JUDGMENT OF THE COURT
16 JUNE 1966[1]

Alfons Lütticke GmbH v Hauptzollamt Saarlouis (Reference for a preliminary ruling by the Finanzgericht des Saarlandes)

Case 57/65

Summary

1. *Member States of the EEC — Absolute obligation under the Treaty — Concept — Rights of individuals — Protection of such rights by national courts*

2. *Policy of the EEC — Common rules — Tax provisions — Internal taxation of one Member State imposed on the products of other Member States — Prohibition of discrimination as compared with charges on the domestic products of that State — Entry into force of this rule — Its nature and consequences — Rights of individuals — Protection of such rights by national courts*
   (EEC Treaty, Article 95)

3. *Deleted*

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

5. *Policy of the EEC — Common rules — Tax provisions — Internal taxation — Charges intended to offset its effect — Nature of internal taxation*
   (EEC Treaty, Article 95)

1. Cf. para. 7, summary, Case 6/64, Rec. 1964, p. 1145.
2. The first paragraph of Article 95 has direct effects and creates individual rights which national courts must protect.
   As a result of the third paragraph of Article 95, the first paragraph of that Article applies to the provisions in existence at the time of the entry into force of the Treaty only from the beginning of the second stage of the transitional period.
3. Deleted.
4. Articles 12 and 13, on the one hand, and Article 95 on the other cannot be applied jointly to one and the same case.
5. A charge intended to offset the effect of internal taxation thereby takes on the internal character of the taxation whose effect it is intended to offset.

In Case 57/65

Reference to the Court of Justice under Article 177 of the EEC Treaty by the Finanzgericht des Saarlandes (Second Chamber) for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.

ALFONS LÜTTICKE GMBH of Köln-Deutz, represented by its representative ad litem, Peter Wendt, Bieberstraße 3, Hamburg 13,

plaintiff,

and

HAUPTZOLLAMT SAARLOUIS,

defendant,

THE COURT

composed of: Ch. L. Hammes, President, L. Delvaux and W. Strauß, Presidents of Chambers, A. M. Donner (Rapporteur), A. Trabucchi, R. Lecourt and R. Monaco, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and Procedure

The facts may be summarized as follows:
On 9 October 1963, the undertaking Alfons Lütticke GmbH, of Köln-Deutz, the plaintiff in the main action, requested the customs office, Nennig, to given customs clearance for 15 000 kg of whole milk powder originating in Luxembourg. In granting the request, the customs office, on the basis of a value for customs purposes of 29 815.50 DM, required the plaintiff to pay the sums of 3 279.70 DM as customs duties and 1 323.80 DM as turnover equalization tax ('Umsatzausgleichsteuer').
The plaintiff's representative made an administrative complaint against the second section of that decision, alleging that the turnover equalization tax demanded was unfounded in law. Since 1 February 1956, paragraph 4, No 20 (f), of the Turnover Tax Law ('Umsatzsteuergesetz') has exempted domestic whole milk powder from the internal turnover tax. Pursuant to paragraph 4, No 25, of the Turnover Tax Law, after 30 June 1961 supplies of the basic product, that is to say, milk, were also exempt from the turnover tax, so that the levying of the turnover equalization tax was prohibited under Article 95 of the EEC Treaty.
The Hauptzollamt (Principal Customs Office) by decision of 23 January 1964, rejected the complaint as unfounded and the Lütticke company lodged an appeal against this rejection with the Finanzgericht des Saarlandes.
In its Order of 25 November 1965 the Finanzgericht took the view that the result of the dispute depends, on the one hand, on whether the turnover equalization tax is an internal tax or a charge having equivalent effect to that of customs duties and, on the

other hand, on whether the provisions of Article 95 of the Treaty have direct effect so as to create individual rights of which national courts must take account, and it therefore stayed the proceedings and made a reference to the Court of Justice under Article 177 of the Treaty in order to obtain a preliminary ruling on the questions which it formulated as follows:

1. Does the first paragraph of Article 95 of the EEC Treaty have direct effect, creating individual rights of which the national courts must take account?

If the answer to this question is in the negative:

2. Does the third paragraph of Article 95 of the EEC Treaty in conjunction with the first paragraph of that Article have direct effect as from 1 January 1962 and create individual rights of which the national courts must take account?

