States which have exercised the power made available to them by Article 97, rates are considered as 'average rates', if they are established as such by the States in question even if they were introduced before the entry into force of the Treaty and without prejudice to the operation of the second paragraph of that Article.

The first and second questions of the Finanzgericht should therefore be answered to that effect.

(3) It follows from the information provided by the court making the reference and the general structure of its questions that the eighth, ninth and tenth questions require an interpretation of Article 95 only in the light of that of Article 97.

Consequently these questions are no longer relevant, so that the Court need not reply to them.

(4) The sixth question inquires whether or not in certain cases set out by the Finanzgericht there is a 'legal average rate'.

By the seventh question the Court is asked to say 'on whom the duty of setting out the claims and the burden of proof fall when the proceedings are concerned with the question whether a rate of tax constitutes an average rate within the meaning of Article 97 of the EEC Treaty'.

These two questions were raised only in case the Court should rule that Article 97 creates individual rights.

As this eventuality has not materialized, there is no necessity to reply to these questions.

III — The interpretation of Article 11 of Regulation No 22 of the Council (eleventh and twelfth questions)

The eleventh question of the Finanzgericht, put forward in case—as has actually happened—the Court should not recognize Article 97 as having direct effect, inquiries whether 'the turnover equalization tax is in whole or in part a charge having an effect equivalent to that of a customs duty within the meaning of Article 11' of Regulation No 22 of the Council on the progressive establishment of a common organization of the markets in poultry meat.

To the extent to which the Court agrees that such is the case the court making the reference asks in its twelfth question whether the said Article 11 creates direct individual rights which national courts must protect.

Although within the framework of Article 177 the Court does not have the jurisdiction to decide upon the classification of the disputed tax in view of the concepts of Community law, it may on the other hand interpret the concept of 'charges having equivalent effect' within the meaning of the said Article 11 in respect of the essential characteristics of such a charge.

According to the wording of the first paragraph of Article 11 of Regulation No 22, in trade between Member States, whether in respect of imports or exports 'the imposition of any customs duty or charge having equivalent effect' is incompatible with the intra-Community levy system.

The present case is one dealing with intra-Community trade. Consequently the question put by the court making the reference must be considered within the framework of the provisions of the Treaty concerning trade between Member States.

The concept of 'charge having equivalent effect', which depends upon that of a 'customs duty', has been taken from Articles 9, 12, and 13 of the Treaty.

Nothing in Regulation No 22 leads to the conclusion that this regulation is intended to give this concept a scope different from that which it bears within the framework of the Treaty itself.

Articles 12 and 13 on the one hand and Article 95 on the other cannot be applied together to a single set of facts.

Consequently it is difficult to conclude that within the system of the Treaty one and the same charge may at the same time be a 'charge having equivalent effect' within the meaning of Articles 9, 12 and 13 and also 'internal taxation' for the purposes of Articles 95 and 97.

An equalization tax such as that which is the subject of the main action levied within the framework of turnover tax legislation and which is intended to place all categories of products both domestic and imported in a comparable tax position, amounts to internal taxation within the meaning of Article 95.

If in the case of a given imported product it were to exceed the total amount of the direct or indirect charges on the equivalent domestic product, it would then be subject to the prohibitions contained in Articles 95 and 97, but even so, would not have the nature of 'a charge having equivalent effect'.

It follows from all these considerations that the reply to the eleventh question of the Finanzgericht is in the negative.

In these circumstances the twelfth question which was raised only in case the Court might reply affirmatively to the preceding question has become irrelevant.

IV — Costs

The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which submitted their observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Finanzgericht of the Saarland, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Government of the Federal Republic of

Germany, the Commission of the European Communities and the plaintiff in the main action;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 9, 12, 13, 95, 97, 169, 170 and 177;
Having regard to Regulation No 22 of the Council of the EEC on the progressive establishment of a common organization of the market in poultry meat (Official Journal of 20 April 1962, p. 959 et seq.), especially Article 11;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to the judgment of the Court of 3 April 1968 in Case 28/67,

THE COURT

in answer to the questions referred to it by the Finanzgericht of the Saarland, by order of that court of 19 June 1967, hereby rules:

1. **The first paragraph of Article 97, which applies where Member States operating a turnover tax according to the cumulative multi-stage system have actually exercised the right therein granted to them, does not create individual rights which national courts must protect;**
2. **In States which have exercised the power made available to them by Article 97 rates are considered as 'average rates' if they are established as such by the States in question, without prejudice to the operation of the second paragraph of that article;**
3. **A tax which is levied within the framework of turnover tax legislation and is designed to place all categories of products both domestic and imported in a comparable tax situation constitutes 'internal taxation' within the meaning of Article 95;**

and declares:

It is for the court making the reference to decide upon the costs of the present proceedings.

Lecourt Donner Strauß

Trabucchi Monaco Mertens de Wilmars Pescatore

Delivered in open court in Luxembourg on 4 April 1968.

A. Van Houtte R. Lecourt

Registrar President