OPINION OF ADVOCATE GENERAL JACOBS

delivered on 13 November 1997 *

1. Is it compatible with Community law, and in particular with Articles 12 and 95 of the Treaty, for a Member State to levy duty on imported electricity at a flat rate when the duty on electricity generated within that State is imposed at various rates, depending essentially on the production method and prompted by environmental concerns? That, in essence, is the question referred to the Court by the Uudenmaan Lääninoikeus (Uusimaa Provincial Administrative Court, Finland).

The national legislation

2. The summary of the national legislation which follows is drawn almost verbatim from the order for reference.

3. Under the Eräiden energialähteiden valmisteverosta annettu laki (Law on excise duty on certain sources of energy, 1473/94), [1] coal, peat, natural gas, electricity and pine oil are subject to duty payable to the Finnish State, consisting of basic duty and additional duty. The customs authorities are responsible for administering the taxes on the products specified in the Law. By electricity the Law means electrical energy within heading 2716 of the customs tariff referred to in the tax table annexed to the Law. Liable to pay duty on electricity are:

(1) those who produce electricity in Finland by nuclear or water power;

(2) those who in the course of a business receive electricity from the Community or import it from outside the Community.

Duty on electricity is not, however, payable on electrical energy which is produced in a generator with an output of less than two megavolt-amperes. It appears in addition that electricity generated from certain industrial waste and electricity generated from peat if production is no more than 25 000 MWh per annum is exempt from the duty.

* Original language: English.

1 — It appears that that law was repealed by Law 1260/1996 of 30 December 1996 on the goods duty applicable to electricity and certain fuels, which came into force on 1 January 1997.

4. The tax table annexed to the Law is as follows:

Product	*Product group*	*Basic duty*	*Additional duty* [1]
Coal, coal briquettes, solid fuels processed from coal; lignite	1	—	116.1 mk/tonne
Peat	2	—	3.5 mk/MWh
Natural gas, gaseous	3	—	11.2 p/nm^3 *
Electrical energy			
— produced by nuclear power	4	1.5 p/kWh	0.9 p/kWh
— produced by water power	5	—	0.4 p/kWh
— imported	6	1.3 p/kWh	0.9 p/kWh
Pine oil	7	18.55 p/kg	—

1 — 'mk' and 'p' are abbreviations of the Finnish units of currency, markka and penni. 'kWh' and 'MWh' are abbreviations of kilowatt-hour and megawatt-hour.

*The duty payable on natural gas for the period from 1 January 1995 to 31 December 1997 is reduced by 50%.

5. The taxation of coal, electricity, natural gas, milled peat, sod peat and crude pine oil was based on environmental grounds. The total tax on the import of electricity was determined in such a way that it corresponded to the average tax content of electricity produced in Finland. No account was taken of the reduction of duty on peat and natural gas.

The facts and the main proceedings

6. Outokumpu Oy ('Outokumpu') is the holding company of a group which is among the biggest industrial consumers of electricity in Finland. Outokumpu *inter alia* sells electricity to its subsidiaries. Since 1 November 1995 Outokumpu has been importing electricity from a Swedish generating company pursuant to a five-year supply contract. Before delivery of electricity under that contract started, electricity was supplied by the Swedish company to Outokumpu for a trial period from 18 September 1995 to 9 October 1995. Outokumpu made a tax declaration with respect to the trial supply to the Helsinki District Customs Office, submitting with its declaration a letter in which it expressed its opinion that the levying of the duty on electricity was contrary to Articles 12 and 13 of the EC Treaty and that for that reason the duty ought not to be assessed. It appears that the customs office none the less decided that the duty was payable. Outokumpu appealed against that decision to the Lääninoikeus.

7. The Lääninoikeus decided to stay the proceedings and seek a preliminary ruling from this Court on the compatibility of the duty with Community law. The questions referred are prefaced by the following summary of the salient features of the relevant legislation:

'Under Finnish national legislation on the taxation of energy, excise duty on electricity is levied in Finland on electrical energy produced there, the amount of the duty depending on the method of production of the electricity. On electricity produced by nuclear power, the excise duty charged is a basic duty of 1.5 p/kWh and an additional duty of 0.9 p/kWh. On electricity produced by water power, the excise duty charged is only an additional duty of 0.4 p/kWh. On electricity produced by other methods, for example from coal, excise duty is charged on the basis of the amount of input materials used to produce the electricity. On electrical energy produced by some methods, for example in a generator with an output below two megavolt-amperes, no excise duty at all is charged. On imported electricity, the excise duty charged, regardless of the method of production of the electricity, is a basic duty of 1.3 p/kWh and an additional duty of 0.9 p/kWh. The excise duty on electricity is thus determined with respect to imported electricity on a different basis from that applied to electricity produced in Finland. The levying of excise duties determined on the basis of the method of production of the energy is founded on environmental grounds in the drafting history of the law. The amount of duty chargeable on imported electricity is not, however, determined on the basis of the method of production of the electricity. The excise duty chargeable on imported electricity is higher than the lowest excise duty chargeable on electricity produced in Finland, but lower than the highest excise duty chargeable on electricity produced in Finland. The excise duty on imported electricity is levied on the importer, whereas the excise duty relating to electricity produced in Finland is levied on the electricity producer.

1. Is excise duty on electricity, determined for imported electricity in the manner described above, to be regarded as a charge having equivalent effect to a customs duty, within the meaning of Articles 9 and 12 of the EC Treaty?

