by the preliminary ruling given or whether it is necessary to make a further reference to the Court.

2. The power made available by Article 97 permits the States concerned to tax an imported product at a single rate deemed to correspond to the aggregate tax burden borne by domestic products.

3. In order to enable the national court to decide whether the case before it is governed by Article 97, it is only necessary for it to be in a position to decide, on the one hand, whether the said case involves a turnover tax calculated on a cumulative multi-stage tax system and, on the other hand, whether the Member State has actually exercised the power made available to it by the said article. If the national court can establish the existence of these two factors, it merely remains for the Commission and the other Member States to put into operation the machinery provided for them by the second paragraph of Article 97 and by Articles 169, 170 and 173, to review the legality of the measures adopted or have it reviewed.
The question whether the power made available by Article 97 has actually been exercised in a particular case is, from the point of view of Community law, a question which national courts must decide within the context of national law.

4. If a State has exercised the power made available to it by Article 97, the rates which it has established are governed by that provision, even where it could be shown that they do not correspond to the aggregate tax burden borne by domestic products.
In States which have exercised the power made available by Article 97, an 'average rate' is any rate established as such by the State concerned, even if it was established prior to the entry into force of the Treaty.

5. In order to establish an average rate within the meaning of Article 97 of the EEC Treaty, it is sufficient that the body which is competent in accordance with the legal system of a Member State should declare that an existing rate of tax is an average rate.

6. Under a cumulative multi-stage tax system, a rate applicable to a single stage of marketing may constitute an average rate within the meaning of Article 97 of the EEC Treaty. As far as national courts are concerned, infringement of Articles 95 and 97 would not mean that the rate in question was no longer an 'average rate', but would merely render it liable to the measures laid down in the second paragraph of Article 97.

7. By permitting Member States to establish average rates for groups of products the Treaty merely intended to indicate that the States are not bound to establish separate rates for each product. Nothing in Article 97 allows the conclusion to be drawn that the status of 'average rate' depends on the composition of the groups covered by the rate in question.
Consequently, Article 97 does not exclude the possibility that products liable to a rate of turnover equalization tax which does not differ from the general rate may form a group of products within the meaning of that article.

In Case 29/68

Reference to the Court under Article 177 of the Treaty establishing the European Economic Community by the Finanzgericht (Finance Court), of the

Saarland for a preliminary ruling in the action pending before that court between

MILCH-, FETT- UND EIERKONTOR GMBH, Hamburg,

and

HAUPTZOLLAMT (Principal Customs Office) SAARBRÜCKEN,

on the interpretation of the said Treaty and especially Articles 95 and 97,

THE COURT

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

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

gives the following

JUDGMENT

Issues of fact and of law

I — Origin of the case

1. In March 1967 the Milch-, Fett- und Eierkontor company, (hereinafter referred to as the 'Milchkontor company') obtained customs clearance in Germany for slaughtered poultry imported from the Netherlands, upon which under German law the relevant customs office levied a turnover equalization tax (Umsatzausgleichsteuer — UASt; hereinafter referred to as 'equalization tax').

The Milchkontor company appealed against this imposition to the Finanzgericht of the Saarland, asking for the notice of taxation, in so far as it referred to the equalization tax, to be annulled and for an order that this tax, the amount of which had already been paid, should be reimbursed.

As reasons for its appeal it made the following points in particular.

— the similar domestic product is not subject to a turnover tax, or is subject to it only to an insignificant extent;

— the Milchkontor company is therefore the victim of discrimination, which it is entitled to bring to the attention of the national court, since Article 97 of the EEC Treaty constitutes a provision implementing Article 95 which, according to the case-law of the Court, gives this right to those subject to its jurisdiction;

— even if Member States exercise the

power provided for in Article 97, they are not entitled to go beyond the principles laid down by Article 95;

— if indeed the solution of the problem depends on Article 97, it is still necessary to consider the fact that the disputed rate does not amount to an average rate; it is irrelevant to point out that, with effect from 30 December 1966, paragraph 7 of the German Law concerning turnover tax provides that the rates of equalization tax applicable to goods corresponding to similar or comparable domestic goods are average rates.

