JUDGMENT OF THE COURT
4 APRIL 1968[1]

Firma Kurt A. Becher v Hauptzollamt München-Landsbergerstraße[2] (Reference for a preliminary ruling by the Finanzgericht, Munich)

Case 13/67

Summary

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

2. *Policy of the ECC — Common rules — Tax provisions — Internal taxation imposed by one Member State on products from other Member States — Concept (EEC Treaty, Article 95)*

1. Cf. paragraph 4, summary, Case 28/67. 2. Cf. paragraph 3, summary, Case 28/67.

In Case 13/67

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court), Munich, for a preliminary ruling in the action pending before that court between

FIRMA KURT A. BECHER, Munich,

and

HAUPTZOLLAMT (Principal Customs Office) MÜNCHEN-LANDSBERGERSTRASSE,

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 and J. Mertens de Wilmars, Judges,

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

gives the following

1 — Language of the Case: German.
2 — CMLR.

JUDGMENT

Issues of fact and of law

I — Summary of the facts

1. *Origins of the case*

On 7 December 1962 the Becher undertaking had two deliveries of Italian maize cleared through customs and accordingly the Hauptzollamt (Principal Customs Office), the defendant in the main action, claimed payment, under German law, of the turnover equalization tax (Umsatzausgleichssteuer or UASt, hereinafter referred to as 'equalization tax') at the rate of 1.5%. Becher raised an objection ('Einspruch') through administrative channels to this charge, alleging that in this case it had the same effect as a customs duty and that, therefore, it did not accord with the provisions of Article 18(1) of Regulation No 19 of the Council of the EEC on the progressive establishment of a common organization of the market in cereals (Official Journal of 20 April 1962, p. 933).

This objection was rejected. Becher then appealed to the Finanzgericht (Finance Court), Munich, before which it added to its arguments by asserting that the provisions of German fiscal law which the defendant customs office had applied were contrary to Article 95 of the EEC Treaty for the following reasons:

— in Germany, deliveries of home-grown maize effected by producers and wholesalers are exempt from the turnover tax, therefore this is not a case of a fiscal charge imposed *directly* on domestic products, as referred to by Article 95;

— nor are those deliveries *indirectly* subject to tax within the meaning of that provision because it is not permissible to include in the comparison levies on auxiliary materials ('Hilfsstoffe') and on the means of production used for creating the similar domestic product; in any event these levies are negligible.

2. *Wording of the questions referred; arguments of the Finanzgericht*

A — On 26 April 1967 the Finanzgericht, Munich, decided to refer the following questions to the Court for a preliminary ruling:

'I — Does the first paragraph of Article 97 of the EEC Treaty produce direct effects and create individual rights which national courts must protect or, if an average rate does not conform to the principles laid down in Article 95 of that Treaty, does the only remedy lie in the right of the Commission to address appropriate directives or decisions to the State concerned in accordance with the second paragraph of Article 97?

II — How is the expression "average rates" appearing in Article 97 of the EEC Treaty to be interpreted, and in particular:

(a) In a cumulative multi-stage tax system are the rates of the turnover equalization tax (Umsatzausgleichssteuer) deemed to constitute, as a general rule, average rates within the meaning of Article 97? or

(b) Is it necessary to check in each case whether the rate of the tax is higher or lower than the average of the charge imposed either directly or indirectly by way of turnover tax on similar domestic products, for example when this rate corresponds only to the charge imposed on a single stage in the movement of the said products?

(c) Is there an average rate when the same rate of tax is applied to products, corresponding to different stages of manufacture, for example to cereals on the one hand and to baker's produce obtained from them on the other?

III — What is to be understood by internal taxation imposed indirectly on sim-

ilar domestic products? Does this also include the turnover tax, or, where applicable, the transportation tax on auxiliary materials, packaging materials, working materials and the means of production used to manufacture and deliver similar products, and transport effected by third parties?'.

B — The Finanzgericht sets out certain considerations which may be summarized as follows:

On Question I

In Case 57/65 (Rec. 1966, p. 295), the Court decided that the first paragraph of Article 95 produces direct effects in favour of individuals. This principle remains applicable in cases where the taxpayer alleges that an average rate does not conform to Article 95. It matters little that an inquiry into this complaint may necessitate lengthy investigations and special methods of calculation. Article 97 does not oblige a Member State to fix average rates, even though as a general rule these are inevitable in a cumulative multi-stage tax system. But if the Member State decides to do so, it is hardly to be doubted that it will have made its calculations before fixing the average rates, and not have done so merely because an individual has brought an action. At the very least it has been required, under the third paragraph of Article 95, to consider its existing taxation rates, as required therein, by 1 January 1962 at the latest.