2. If it is not a charge having equivalent effect to a customs duty, is excise duty on electricity, determined for imported electricity in the manner described above, to be regarded as a tax which discriminates against imports from other Member States, within the meaning of Article 95 of the EC Treaty?'

8. Written observations have been submitted by Outokumpu, the Finnish and French Governments and the Commission. Outokumpu, the Finnish Government and the Commission were represented at the hearing.

9. Exhaustive detail of the applicable legislation has been provided by the applicant. Since however the essential features for the purpose of the questions referred have been supplied in exemplary and lucid fashion by the national court, both in the summary

prefacing the questions and in its précis of the legislation reproduced above, [2] I do not propose to set out the legislation in any further detail save for the addition of the following table provided by the Finnish Government showing the comparative tax burden on electricity produced from all the sources concerned.

Source of electricity	*mk/MWh*	*Percentage of production*
Heavy fuel oil	43	2%
Coal	43	19%
Peat	9	8%
Natural gas	15	9%
Nuclear	24	27%
Hydraulic	4	17%
Imported	22	10% [of consumption]

The Treaty provisions

10. Articles 9 and 12 of the Treaty, in so far as is relevant to this case, provide as follows:

'*Article 9*

1. The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect ...

Article 12

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

11. Article 95 of the Treaty provides as follows:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in

2 — Paragraphs 3 to 5.

excess of that imposed directly or indirectly on similar domestic products.

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

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

The nature of the excise duty

12. As a preliminary point I should observe that the Court has ruled that electricity comes within the meaning of 'goods'; it is accordingly the Treaty provisions on goods rather than services which are at issue. [3] As the Commission points out, however, the particular characteristics of electricity may give rise to problems in slotting it into a system of goods tax. The Finnish Government adds that the market in electricity sales between Member States is significantly less developed and liberalised than the market in most other goods. National restrictions — legislative, technical and other — prevent free trade in electricity within the Community, although the Nordic countries share a unified grid which makes trade in electricity practicable.

13. It is settled case-law that a given levy cannot be both a charge having an equivalent effect under Articles 9 and 12 and internal taxation under Article 95. [4]

14. The Court has consistently held that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9 and 12 of the EEC Treaty. [5] However, such a charge may not be so characterised if it forms part of a general system of internal dues applying systematically to categories of products according to objective criteria applied without regard to the origin of the products, in which case it falls within the scope of Article 95 of the Treaty.

3 — Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 28 of the judgment, and Case C-158/94 *Commission* v *Italy*, judgment of 23 October 1997, ECR I-5789, paragraphs 14 to 20.

4 — See most recently Case C-90/94 *Haahr Petroleum*, judgment of 17 July 1997, ECR I-4085, paragraph 19, and Case C-28/96 *Fazenda Pública* v *Fricarnes*, judgment of 17 September 1997, ECR I-4939, paragraph 19.

5 — See most recently *Haahr Petroleum*, cited in note 5, paragraph 20 of the judgment, and *Fazenda Pública*, cited in note 5, paragraph 20.

15. Although, as I stated in my Opinion in *Haahr Petroleum*, [6] the line between the parallel concepts of customs duties and charges having an equivalent effect, on the one hand, and internal taxation contrary to Article 95, on the other, is very fine, [7] the Court has since its first decisions on the distinction between those concepts frequently reiterated that the essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax resides in the fact that the former is borne solely by an imported product as such whilst the latter is borne both by imported and domestic pro ducts. [8]

16. Since the Finnish duty on electricity applies to both imported and domestic electricity, it seems clear *prima facie* that it is not a charge having an effect equivalent to customs duties.

17. The Finnish and French Governments and the Commission share that view and submit that the duty, forming part of a system of general internal taxation, falls to be assessed under Article 95 of the Treaty.

18. The Finnish Government contrasts a hypothetical duty imposed on imported products purely on account of their crossing a frontier, which would be a charge having an effect equivalent to a customs duty, with a duty such as that at issue in this case, which is applicable to both imported and national products. The chargeable event in both cases is the moment when the electricity enters the national grid. The duty on imported electricity is part of a general system of taxes on production in which the method of production has an effect on the rate of the duty. Only when that is not possible is the duty based on the final product. The duty thus applies both to electricity produced in Finland and to imported electricity. The same authority collects the duty. The object of the duty was not to align the price of the imported and national products, but to arrive at a duty on imported electricity corresponding to the average rate of the duty on electricity produced in Finland.

19. The French Government notes that the legislation at issue is part of a general system of taxing energy, applicable to most non-petroleum sources of energy. It refers to the Court's statement in *Denkavit* [9] that, in order to relate to a system of internal dues, the charge to which an imported product is subject must impose the same duty on national products and identical imported products at the same marketing stage, and the chargeable event giving rise to the duty must also be identical in the case of both products. The French Government considers

6 — Cited in note 5.

7 — Paragraph 38.

8 — See, for example, Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, paragraph 28 of the judgment, Case 32/80 *Officier van Justitie* v *Kortmann* [1981] ECR 251, paragraph 18, and Case 193/85 *Co-Frutta* v *Amministrazione delle Finanze dello Stato* [1987] ECR 2085, paragraph 9.

9 — Case 132/78 *Denkavit* v *France* [1979] ECR 1923, paragraph 8 of the judgment.

that those requirements are satisfied in this case.