The Hauptzollamt (Principal Customs Office), the defendant in the action thus brought, replied to that argument in the following manner: the disputed rate amounts to an average rate and must therefore be considered exclusively in relation to Article 97; consequently, if it appears that this rate exceeds the limits fixed by Article 95, only the Commission of the European Communities is entitled to take action against the Member State concerned (second paragraph of Article 97).

2. By an order of 19 June 1967, the Finanzgericht of the Saarland suspended proceedings and asked the Court to give a ruling in particular on the following questions:

'(1) What must be understood by "average rate" within the meaning of Article 97 of the EEC Treaty?

(2) Can a general rate of taxation which was imposed in 1951 and which has remained unchanged since that date be regarded as an average rate within the meaning of Article 97 of the EEC Treaty?

(3) Is Article 97 of the EEC Treaty an independent legislative provision or a special case of Article 95 which goes no further than altering the procedure by which the Commission is to ensure observance of the Treaty?

(4) To the extent to which Article 97 is a special case of Article 95, is the national court entitled and required to consider whether the turnover equalization tax charged on importation of products from Member States of the EEC is compatible with Article 95 of the EEC Treaty when the disputed rate of tax is an average rate within the meaning of Article 97?

(5) To the extent to which Article 97 of the EEC Treaty is an independent legislative provision, does the first paragraph thereof produce direct effects and does it create individual rights which national courts are bound to uphold, or does Article 97 only give to the Commission the right to address appropriate directives or decisions to the State concerned in accordance with the second paragraph thereof?

(6) To the extent to which Article 97 alone or in conjunction with Article 95 of the EEC Treaty creates individual rights, is there not a legal average rate, in particular?

(a) When the total burden of the turnover tax on national products of the same type has not been calculated on the basis of firm statistics, but has been the subject of an estimate;

(b) When calculations have in fact been made on the basis of statistics, but for periods prior to 31 December 1961;

(c) When the national products in respect of which the system of production and of distribution varies or for which the total burden of turnover tax varies by more than 0.5%, or which are not similar, have been combined in a single group of products?

(7) . . .

(8) Is it necessary to classify among the comparable taxes referred to by Article 95 of the EEC Treaty which are imposed indirectly on similar domestic products:

(a) Only those amounts of turnover tax levied upon similar products at one or more prior stages of distribution; or

(b) Also the amounts of turnover tax imposed on raw materials or semi-finished products which have been used in the manufacture of similar domestic products; or

(c) Also the amounts of turnover tax imposed on accessory products, for example packaging materials or auxiliary materials, that is to say, those which are destroyed during the manufacture of the product or absorbed by the latter without themselves being the subject of manufacture; or

(d) Amounts of turnover tax charged upon the means of production, transport costs and sales costs?

(9) (a) Does the expression 'imposed directly' appearing in the first paragraph of Article 95 of the EEC Treaty mean that account must be taken only of the first of the previous stages through which the similar domestic product was passed; or possibly

(b) Include several stages of distribution (if so, how many); or

(c) Include several stages of production (if so, how many)?

(10) (a) In the event of Questions 8(d) 9(c) receiving an affirmative answer, is it lawful to take into account the indirect incidence of the tax going back as far as primary product only; or

(b) Is it necessary also to take into account the turnover tax levied upon the earlier stages of the primary products for raw materials (for example hatching eggs for poultry, and seeds for plants); or even

(c) Is it also necessary to take into account turnover tax imposed on the means of production used to obtain the primary products, for example incubators or brood hens?

. . .'

The Court decided these questions by a judgment of 4 April 1968 (Case 25/67, Rec. 1968, p. 307 et seq.) the operative part of which includes in particular the following (loc. cit. p. 325):

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

(2) In States which have exercised the power made available to them by Article 97 rates are considered as 'average rates' if they are established as such by the States in question, without prejudice to the operation of the second paragraph of that article;

. . .'