On Question II

The average rates can represent both the average fiscal charge on various products (in other words, a group of products) and the fiscal charge on a single product considered in several stages of production and distribution. In a cumulative multi-stage tax system, both possibilities may occur and are often inevitable.

At all events, in order to fix an average rate it is necessary to determine what are the *total* charges on the similar domestic products (this concept being understood in such a sense that an affirmative answer must be given to Question III). But in order to have a real average rate, the products in a given group must be subject to approximately equal charges. This means, where applicable, that they must go through the same number of distribution stages, and also that there must not be too much difference between them from the point of view of prior charges on auxiliary materials etc. The Finanzgericht wonders whether it is permissible to group under one and the same average rate the following: raw materials ('Rohstoffe'), which it so happens are largely exempt from taxation, and products made from them, which go through more production stages and have borne higher taxation, for example cereals and baker's produce.

II — Procedure

The order referring the matter was received at the Court Registry on 3 May 1967.

The Government of the Federal Republic of Germany, the Commission of the European Communities and the Becher undertaking submitted written observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC and presented oral argument at the hearings on 5, 6 and 7 December 1967.

The Advocate-General delivered his reasoned, oral opinion at the hearing on 25 January 1968.

The defendant in the main action was represented by Messrs Wendt and Dräger, Advocates of Hamburg, the Government of the Federal Republic of Germany by Mr Everling, Ministerialrat, Mr Hahnfeld, Ministerialrat, and Mr Bülow, Overlandesgerichtsrat, and the Commission of the European Communities by its Legal Adviser, Mr Thiesing.

III — Summary of the observations submitted by the interested parties

1. *Question I*

The observations of the *Becher undertaking* 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 objectives 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 whatsoever 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 jugment 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 below (3), 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 States. 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 matters 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, the courts would have to make far-reaching investigations to decide whether the rate of a tax was 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 a 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.

Similarly the special procedure provided for in the second paragraph of Article 97 makes it impossible to consider this as a 'special case' under Article 95, in that all the rules applicable to that article are also applicable to the first. It might at the most be considered as a *'lex specialis'*, although that theory does not take into account the 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 'procuts *or* groups 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 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.

2. *Question II*

The *Becher undertaking* declares that the rate of a charge does not become an average rate by virtue of the sole fact that it has been so described by the legislature.

In this connexion it puts forward the following considerations:

The term 'average' implies that a weighted average must be calculated. A real average rate must of necessity involve an actual comparison of charges, based on up-to-date and reliable statistical data. Moreover account must be taken of the same rate for import and for export (Article 96). Finally, the wording of Article 97 alone indicates that it is only to be applied to rates fixed after 1 January 1958 on the basis of new calculations.

Point (b) of Question II must be answered in the affirmative: this is because of the fact that Article 97 refers to the principles stated in Article 95, and also because of the judgment delivered by the Court in Case 57/65.

Point (c) of Question II should be answered in the negative, for the reasons stated by the Finanzgericht.

The *Federal Government* makes the following observations:

The concept of 'average rates' is closely bound up with the difficulties to which a turnover tax on domestic products gives rise within a cumulative multi-stage tax system.

The first difficulty results from the fact that

it is extremely difficult to determine with which similar products the imported product is to be compared. The domestic products are often manufactured by very different production processes. The amount of the turnover tax varies in accordance with the number of commercial processes which the product is required to undergo.

Other difficulties arise when the indirect tax is determined. The comparison must relate to the total tax and cannot be calculated precisely even after lengthy calculations. Moreover, the basic factors in the calculations (price, analysis of costs and structure of the undertakings) undergo constant modifications.

Finally, in view of the multitude of products with which it is faced (more than 50 000), it is 'impossible to require of the administration' completely accurate calculations, 'taking into account the time which this would take, the personnel at its disposal and reasons inherent in the problem itself'. The work required in this connexion would moreover be out of proportion with the result, as, once again, to whatever lengths the consideration was taken, it could only give approximate figures.