20. First, electricity generated in Finland is taxed on production, which amounts in practice to being taxed when it arrives on the grid. That is so in effect even for electricity generated from sources other than nuclear and hydraulic: even though in economic terms it is those sources which bear the duty, the duty is none the less directly proportional to the amount of electrical energy delivered to the grid derived from those sources. Imported electricity is similarly taxed when it arrives on the national grid. The French Government submits that there is thus no need to attach any symbolic significance to the crossing of the frontier.

21. Secondly, even though the rates of duty applicable to domestic and imported electricity differ, the unitary nature of the duty cannot be denied. The duty is governed by the same law, and although there are different rates, it is not a question of one rate for domestic production and a separate rate for imports. If 'different rates' always meant 'different tax', Article 95 would never be applicable where rates varied; the French Government doubts whether that was the intention of the authors of the Treaty.

22. The Commission notes that there are certain borderline cases in the 'grey zone' between Articles 9 and 12 on the one hand and Article 95 on the other. There are clearly differences in the basis on which imported and domestic electricity are taxed in the present case. The fact that fiscal distinctions are drawn between domestic and imported products does not, however, necessarily mean that Article 95 is inapplicable, since the very purpose of Article 95 is to prevent any discrimination to the detriment of imported goods. The Commission accordingly considers, to my mind correctly, that each borderline case calls for a global assessment which takes account of the general objectives and the nature of the tax regime in question and compares the scope and effect of the systems applicable to imported and to domestic products. If the differences are sufficiently marked to preclude a straightforward comparison, that would tend to support the view that Articles 9 and 12 were at issue.

23. The Commission notes that the regime for the taxation of energy in Finland appears to be a general fiscal regime: the imposition of the duty on both imported and domestic production and the procedure for its assessment are laid down in the same legislation, the duty on imported electricity seems to have been calculated so as to correspond to the average rate of duty on domestic electricity, the same authority, namely the customs, oversees the collection of the duty, and all the proceeds accrue to the State. The differences which may be detected are justifiable given the difficulty, even impossibility, of using the method of production as the decisive criterion for the rate applicable to imported electricity. The Commission concludes that the differences between the duty on imported electricity and that on domestic

electricity are not sufficiently flagrant for the former to be categorized as a charge having an effect equivalent to a customs duty within the meaning of Articles 9 and 12. The duty may on the other hand be considered to form an integral part of the general Finnish regime of excise duties applicable both to domestic goods and to goods originating in other Member States.

24. I also consider that Article 95 applies. Outokumpu however submits that the duty on imported electricity is a charge having an effect equivalent to a customs duty and as such contrary to Articles 9 and 12 of the Treaty. It advances a number of arguments in support of that thesis.

25. First, Outokumpu makes the somewhat axiomatic point that the duty on imported electricity is a duty on imports. However, that fact alone cannot in my view entail that it is to be categorized as a charge having an effect equivalent to a customs duty, since that would deprive Article 95 of any meaning. The fiscal framework within which a contested tax is levied must be examined as a whole in order to determine whether it affects imports alone or both imported and domestic products, albeit at different rates. [10]

26. Secondly, Outokumpu refers to the provision in the Finnish law which provides that the duty on imported electricity is payable by the importer whereas the duty on electricity produced in Finland is payable by the producer. Outokumpu states that it is evident from that provision that the duty on imported electricity is levied by virtue of the crossing of a frontier between Member States. To my mind, however, that argument is no more decisive than the previous one: any tax affecting imports may be seen as due by reason of the crossing of a frontier. As I pointed out in my Opinion in *Haahr Petroleum*:

'In this context, it is important to distinguish the fact that a tax is levied at the moment of importation from the question whether it is imposed solely on imports: the former is conceptually a different issue from the latter. The fact that the chargeable event for a given tax is importation is not decisive for the purposes of its categorization under Articles 9 to 13 on the one hand and Article 95 on the other: the chargeable event for value added tax on imports, for example, occurs when the goods are imported, but that does not of course mean that it is a charge on imports.' [11]

27. In any event, the Court has been prepared to find certain taxes levied expressly

10 — See *Haahr Petroleum*, cited in note 5, paragraph 25 of the judgment.

11 — Cited in note 5, paragraph 43.

on the crossing of a frontier to be within the scope of Article 95 rather than Articles 9 and 12: see for example *Commission* v *Italy*, [12] which concerned a 'frontier surcharge' imposed on certain imported mineral oils and derivatives, and *Stier*, [13] in which the Court stated that taxes such as the turnover tax at issue in that case came within the concept of internal taxation referred to in Article 95 even if charged at the moment of importation. [14]

28. Thirdly, Outokumpu argues that the duty on imported electricity is not applicable to domestic electricity in certain cases and hence, being to that extent specifically imposed on products imported from another Member State but not similar national products, is a charge having an effect equivalent to a customs duty. There appear to be several overlapping strands to that argument, which can be broken down into two principal submissions.

29. Outokumpu starts by asserting that, in relation to electricity generated in Finland from sources other than hydraulic or nuclear energy (namely coal, natural gas, fuel oil, peat), there is no duty on the finished product as such since only the raw materials from which it is produced are taxed.