If the answer to this second question is also in the negative:

3. Do the first and third paragraphs of Article 95 of the EEC Treaty in conjunction with Articles 12 and 13 thereof have direct effect creating individual rights of which the national courts must take account?

This request was transmitted to the President of the Court of Justice by letter of the President of the Second Chamber of the Finanzgericht which was received at the Court Registry on 26 November 1965.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged:

— On 24 February 1966, by the Government of the Kingdom of the Netherlands;
— On 26 Febrruay 1966, by the Commission of the EEC;
— On 28 February 1966, by the plaintiff in the main action;
— On 1 March 1966, by the Government of the Federal Republic of Germany;
— On 1 March 1966, by the Government of the Kingdom of Belgium.

At the oral proceedings on 24 March 1966, the oral observations of the plaintiff in the main action, of the Commission of the EEC and of the Government of the Federal Republic of Germany were heard.

Documents were produced on 19 April 1966 by the Government of the Federal Republic of Germany, following which the same parties were heard a second time by the Court at the hearing on 28 April 1966.

The Advocate-General delivered his opinion at the hearing on 4 May 1966.

II — The written observations submitted to the Court pursuant to Article 20 of the Statute of the Court of Justice

The observations submitted pursuant to the second paragraph of Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

Observations submitted by the Commission of the EEC

The Commission explains that the purpose of Article 95 et seq. is to neutralize the effects of indirect taxation on competition in products of the Common Market. According to it, the turnover equalization tax indubitably comes under Article 95 and does not constitute a charge having equivalent effect to customs duties. The opposite conclusions which have on occasion been drawn from the judgment in Joined Cases Nos 2 and 3/62 fail to recognize the special features of those cases on which the judgment was based. In the present case, however, the circumstances disclosed by the Finanzgericht cannot transform the turnover equalization tax from an internal tax into a charge having an effect equivalent to customs duties. Such an operation would separate the integral tax into two parts, of which one would be considered as a charge having an effect equivalent to customs duties and the other, corresponding to the indirect application of the turnover tax, would be deemed to be internal taxation.

With regard to the effects of Article 95, the Commission considers that the first paragraph entails, from the entry into force of the Treaty, an obligation to maintain the *status quo* (stand-still), whilst the third paragraph entails the obligation to eliminate the existing distortions by the commencement of the second stage of the tran-

sitional period. It considers that these provisions have direct and immediate effect.
The first paragraph is clear, complete and specific and does not assume further implementing provisions either by the Member States or the Community. It cannot be objected either that it requires interpretation or that its application is uncertain. These objections might be raised with regard to many of the rules of internal law without detracting from their obligatory nature. Nor can Article 97 be relied on, because that provision is only applicable provided that the principles of Article 95 are observed.
The Commission is of the same opinion with regard to the third paragraph. The mere circumstance that the present case does not involve an obligation to refrain from acting, but an obligation to act is not a reason to deny the direct effect of this provision. The third paragraph is sufficiently clear and specific and neither assumes further acts by the Community nor leaves the Member States a margin of discretion in implementing it.

Observations of the plaintiff in the main action

The plaintiff regrets that the Finanzgericht has not raised the question whether Community law generally prevails over national law or only when it is more recent that the national law in question. It claims that in view of the frequent amendments to legislation relating to the turnover equalization tax, the latter solution would have undesirable consequences. It consequently hopes that, although the court making the reference has not raised the point, the Court of Justice will feel itself able in this case to give a ruling in favour of the absolute priority of Community law.
With regard to the question whether Article 95 creates, for nationals of Member States, individual rights which the national court is bound to protect, the plaintiff rejects the concept of 'self-executing' as inappropriate and advocates the adoption of the distinction, derived from Roman law, between *leges imperfectae, leges minus quam perfectae, leges perfectae* and *leges plus quam perfectae*. It alleges that since any provision of the Treaty has the character of a *lex perfecta*, it has immediate effect in its field. In its view, Article 95 constitutes such a *lex perfecta*. It endeavours to refute the arguments which led the Finanzgericht to arrive at the opposite conclusion.
Although the Finanzgericht has not raised the point, the plaintiff considers whether the turnover equalization tax by its nature comes under Article 95. Although it states that this is an internal tax coming under the said Article, it claims that this fact does not preclude the simultaneous application of Article 9 et seq. of the Treaty. There is nothing unusual in the simultaneous application of different provisions to the same facts. When the provisions concerned have a common purpose in related fields, such situations are indeed generally found. In this connexion, the judgment in Joined Cases 2 and 3/62 showed a more realistic appreciation that the judgment in Case 10/65.
In cases of the simultaneous application of several prohibitions, the principle of 'Gemeinschaftsfreundlichkeit' (compatibility with Community provisions) requires that the prohibition best fitted to attain the objectives of the Community shall prevail. The plaintiff ends by stating that neither domestic milk products nor the raw materials of which they are composed are subject to any turnover tax.