The grounds of that judgment include in particular the following findings:

'According to the wording of Article 97 its application is subject to a double condition: first that the Member State levies a turnover tax based on the cumulative multi-stage tax system *and secondly, that it has in fact exercised the power made available to it by the said provision* and established average rates. Consequently according to Community legislation currently in force, in States *which have exercised the power made available to them by Article 97,* rates are considered as 'average rates' if they are established as such by the States in question . . . without prejudice to the operation of the second paragraph of that article.' (The italic passages are not italic in the original.)

As to whether Article 97 creates individual rights which national courts

must protect, the said grounds of judgment refer to the negative answer which the Court gave to that question in its judgment of 3 April 1968, given as a preliminary ruling in Case 28/67 (*Molkerei-Zentrale Westfalen/Lippe* v *Hauptzollamt Paderborn*, Rec. 1968, p. 214 et seq.). The operative part of that judgment includes in particular the following passage (loc. cit. p. 230):

'*Since* [Article 97] *gives the Member States a discretion of which they may or may not avail themselves* to have recourse to average rates, it implies, in the case of States *which have used this power properly*, the interposition between the rule of Community law and its implementation of legal measures implying a discretion; this means that, in the present state of Community law, such discretion excludes their choice and its consequences from any possibility of the direct applicability of the relevant provisions of Article 97.' (The underlined passages are not underlined in the original.)

It is not without interest to refer to the statements contained in the above-cited judgments, as they are reproduced in the Reports of Cases before the Court (loc. cit.).

(3) (a) By its application of 2 May 1968, the Milchkontor company, relying on Article 67 of the Rules of Procedure of the Court, has asked the latter to fill the gaps in its judgment in Case 25/67 so as to reply to Questions 2, 3, 5, 7, 8(c) and 10(a) to (c), which were submitted to it by the Finanzgericht of the Saarland in a reference which, by an order of 16 May 1968, the Court decided was inadmissible.

(b) During the latter stages of the main proceedings, the Milchkontor company pointed out that neither the German courts nor the Court of Justice had yet considered the prohibition on discrimination contained in the first paragraph of Article 7 and in the second subparagraph of Article 40(3) of the EEC Treaty and it suggested to the Finanzgericht of the Saarland that questions should be submitted to the Court on that point also.

It also maintained that its appeal was well founded, notwithstanding the aforementioned judgments of the Court, claiming that it was impossible to consider the disputed rate of equalization tax as an average rate, since the Federal Republic had not exercised the power granted to it by Article 97, and pointing out that the amount of the rate which the administration intended to impose on it also precluded its being accepted as an average rate.

The Hauptzollamt considers on the other hand that it follows from the preliminary rulings mentioned above that, since the disputed rate is an average rate, it cannot be challenged by undertakings liable to the tax.

II — Terms and reasoning of the order making the reference

1. Before deciding on the appeal of the Milchkontor company the Finanzgericht of the Saarland wished to make a fresh reference to the Court and on 4 October 1968 asked it to decide by way of a preliminary ruling on the following questions, which are the subject-matter of the present case, 29/68:

'(1) (a) How must the following extract from the first paragraph of Article 97 of the EEC Treaty be interpreted:
"Member States . . . may . . . establish average rates . . . provided that there is no infringement of the principles laid down in Article 95?"

(b) Under a cumulative multi-stage tax system, where the rate of tax imposed upon a single stage was introduced before the entry into force of the EEC Treaty, is it possible to state that that rate of tax amounts to an aver-

age rate within the meaning of Article 97 of the EEC Treaty?