30. That argument however appears to be misconceived. It is clear from the order for reference that what differentiates the duty levied on electricity from such sources from the duty on imported electricity and electricity generated in Finland from nuclear or hydraulic power is the basis on which the rate of duty is calculated. While that difference may be of crucial relevance for determining whether the duty is contrary to Article 95, it cannot prevent the duty from falling within the scope of that provision. The Court has on many occasions held that taxes on imports and domestic production assessed on different bases fall to be assessed under Article 95: a particularly compelling analogy is perhaps provided by the Belgian and Luxembourg beer cases, [15] in which excise duty on domestic production of beer was calculated on the basis of the actual quantity of the intermediate product (hot wort) used in the manufacturing process whereas the duty on imported beer was calculated on the basis of the quantity of the finished product, adjusted so as to take into account the notional amount of wort that will have gone into the production of the beer.

31. In any event, even if it were the case that the duty was levied on the primary source of energy that would not of itself preclude the application of Article 95: the Court ruled at an early stage that the first paragraph of Article 95 covers all taxation which is actually and specifically imposed on the domestic product at all stages of its manufacture and marketing up to the stage at which the

12 — Case 21/79 [1980] ECR 1.
13 — Case 31/67 *Stier* v *Hauptzollamt-Ericus* [1968] ECR 235.
14 — P. 240.
15 — Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3141; Case C-153/89 *Commission* v *Belgium* [1991] ECR I-3171.

product is imported from other Member States. [16] Outokumpu recognises this in its submissions in the alternative alleging that the duty contravenes Article 95.

32. In addition, Outokumpu makes a number of points concerning the different bases on which the duty on imports and on domestic production is calculated. It notes that, of national production, only nuclear electricity is subject to the basic tax, whereas all imported electricity is so subject and that imported electricity is subject to duty at a standard rate whereas national production is taxed at variable rates with some exemptions which, since they depend on the source of the energy which cannot be determined once electricity arrives on the grid, are not available for imported electricity.

33. That argument is similarly unfounded. The Finnish Government disputes Outokumpu's assertion that some electricity on the grid has benefited from exemptions, stating that the exemptions for electricity produced in generators with an output of less than two megavolt-amperes and for certain electricity produced from peat in practice affect only electricity produced for consumption by the producer, for example in a hospital's emergency generator. However, even if the assertion were correct, it would be perverse if a system of taxation which provided for certain exemptions for domestic production could not fall within the scope of Article 95, since such a system is precisely the sort of system which Article 95 is designed to regulate. In any event it is clear from the case-law of the Court that Article 95 applies in such circumstances: see, for example, *Schöttle* [17] and *Commission* v *France*. [18] The Court has even been prepared to find Article 95 applicable where all equivalent domestic products and the raw materials from which they were produced were exempt. [19]

34. Fourthly, Outokumpu refers to the principle established by the Court that, in order to fall within the scope of Article 95 of the Treaty rather than Articles 9 and 12, the contested measure must form part of a general system of internal taxation applying systematically to domestic and imported products according to the same criteria. [20] It refers to four criteria which allegedly differ depending on whether the excise duty is levied on domestic or imported electricity and concludes that the duty is a charge having effect equivalent to a customs duty rather than internal taxation within the meaning of Article 95.

35. First, Outokumpu asserts that the chargeable event is different: for domestically produced electricity, it is the production of

16 — Case 28/67 *Molkerei-Zentrale Westfalen* v *Hauptzollamt Paderborn* [1968] ECR 143, p. 155. It may be noted that the French is somewhat clearer than the English.

17 — Case 20/76 *Schöttle* v *Finanzamt Freudenstadt* [1977] ECR 247, paragraph 21 of the judgment.

18 — Case 196/85 [1987] ECR 1597, paragraph 7 of the judgment.

19 — *Molkerei-Zentrale Westfalen* v *Hauptzollamt Paderborn*, cited in note 17.

20 — Case 46/76 *Bauhuis* v *Netherlands* [1977] ECR 5, paragraph 11 of the judgment.

the electricity or, in relation to electricity produced from sources other than nuclear or hydraulic, the use of the raw materials, whereas for imported electricity, it is the importation. As indicated above, however, the chargeable event for a duty which encompasses imports will frequently be the importation, and the Court has accepted that such a duty may none the less fall to be assessed under Article 95. Admittedly, the Court stated in *Denkavit* [21] that, in order to relate to a general system of internal dues, the chargeable event must be identical. That statement, however, has more recently been explained by the Court as follows:

'As to the requirement that the chargeable events be identical, no difference may be discerned in the present case in the fact that the charge is levied on an imported product at the time of importation and on the domestic product when it is sold or used, for in actual economic terms the marketing stage is the same since both operations are carried out with a view to utilisation of the product.' [22]

36. Secondly, Outokumpu asserts that the duty is levied at a different stage: in the case of domestically produced electricity, the duty is levied at the stage of production whereas in the case of imported electricity it is levied at the stage of distribution or consumption. This seems a somewhat artificial distinction when applied to a commodity in the nature of electricity, whose production is surely contemporaneous with release into the national grid. In any event, it is clear that the fact that the duty is levied at different stages in production and marketing does not preclude application of Article 95. [23]

37. Thirdly, Outokumpu argues that the basis of assessment is different: domestically produced electricity is subject to duty at different rates depending on whether it is nuclear or hydraulic, or is taxed only at the level of raw materials (and even that is differentiated), or is not taxed at all, whereas imported electricity is taxed at a single, relatively high rate, which is even higher if duties levied by the State of production are taken into account. Outokumpu cites a number of cases (in particular *Bresciani*, [24] *Denkavit*, [25] *United Foods* [26] and *Commission* v *Belgium* [27]) in support of its argument that those differences are sufficient to take the duty on electricity outside the scope of Article 95. Those cases all concern the status of charges based on public health grounds and levied on certain imported animal products. It was unsuccessfully argued in each

21 — Cited in note 10, paragraph 8 of the judgment.