Observations of the Government of the Federal Republic of Germany

The Federal Government restricts its observations to two questions which it considers essential to the case in question, namely:
1. On the direct effect of Article 95 of the Treaty;
2. On the delimitation of the respective fields of Articles 12 and 95.

With regard to the first question: it may be deduced from the case-law of the Court that the direct effect of the provisions of the Treaty is conditional upon three requirements:
(a) They must relate to a prohibition, that is to say, to an obligation to refrain from acting and not to an obligation to act;

(b) It must be an unconditional obligation, and in particular it must not assume measures by the Member State in question;
(c) The obligation must be unambiguous, so that it can be applied without substantial difficulty by the national courts and administrations.

The Federal Government states that none of these conditions is fulfilled in the case of Article 95.

It furthermore observes that the Finanzgericht restricted itself to finding that supplies of milk were exempt from turnover tax as from 1 July 1961, but failed to inquire at what rate the milk, as a basic product for powdered milk, was taxable and what quantity of milk was necessary to produce a unit of powdered milk. Only after lengthy researches carried out jointly by the Federal Government and the Commission, was the equalization tax reduced from 4% to 3%.

With regard to the second question: the Federal Government considers that a clear distinction must be made between customs duties and charges having equivalent effect, which both come under Article 12 of the Treaty, and internal taxation which comes under Article 95. Even the fact that the rate of the turnover tax is reduced to nil for certain products is not such as to deprive the turnover equalization tax of the character of internal taxation, as is proved in particular by the second paragraph of Article 97.

Observations of the Government of the Kingdom of the Netherlands

With regard to Questions 1 and 2: both Article 97 of the Treaty, which allows for different forms of implementation and thereby presumes the taking of measures by national legislatures, and the structure of Article 95 itself militate against recognizing the latter's provisions as having direct effect. Compliance with the third paragraph of that Article can only be assured by means of Article 169.

With regard to Question 3: The simultaneous application of Article 12 et seq. and of Article 95 et seq. risks causing confusion with regard to the appropriate system for the abolition of discrimination. For these reasons, the Government considers that it would be more expedient to consider the turnover equalization tax and the turnover tax as a single tax falling under Article 95 of the Treaty.

Observations of the Government of the Kingdom of Belgium

With regard to Questions 1 and 2: The Belgian Government considers that the provisions of Article 95 of the Treaty do not create individual rights which the national courts must protect. This interpretation is based on the actual wording of the Articles in question and on the fact that compliance with and implementation of the said provisions are inconceivable without the adoption by each of the Member States of the appropriate measures.

With regard to Question 3: it is observed that Article 12 and Article 95 et seq. of the Treaty pursue similar objectives in their related but distinct fields, so that the cumulative application of the two types of provision to the same case is inadmissible.

Grounds of judgment

1. The first and second questions

In its first question, the Finanzgericht des Saarlandes requests the Court to rule whether the first paragraph of Article 95 of the Treaty produces direct effects and creates individual rights of which national courts must take account. If a negative answer is given to this question, the Finanzgericht asks whether, as from 1 January

1962, the third paragraph of the same Article, together with the first paragraph, produces the effects and creates the rights mentioned above.

It is necessary to consider the two questions together and first of all to clarify the relationship between the said paragraphs of Article 95.