(2) (a) Does the fact that the body to which the legal system of a Member State grants competence to do so declares that a rate which is in force is an average rate amount to the establishment of an average rate within the meaning of Article 97 of the EEC Treaty; or

(b) Is it necessary at least that, in the procedure during which the rate was declared to amount to an average rate, the intention should also have been shown by the legislative or regulatory body of the Member State substantially to modify the previous situation; or

(c) Must this procedure show further that on the basis of the facts available to it the competent body was able to establish an average rate in accordance with the principles set out in Article 95 of the EEC Treaty and that it had the intention of so doing?

(3) What must be understood by "groups of products" within the meaning of Article 97 of the EEC Treaty?

(4) Must it be accepted that a group of products within the meaning of Article 97 of the EEC Treaty may consist of all goods corresponding to similar or comparable domestic goods for which the rate of turnover equalization tax applicable does not differ from the general rate?

(5) If a declaration by the legislative or regulatory body of the Member State is not in itself sufficient to establish an average rate, or if it is impossible to accept that a group of products within the meaning of Article 97 of the EEC Treaty may consist of all goods corresponding to similar or comparable domestic goods for which the rate of turnover equalization tax applicable does not differ from the general rate, the Court is asked to reply to Questions 8, 9 and 10 which were put to it [in Case 25/67] by the order of the Finanzgericht of the Saarland of 19 June 1967 referring the matter, reference to these questions taking the place of their complete reproduction.'

(Cf. above: 1, 2)

In the event of the Court's not sharing the opinion of the Finanzgericht as set out below (2,(e)), that court states that it asks 'further, as a subsidiary matter, for an answer to the questions concerning Articles 7 and 40', meaning clearly by that the questions which the Milchkontor company formulated in the following terms in a statement which it submitted to the Finanzgericht, of which at present the Court is also in possession:

'Are Articles 7 and 40 of the EEC Treaty directly applicable provisions creating rights and obligations for nationals of the Member States?

Do Article 95 et seq. constitute *leges speciales* in relation to Article 7 or to Article 40?'

2. The statement made by the Finanzgericht of the Saarland of the reasons for its order, commenting upon the questions thus raised, may be summarized as follows:

(a) *In general*

It is necessary that the Court should give a ruling on the said questions. If, in fact, the reply of the Court shows that the disputed rate is an average rate, the Milchkontor company's appeal must be rejected; if the contrary is so, the Finanzgericht must check whether this rate is compatible with Article 95.

(b) *Questions 1 and 2*

Notwithstanding the judgments of the Court mentioned above, uncer-

tainty remains regarding the content of Article 97 because certain phrases which are used therein '[are] capable of being interpreted and in fact need to be interpreted'; the Finanzgericht here refers to the expression '. . . States which have exercised the power made available to them by Article 97' (judgment in Case 25/67, loc. cit., p. 325) and the expression 'have used this power properly' (judgment in Case 28/67, loc. cit., p. 230).

In order for this condition to be fulfilled, it is not sufficient that the legislative or regulatory measure of the Member State was properly adopted from the formal point of view alone. The Finanzgericht is on the contrary of the opinion 'that it is also necessary that at the time when it introduces the legislative or regulatory measure, the body entitled to do so should also have, within the context of the exercise of the power made available under the Treaty, the intention substantially to modify the previous state of the legislation, in such a way, either that the procedure for introducing average rates should lead to the express and intentional establishment of a new average rate within the meaning of Article 97 of the EEC Treaty, or that a rate laid down during a previous legislative procedure which, by reason of the circumstances under which it was created, its function and its amount, corresponds materially to the requirements of Article 97, . . . should be defined as an average rate by a formal act, which could take the form of a simple declaration'. The Finanzgericht explains that this much is clear from the wording of Article 97 ('may . . . establish average rates'): the States which signed the Treaty appear to have started from the idea that, at the time when it entered into force, no average rates within the meaning of the Treaty could have been fixed. It also follows from that provision that the States were required to fix the 'average' of certain figures on the basis of information which could be checked.

The Finanzgericht gives details of the reasons why it considers that the disputed rate does not correspond to these requirements.