Consequently the only remedy for those difficulties is to have recourse to assessments and flat-rates; this is in fact the basic idea of the signatory States in adopting the concept of 'average rates' in Article 97. In those circumstances, far from being equivalent to the 'average' of rates calculated exactly, those rates can only represent an exact median value for an aggregate number of cases.

These are the reasons why in the States concerned all the rates of equalization tax are of necessity 'average rates', unless there are in the national territory no similar products or products capable of substitution with which a comparison might be made. It is of little importance whether the rate under consideration has been fixed before or after the entry into force of the Treaty. Far from conferring fresh powers, Article 97 ratifies the possible existence of rules prior to the entry into force of the Treaty.

It is also of little importance that the rate of the charge has not been modified for some years or that it has been calculated on the basis of statistical data relating to an earlier period. If, for all the products liable to the equalization tax, continual examination of the criteria were to be made in order to take into account any slight variations, the effort would be out of proportion to the result, as on the whole modifications to the charges, whether up or down, would end by offsetting one another. In principle it is for the legislature to decide the groups into which products are to be formed in order to establish the average rates. There is an average rate even when an identical rate of charge is applied to products corresponding to different stages of production.

It is not correct that the average rate ('Durchschnittssatz') must be determined on the basis of the tax imposed on the product with the lowest charge; 'average' ('Durchschnitt') means the median value.

The *Commission* makes the following observations:

(a) Only the rates which were fixed on the basis of a comparison made *in concreto* with the turnover tax on domestic products constitute genuine average rates. It follows from this that the expression does not cover, for example, the rates established by a Member State before the entry into force of the Treaty, by exact alignment on the level of the rates imposed on domestic products at the stage corresponding to that of the imports. In cases of this type Article 97 is not applicable. Nevertheless in practice the rates so fixed generally represent only a minimum charge and they consequently conform to Article 95. The truth of this argument emerges from the following considerations.

The charge imposed at a prior stage on similar domestic products constitutes the permitted ceiling for average rates. No doubt, in order to determine what this charge is, recourse may, and indeed must, be had to assessments and average values; but this does not alter in any way the need to calculate genuine averages and to establish the actual charges imposed on each of the categories of products. The 'imposition of a flat rate' ('pauschalieren') is only admissible in connexion, within the specific framework of Article 97, with the establishment of the charge which is permissible on imported products.

(b) A rate calculated on the basis of an estimate can only be an average rate if the estimate is restricted to a minimum average charge which can be justified by valid reasons.
Although it is true that the turnover tax levied on similar domestic products must be calculated on the basis of the most up-to-date statistical information available, the question of the reference period is nevertheless of importance only if the situation has undergone 'appreciable alteration'.
(c) As regards point (c) of Question II, the Commission shares the doubts of the Finanzgericht and states as follows: if one were allowed to allocate products bearing extremely different charges to a same 'group of products' this would leave the field open to operations whereby Articles 95 and 97 could easily be evaded. A 'group of products' should only be formed on condition that it includes only products on which approximately equivalent charges are imposed. Nevertheless this interpretation itself does not prevent the continued existence of numerous factors making for uncertainty and this leaves a wide area of discretion to the Member States.

3. *Question III*

The *Becher undertaking* observes that by an indirect tax on domestic products there must be understood the direct charge levied on basis products (raw materials, semi-finished products and finished products which are added). On the other hand there should not be taken into consideration the charge on accessory and auxiliary materials, the means of production, transport costs and marketing costs. In investigating what the charge on domestic products is, it is not permissible to look to any stage beyond the primary product ('Urprodukt').

The *Federal Government* makes the following points:

As a general rule the objective of the equalization tax (and this is established by the Treaty) is to offset the turnover tax imposed on comparable domestic products. This objective can only be attained if the total tax on domestic products is taken into account. But from the outset 'natural barriers' are erected, as the imposition of turnover tax has less effect on the price of the final product the further back one goes in considering prior taxation at earlier stages of the basic products in an endeavour to determine the tax. Thus the Member States have resorted to a flat rate in order to determine the tax deriving from the basis products and auxiliary materials.
This then is how the question must be answered: account must be taken of all taxation exigible as turnover tax in the course of the manufacturing cycle of a product, since, in one way or another, it is connected to the product and consequently constitutes an element of its final price.