22 — Joined Cases C-149/91 and C-150/91 *Sanders Adour and Guyomarc'h Orthez* v *Directeur des Services Fiscaux des Pyrénées* [1992] ECR I-3899, paragraph 18 of the judgment. See also the Opinion of Advocate General Mischo in Case C-235/90 *Aliments Morvan* [1991] ECR I-5419, at paragraphs 8 to 11.

23 — See *Molkerei-Zentrale Westfalen*, cited in note 17.

24 — Case 87/75 *Bresciani* v *Amministrazione Italiana delle Finanze* [1976] ECR 129.

25 — Cited in note 10.

26 — Case 132/80 *United Foods and Van den Abeele* v *Belgium* [1981] ECR 995.

27 — Case 314/82 [1984] ECR 1543.

case that the charges were internal taxation within the meaning of Article 95, rather than charges having an effect equivalent to customs duties, on the basis that there was a charge for an allegedly equivalent domestic check. *Bresciani* concerned a charge for a compulsory public health inspection of imported raw hides and a charge for a veterinary inspection of domestic animals on slaughter the main purpose of which was to establish whether the meat was fit for consumption. *Denkavit* concerned a charge on imported lard produced by rendering or solvent-extraction and a charge on the slaughter of domestic animals. *United Foods* concerned levies for the inspection of fish: the inspection of fish caught in national waters took place in fish markets and concerned the hygienic standard, freshness and purity of the fish whilst the inspection on importation took place at customs offices and concerned in particular the health certificate, the means of transport and the state of preservation of the fish. *Commission* v *Belgium* concerned a charge for health checks made on and after the slaughter of domestic poultry, based on the number of visits by the veterinarian and the number of animals, and a charge made on the importation of poultrymeat, based on weight.

38. In my view those cases do not establish any general principle that the application of different bases of assessment to imports and national products is a decisive factor for the classification of a tax as a charge having an equivalent effect (although it is, of course, highly relevant to whether a tax is contrary to Article 95, and I shall return to it in that context). The charges at issue in all those cases were levied on a manifestly distinct basis for imports and national products and are for that reason to my mind not comparable to the duty on electricity at issue in this case. The cases rather illustrate the Court's understandable reluctance too readily to classify as internal taxation charges for health checks on imports merely because it is possible to identify some loosely equivalent domestic charge, and underline the principle that, as Advocate General Warner expressed it in *Denkavit*: 'for an impost to be regarded as forming part of the general internal taxation system of a Member State ... [the] circumstance that domestic products may be subjected to a burden similar to that affecting imports in some other way is not enough'. [28]

39. Finally, Outokumpu states that the duty is not levied on groups of products independently of their origin, since the rate of duty and the basis of assessment differ for electricity produced in Finland and for imported electricity. Outokumpu asserts that a tax falls within the scope of Article 95 only if the provenance of the goods is irrelevant to the rate of the tax or the basis of assessment or the manner in which it is levied. That argument however is based on a misreading of

28 — P. 1939.

the cases invoked by Outokumpu in support. Outokumpu refers to the Court's judgments in *Co-Frutta*, [29] *Simba* [30] and *OTO*. [31] In those cases, however, the Court in analysing the levy at issue merely noted that whether the goods subject to it were produced at home or abroad seemed to have no bearing on the rate, the basis of assessment or the manner in which the tax was levied: it did not say that that was an essential requirement for the application of Article 95. It would be anomalous if Article 95 could not apply to the most flagrant example of the mischief it is intended to remedy, namely explicitly differential rates of duty for imports and domestic products. It is in any event clear since the judgment of the Court in *Haahr Petroleum* [32] that Article 95 does apply to such a duty.

40. I am accordingly not persuaded by Outokumpu's various arguments to the effect that the Finnish excise duty on imported electricity is a charge having an effect equivalent to a customs duty. In my view, the duty forms part of a general system of internal dues and consequently its compatibility with Community law falls to be assessed in the light of Article 95 of the Treaty.

29 — Cited in note 9, paragraph 12 of the judgment.

30 — Joined Cases C-228/90 to C-234/90, C-339/90 and C-353/90 *Simba and Others* v *Ministero delle Finanze* [1992] ECR I-3713, paragraph 8 of the judgment.

31 — Case C-130/92 *OTO* v *Ministero delle Finanze* [1994] ECR I-3281, paragraph 12 of the judgment.

32 — Cited in note 5, paragraph 25 of the judgment.

Compatibility of the duty with Article 95

41. The first paragraph of Article 95 prohibits internal taxation in excess of that imposed directly or indirectly on similar domestic products.

42. The Finnish Government is of the view that the duty falls to be assessed in accordance with Article 95 but considers that it is compatible with that provision. In the absence of harmonisation of the relevant taxes, taxing imported electricity at an average rate is the only logical way to treat imported electricity equitably and falls within the Member State's domestic competence.

43. Outokumpu argues that Law No 1473/1994 is incompatible with Article 95 in so far as it provides for an internal duty on imported electricity which, in the case of electricity produced from certain sources, is higher than the tax directly or indirectly imposed on the similar domestic product.