The first paragraph of Article 95 sets forth, as a general and permanent rule of Community law that Member States shall not impose on the products of other Member States any internal taxation in excess of that imposed on similar domestic products. Such a system, often adopted by the Treaty to ensure the equal treatment of nationals within the Community under national legal systems, constitutes in fiscal matters the indispensable foundation of the Common Market. In order to facilitate the adaptation of national legal systems to this rule, the third paragraph of Article 95 allows Member States a period of grace lasting until the beginning of the second stage of the transitional period, that is to say, until 1 January 1962, to repeal or amend any 'provisions existing when this Treaty enters into force which conflict with the preceding rules'. Article 95 thus contains a general rule provided with a simple suspensory clause with regard to provisions existing when it entered into force. From this it must be concluded that on the expiry of the said period the general rule emerges unconditionally into full force.

The questions raised by the Finanzgericht must be considered in the light of the foregoing considerations.

The first paragraph of Article 95 contains a prohibition against discrimination, constituting a clear and unconditional obligation. With the exception of the third paragraph this obligation is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States. This prohibition is therefore complete, legally perfect and consequently capable of producing direct effects on the legal relationships between the Member States and persons within their jurisdiction. The fact that this Article describes the Member States as being subject to the obligation of non-discrimination does not imply that individuals cannot benefit from it.

With regard to the third paragraph of Article 95, it indeed imposes an obligation on the Member States to 'repeal' or 'amend' any provisions which conflict with the rules set out in the preceding paragraphs. The said obligation however leaves no discretion to the Member States with regard to the date by which these operations must have been carried out, that is to say, before 1 January 1962. After this date it is sufficient for the national court to find, should the case arise, that the measures implementing the contested national rules of law were adopted after 1 January 1962 in order to be able to apply the first paragraph directly in any event. Thus the provisions of the third paragraph prevent the application of the general rule only

with regard to implementing measures adopted before 1 January 1962, and founded upon provisions existing when the Treaty entered into force.

In the oral and written observations which have been submitted in the course of the proceedings, three governments have relied on Article 97 in order to support a different interpretation of Article 95.

In empowering Member States which levy a turnover tax calculated on a cumulative multi-stage tax system to establish average rates for products or groups of products, the said Article thus constitutes a special rule for adapting Article 95 and this rule is, by its nature, incapable of creating direct effects on the relationships between the Member States and persons subject to their jurisdiction. This situation is peculiar to Article 97, and can in no circumstances influence the interpretation of Article 95.

It follows from the foregoing that, notwithstanding the exception in the third paragraph for provisions existing when the Treaty entered into force until 1 January 1962, the prohibition contained in Article 95 produced direct effects and creates individual rights of which national courts must take account.

2. The third question

In its third question, the Finanzgericht requests the Court to rule whether 'the first and third paragraphs of Article 95 of the EEC Treaty in conjunction with Articles 12 and 13 thereof have direct effect creating individual rights of which the national courts must take account'.

Since this question was only raised in the event of the Court's answering the first two questions in the negative, it is unnecessary to give a reply to it. It should however be made clear that Articles 12 and 13 on the one hand and Article 95 on the other cannot be applied jointly to one and the same case. Charges having an effect equivalent to customs duties on the one hand and internal taxation on the other hand are governed by different systems. In this respect it should be noted that a charge intended to offset the effect of internal taxation thereby takes on the internal character of the taxation whose effect it is intended to offset.

Costs

The costs incurred by the Government of the Kingdom of the Netherlands, by the Commission of the European Economic Community and by the Governments of the Federal Republic of Germany and of the Kingdom of Belgium, which have submitted observations to the Court are not recoverable, and 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 des Saarlandes, 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 observations of the plaintiff in the main action, the Commission of the European Economic Community and the Government of the Federal Republic of Germany;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 12, 13, 95 and 97 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby rules:

1. **The first paragraph of Article 95 produces direct effects and creates individual rights which national courts must protect;**

2. **As a result of the third paragraph of Article 95, the first paragraph of that Article applies to provisions in existence at the time of the entry into force of the Treaty only form the beginning of the second stage of the transitional period;**

and declares that the decision on costs in the present proceedings is a matter for the Finanzgericht des Saarlandes.

Delivered in open court in Luxembourg on 16 June 1966

Hammes Delvaux Strauß

Donner Trabucchi Lecourt Monaco

A. Van Houtte Ch. L. Hammes

Registrar President