The *Commission* makes the following remarks:

The *ratio legis* of Article 95 et seq. indicates that they only refer to 'taxes pertaining to the products' ('produktbezogene Steuern'), which are governed by the principle of the country of destination in almost all modern tax systems. Moreover, the term 'indirectly' must nevertheless be widely interpreted, because the logical application of this principle requires that charges imposed on domestic products be wholly offset. There is nothing to support the view that the authors of the Treaty intended to restrict this application. 'By internal taxation imposed indirectly on a product there must thus be understood not only taxes which were imposed, as taxes pertaining to the product, at all stages of its production, the raw materials, the semi-finished products, and possibly the finished products which are met with in the final product, but also the taxes borne, in the form of taxes pertaining to the product, by the auxiliary materials, the means of production and the services (connected with production) (such as the transport of products, for example) which were employed at all earlier stages, in the course of production of the raw materials, the semi-finished products and the finished products'.

Grounds of judgment

By order dated 26 April 1967, which reached the Court on the following 3 May, the Finanzgericht, Munich, under Article 177 of the Treaty establishing the EEC, referred to the Court several questions on the interpretation of Articles 95 and 97 of the said Treaty.

Substance

In its first question the court making the reference asks the Court to state whether;

'the first paragraph of Article 97 of the EEG Treaty produces direct effects and creates individual rights which national courts must protect or whether, if an average rate does not conform to the principles laid down in Article 95 of the EEC Treaty, the only remedy lies in the right of the Commission to address appropriate directives or decisions to the State concerned in accordance with the second paragraph of Article 97.'

The second question asks: 'How the expression "average rates" appearing in Article 97 of the EEC Treaty is to be interpreted' particularly as regards various situations specifically set out by the Finanzgericht.

Finally the third question of the Finanzgericht raises the problem 'What is to be understood by internal taxation imposed indirectly on similar domestic products', and in particular whether this expression 'includes the turnover tax or the transportation tax on auxiliary materials, packaging materials, working materials and the means of production used to manufacture and deliver similar products, and transport effected by third parties'.

In its judgment of 3 April 1968 in Case 28/67 referred by the Bundesfinanzhof (Federal Finance Court), the Court of Justice has already given its ruling on questions of an identical nature.

Reference should therefore be made to that decision.

Costs

The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which have submitted their observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Finanzgericht, Munich, the decision as to 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 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 EEC, especially Articles 95, 97 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to the judgment delivered by the Court on 3 April 1968 in Case 28/67;

THE COURT

in answer to the questions referred to it by the Finanzgericht, Munich, by order of that court of 26 April 1967,

refers to the interpretation given in its judgment in Case 28/67, namely:

1. **On the first question:**

   The first paragraph of Article 97, which applies where Member States operating a turnover tax according to the cumulative multi-stage tax system have actually exercised the right therein granted to them and established average rates, does not create individual rights which national courts must protect;

2. **On the second question:**

   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. **On the third question:**

   By the expression 'internal taxation imposed directly or indirectly on similar domestic products' the first paragraph of Article 95 refers to all taxation which is actually and specifically imposed on the domestic product at all earlier stages of its manufacture and marketing or which correspond to the stage at which the product is imported from other Member States;

and declares:

It is for the Finanzgericht, Munich, to make an order as to the costs of the present proceedings.

Lecourt Donner Strauß

Trabucchi Mertens de Wilmars

Delivered in open court in Luxembourg on 4 April 1968.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL GAND
(See Case 28/67, p. 159)

ORDER OF THE COURT
16 MAY 1968[1]

In Case 13/67

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court), Munich, for a preliminary ruling (given by the Court on 4 April 1968) in the action pending before that court between

FIRMA KURT A. BECHER, Munich,

and

HAUPTZOLLAMT (Principal Customs Office) MÜNCHEN-LANDSBERGERSTRASSE,

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

Whereas by application made on 2 May 1968 the Becher undertaking requested the Court under Article 67 of the Rules of Procedure 'to supplement the judgment of the Court of 4 April 1968 so that Questions II and III put by the court making the reference might receive a complete answer';

Whereas, in the event of the Court's considering this request to be inadmissible, the Becher undertaking considers that at all events it is admissible under Article 40 of the Protocol on the Statute of the Court of Justice of the EEC;

1 — Language of the Case: German.