44. I would at this point note the reference made by Outokumpu to the fact that electricity imported from Sweden (which according to Outokumpu is the only Mem-

ber State which exports electricity directly [33] to Finland) will already have borne duty imposed in Sweden which is not refunded on export. The cumulative effect of the Swedish and Finnish duties obviously further increases the difference between the total duties payable on imported electricity produced from certain sources (particularly electricity produced in hydraulic power stations built before 1978) and the duty payable on electricity produced in Finland from equivalent sources.

45. It is clear from the case-law of the Court that Community law does not prohibit effects of double taxation of this type. Although, as the Court has stated, the abolition of such effects is doubtless desirable in the interests of the freedom of movement of goods, that can only result from the harmonisation of the national systems. [34] The increased differential attributable to the prior imposition of Swedish duties cannot therefore be regarded as discriminatory in effect. It may be noted moreover that Articles 95 to 98 are based on the principle of destination taxation, namely that goods are taxed by the country of importation. In application of that principle, Sweden could lawfully refund on export the taxes borne by electricity produced in Sweden: see Article 96.

46. The French Government, while recognising that it is difficult, even impossible, to determine how imported electricity was produced, considers that the Finnish regime is contrary to Article 95: it is liable to discriminate against electricity imported from other Member States since such electricity may be taxed at a higher rate than the same amount of electricity generated in Finland from the same source materials.

47. The Commission, which also concludes that the tax regime is incompatible with Article 95, refers in addition to the fact that electricity generated in Finland from certain sources and in certain circumstances enjoys exemption from the duty.

48. The Court has ruled in a series of decisions that the first paragraph of Article 95 is infringed where taxation on an imported product and that on a similar domestic product are calculated in a different manner on the basis of different criteria, which lead, if only in certain cases, to higher taxation being imposed on the imported product. [35] Thus

33 — Some may however have originated in Denmark. Russia is the other principal exporter to Finland.

34 — Case 142/77 *Statens Kontrol med Ædle Metaller* v *Larsen* [1978] ECR 1543, paragraphs 32 to 36 of the judgment.

35 — Case 45/75 *REWE* v *Hauptzollamt Landau* [1976] ECR 181, paragraph 17 of the judgment; Case 127/75 *Bobie* v *Hauptzollamt Aachen-Nord* [1976] ECR 1079, paragraph 3; *Commission* v *Luxembourg*, cited in note 16, paragraph 20; *Commission* v *Belgium*, cited in note 16, paragraph 12; Case C-327/90 *Commission* v *Greece* [1992] ECR I-3033, paragraph 12. See also my Opinion in *Luxembourg* and *Belgium*, cited in note 16, at paragraph 26.

the Court has ruled incompatible with Article 95 systems involving a graduated tax on domestic production and a flat-rate tax on imports, [36] a tax on domestic production involving calculation of actual wastage in the manufacturing process and a tax on imports involving a flat-rate assumption of wastage, [37] and a tax on domestic production based on the actual wholesale price and a tax on imports subject to a flat-rate increase of the basis of assessment. [38]

49. Since the structure of the Finnish excise duty on electricity at issue entails the possibility that imported electricity produced from a given source will be subject to a higher rate of duty than electricity produced in Finland from an equivalent source, on the basis of the principle laid down in those decisions the duty is *prima facie* contrary to the first paragraph of Article 95. It would of course be otherwise if it could be shown that all imported electricity came from sources such that, if it had been produced in Finland, the duty would be the same as or higher than the flat rate levied on imports: if, for example, all imported electricity were generated from nuclear power, the total duty of 2.2 p/kWh to which it would be subject would be less than the total duty of 2.4 p/kWh to which electricity generated from nuclear power in Finland is subject. Since however it is common ground that it is not possible to determine the method of production of imported electricity, it must be assumed that, at least in some cases, the duty borne by imported electricity exceeds that borne by nationally produced electricity from equivalent sources. [39]

50. The Finnish Government, however, argues that the fiscal structure is justified on environmental grounds. It refers to the Court's settled case-law to the effect that, at its present stage of development, Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products, even products which are similar within the meaning of Article 95, on the basis of objective criteria, which may include the nature of the raw materials used or the production processes employed, and that such differentiation is compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and of Community legislation. [40] It suggests that, in the light of Article 130r of the Treaty which sets out the objectives of the Community policy on the environment, those criteria include environmental concerns. The different approach to taxing electricity produced

36 — *REWE* and *Bobie*, cited in note 36.

37 — *Luxembourg* and *Belgium*, cited in note 16.

38 — *Greece*, cited in note 36.

39 — See *Luxembourg*, cited in note 16, paragraph 25 of the judgment, *Belgium*, cited in note 16, paragraph 16, and *Greece*, cited in note 36, paragraph 20.

40 — See, for example, *Commission* v *France*, cited in note 19, paragraph 6 of the judgment.

from different sources in its view reflects the only feasible way of linking environmental considerations and the taxation of electricity.

51. While it is true that the Court has recognised that differential tax regimes may be justified by objective criteria, it has always qualified that proposition with the requirement that, in order to be compatible with Community law, the detailed rules must be such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products. [41] Even where the differential taxation pursues legitimate social or economic aims (and the Court implicitly accepted, even before the insertion of Article 130r in the Treaty, that ecological considerations could be a legitimate aim [42]), the fundamental principle of non-discrimination requires a neutral effect, and thus tax advantages, such as exemptions from or reduction of taxes, must be extended to imported products conforming to the same conditions as preferred domestic products. [43]

52. It may be noted that a Member State wishing to retain differential tax rates based on objective criteria such as, in the present case, the method of production is entitled to require appropriate evidence from the importer that those criteria have been met if that is feasible, provided that the evidentiary requirements are not stricter in respect of imported products than they are for similar national products or disproportionate to the goal pursued, namely to eliminate the risk of fraud. [44]

53. Where, however, that is not possible, a system which applies differential taxation based on the method of production to domestic products and a flat-rate tax to imports cannot, as the case-law now stands, be reconciled with Article 95, since the Court has held that differential treatment cannot be justified by practical difficulties in distinguishing imports satisfying different criteria. In *REWE*, [45] the Court stated:

'This finding [of an infringement of Article 95] cannot be refuted by the claim that although the imported product is taxed at a flat rate whilst the domestic product is taxed according to a sliding scale this is because the investigations which would be necessary in the former case could not be carried out.

41 — See, for example, Case 319/81 *Commission* v *Italy* [1983] ECR 601, paragraph 13 of the judgment; Case 106/84 *Commission* v *Denmark* [1986] ECR 833, paragraph 22.

42 — Case 21/79 *Commission* v *Italy* [1980] ECR 1.

43 — *Commission* v *Italy*, cited in note 43, paragraphs 14 to 15 of the judgment; *Commission* v *France*, cited in note 19, paragraph 7.

44 — *Italy*, cited in note 43, paragraphs 20 and 21 of the judgment, and *France*, cited in note 19, paragraphs 14 and 15.

45 — Cited in note 36.

Even though it might indeed be impossible to introduce the same sliding scale for the increase or reduction of taxation on both domestic and imported products, it is nevertheless possible to impose a single flat rate or fixed charge on both products in order to observe the prohibition on discrimination laid down in Article 95.' [46]

54. If, therefore, it is not possible in practice for the importer in this case to prove the method of production of the electricity, it appears that the importing Member State has only one option: it must tax imports at the lowest rate applicable to domestic production. On the basis of the past decisions of the Court, a system of taxation of sources of energy in which the duty on imported electricity is, even if only in certain cases, higher than the duty on electricity produced domestically would seem to be contrary to the first paragraph of Article 95 of the Treaty.

55. There are, however, certain features of the present case which have not coincided in any of the aforementioned decisions of the Court and which raise the question whether the existing principles should be extended to the present case.

56. First and foremost, there seems to be a compelling justification for the tax system at issue in the present case: it appears that the differential rates of tax for domestic electricity were set with a view to preferring electricity produced by methods less harmful to the environment over that produced by more damaging methods. The Finnish Government's claim to that effect is supported by the structure of the tax rates, ranging from very heavy rates of tax on electricity produced from heavy fuel oil and coal to very low rates of duty on hydroelectric power. The setting of an average rate for imports will not of course affect the environmental impact of the imported electricity in the country in which it is produced, but appears to have been intended to correspond to the average rate applicable to national production and thus to enable Finland to retain its environmentally motivated tax rates on national production. The Court in its decisions on Article 95 has not hitherto directly considered the status of environmental concerns as the driving force behind differential rates of tax. Although such concerns were in part behind the favourable tax treatment of regenerated oils in *Italy*, [47] the Court did not address the issue. It was, however, explored by Advocate General Mayras in his Opinion in that case. Having reached a preliminary conclusion that the divergences between the national laws may lead to disparities in the taxes charged on home-produced regenerated oils and similar imported products which may affect the functioning of the Common Market and distort competition, he continued: 'None the less removal of those disparities must in no circumstances have the result of adversely affecting the protection of the environment.' [48]

46 — Paragraph 15 of the judgment. See also *Greece*, cited in note 36, paragraph 24.

47 — Cited in note 43.

48 — P. 21.

57. Since that case and other decisions of the Court on Article 95, the Treaties have been amended to emphasise environmental objectives. Thus the preamble to the Treaty on European Union refers to the determination of the Member States to promote economic and social progress within the context of reinforced environmental protection. [49] The Treaty establishing the European Community, as amended by the Treaty on European Union, states that the Community shall have among its tasks to promote sustainable economic growth respecting the environment [50] and that its activities shall include a policy in the sphere of the environment. [51] Article 130r, already mentioned, is devoted to Community policy on the environment and provides in particular that environmental protection requirements must be integrated into the definition and implementation of other Community policies. [52] As Advocate General Fennelly commented in a recent case, the Community's powers and responsibility to ensure respect for the environment are in principle an inescapable adjunct of its powers and responsibility in relation to the regulation of economic activity. [53]

58. In the specific area of electricity policy, the importance attached by the Council to the environmental incidence of methods of production is emphasised in the preamble to Directive 90/547 on the transit of electricity through transmission grids, [54] the preamble to which states:

'energy policies, more than any other measure contributing to the achievement of the internal market, must not be implemented with the sole aim of reducing costs and maintaining competition, but must also take account of the need to ensure the security of supplies and the compatibility of energy production methods with the environment;

... to attain that objective, account should be taken of the specific characteristics of the electricity sector'. [55]

59. A further feature of the present case derives from the fact that electricity is, as indicated above, an unusual commodity which cannot comfortably be assimilated to other goods and products. Since it cannot be stored, its production is contemporaneous with its release onto the grid and hence its availability for consumption. For that reason, it is common ground that it is not just difficult but impossible to identify the source, and hence the method of production,

49 — Seventh recital in the preamble.

50 — Article 2.

51 — Article 3(k).

52 — Third sentence of Article 130r(2).

53 — Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraph 45 of the Opinion.

54 — Council Directive 90/547/EEC of 29 October 1990, OJ 1990 L 313, p. 30.

55 — Fourth and fifth recitals.

of imported electricity. It may therefore not be appropriate to apply to electricity the principles developed in cases concerning goods such as alcohol, oil, and beer whose source is less elusive.

60. The Court's previous case-law might be taken to suggest that a system of taxation in which differential rates are applied to domestic production while an average of those rates is applied to equivalent imports can never be compatible with Article 95 since the application of a rate of taxation to imports which represents the average differential rate applied to domestic production may entail that some imports are taxed at a higher rate than equivalent domestic products. [56] That unequivocal conclusion seems inappropriate where imports are, as in the case of electricity, inextricably pooled, so that no individual instance of a greater tax burden can be proved or even identified. In particular where, as here, the differential rates on domestic production are based on different methods of production and it is impossible to determine the method of production of imports or even to identify imports from a particular producer, a strict application of the Court's earlier case-law would in practice mean that a Member State could never subject domestic production to differential rates.

56 — See the cases cited in note 40.

61. It was similarly the absence of any workable alternative which prompted the authors of the Treaty to provide in Article 97 that Member States applying cumulative multi-stage systems of turnover tax were permitted to establish average rates for products or groups of products while respecting the principles laid down in Articles 95 and 96 of the Treaty. It is true that the broad application of turnover taxes to many categories of goods and services meant that the use of average rates was deemed ultimately not to be a satisfactory solution, with the result that the cumulative multi-stage systems were eventually replaced by the Community legislature with the common system of value added tax. The problems arising in relation to electricity are however much more specific and are due to the particular characteristics of the product. It seems to me that to deprive Member States, in the absence of Community rules on the matter, of any possibility of using a system of differential taxation to pursue aims of environmental policy in relation to the production of electricity would be disproportionate given that properly calculated averages do not entail any overall restriction on imports, that any discrimination in individual cases is presumed and unquantifiable and that no other means of achieving the environmental objective seems readily available.

62. In order, however, for a flat-rate duty on imports to be permissible in such circumstances, the average must be correctly calculated. In particular it must be weighted so as precisely to reflect the spread of the domestic products subject to differential taxation; moreover the weighting must be regularly reviewed in the light of changing patterns of production. The table provided by the Finn-

ish Government (set out at paragraph 9 above) suggests that the rate of 22 mk/MWh imposed on imported electricity does represent an average of the rates of duty applied to domestic electricity from different sources weighted according to the quantity derived from each source (on the assumption that the figures given as percentages of domestic production are actually percentages of domestic consumption):

Source of electricity	*Amk/MWh*	*Percentage of production*	*A X B*
Heavy fuel oil	43	2%	86
Coal	43	19%	817
Peat	9	8%	72
Natural gas	15	9%	135
Nuclear	24	27%	648
Hydraulic	4	17%	68
		82%	1826
Weighted average rate applicable to domestic production (excluding 8% of domestic production exempt from duty)			$\frac{1826}{82} = 22.27$
Rate of duty applied to imports (representing 10% of consumption)			22

On the basis of those figures, the duty imposed on imported electricity is approximately half that imposed on domestic electricity produced from heavy fuel oil and coal

(representing 23% $\left(\frac{2\% + 19\%}{90\%}\right)$

of domestic production)

and slightly less than that on domestic electricity produced from nuclear power

(representing 30% $\left(\frac{27\%}{90\%}\right)$

of national production).

63. It is however for the national court to verify the accuracy of the figures presented by the Finnish Government and of the resultant average tax which can lawfully be imposed on imports. It may be noted that Outokumpu produces slightly different figures. It appears moreover that the average rate of 22 mk/MWh does not take account of the categories of electricity which are exempt from taxation (including electricity produced from certain industrial waste and by a generator with an output below two megavolt-amperes). If that is so, the national court must verify whether such electricity is in a competitive relationship with imported electricity. That would be the case if it entered on to the national grid.

64. In the light of all the foregoing considerations, I conclude that a system of taxation of electricity such as that at issue in the present case should not be regarded as infringing Article 95 where the average rate applied to imports has been correctly calculated.

Conclusion

65. Accordingly I am of the opinion that the questions referred by the Uudenmaan Lääninoikeus should be answered as follows:

(1) A national system of taxing electricity under which electricity produced nationally is subject to excise duty levied at differential rates depending essentially on the method of production whereas imported electricity, regardless of the method of production of the electricity, is subject to duty levied at a flat rate corresponding to the average of all rates applicable to national production, is not a charge having an effect equivalent to a customs duty within the meaning of Articles 9 and 12 of the EC Treaty but internal taxation within the meaning of Article 95 of the EC Treaty.

(2) Article 95 of the Treaty does not preclude a system of taxing electricity under which electricity produced nationally is subject to excise duty levied at differential rates depending essentially on the method of production in order to favour methods of production less harmful to the environment whereas imported electricity, of which the method of production is impossible to determine, is subject to duty levied at a flat rate corresponding to a properly weighted average of all rates applicable to national production.