No doubt this rate constitutes the general rate applicable to a stage and is consequently, for many products, lower than the average tax imposed upon comparable domestic goods; but the only conclusion which may be drawn is that for a great number of products it is not contrary to Article 95; it cannot however be inferred that it amounts to an 'average rate'.

(c) *Questions 3 and 4*

These questions require a decision as to the criteria (physical properties, number of stages of production, utilization, absolute or approximate equivalence of taxes borne, etc.) according to which products may be grouped together. The Finanzgericht emphasizes that it is also necessary to consider whether it is permissible to include a large number of different products in the same group.

(d) *Question 5*

In respect of this question the Finanzgericht refers to the remarks which it made in Case 25/67 (which are summarized in the judgment which the Court gave in that case, loc. cit., p. 311).

(e) *The interpretation of the first paragraph of Article 7 and of the second subparagraph of Article 40 (3) of the EEC Treaty*

In respect of the observations of the Milchkontor company reproduced below (IV, 2, D), the Finanzgericht states the following: Contrary to the claim made by the defendant in the main action, it is not true that the

German legislature failed to observe the provisions mentioned above. As to Article 7, it refers only to cases where a difference of nationality results in different legal effects when provision for the same legal matter is made. Such is not the case in the present instance. As to the second subparagraph of Article 40(3), this provision must give way before the special provisions of Articles 95 et seq. which particularly relate to matters of taxation.

III — Procedure

The order referring the matter was received at the Registry of the Court on 29 November 1968.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community the Milchkontor company, the Government of the Federal Republic of Germany and the Commission of the European Communities submitted statements of case and presented their oral observations at the hearing on 25 March 1969.

The Advocate-General delivered his oral, reasoned opinion at the hearing on 29 April 1969.

The Milchkontor company was represented by Mr Wendt and Mr Wiech, Advocates, Hamburg, the Government of the Federal Republic of Germany by Mr Everling, Ministerialdirigent, and by Messrs. Morawitz and Hahnfeldt, Ministerialräte, and the Commission of the European Communities by its Legal Adviser, Mr Wägenbaur.

IV — Summary of the observations submitted by the parties concerned

1. *The admissibility of the questions when the Finanzgericht of the Saarland has submitted to the Court*

The *Milchkontor company* and the *Commission* expressed no doubt on the admissibility of the questions submitted to the Court.

On the other hand, the *Federal Government* sets out the following points:

(a) The questions currently put to the Court coincide broadly with those which the same Finanzgericht has already submitted to it at an earlier stage in the proceedings in which it has to give judgment (Case 25/67); at the very most one may say that Questions 3 and 4 currently put before the Court remain unanswered after the preliminary ruling which it gave in the said case, 25/67. Decisions which the Court gives by way of preliminary rulings bind all courts hearing the main proceedings. Consequently, it is doubtful whether it is possible to regard all the questions which are submitted to it at present as admissible.

(b) Furthermore, to a great extent those questions concern the application of the EEC Treaty and even, on certain points, the interpretation and application of national law. It appears in fact from the judgments of the Court mentioned above that the question what should be understood by average rates and how they should be fixed depends on national law.

2. *The reply to be given to the questions put to the Court*

A — Questions 1 and 2

(a) The observations submitted by the *Milchkontor company* may be summarized as follows:

(1) The rule set out in the first paragraph of Article 97 and cited in Question 1(a) must be interpreted in the context of Community law. Article 95 lays down a rule; Article 97 makes provision for an exception to that rule. It follows from this that the condition required for the applicability of

Article 97 (that is to say, that the Member State in question '[should levy] a turnover tax calculated on a cumulative multi-stage tax system') is not fulfilled with sufficient generality when it is fulfilled for most categories of product, but only when it is fulfilled in each particular case for the category of product or group of products for which an average rate must be fixed.

Where the Court of Justice has stated in previous judgments that it is necessary that an average rate should have been 'established as such', the only meaning which that statement can be taken as having is that rates established *before* the entry into force of the EEC Treaty cannot be 'average rates' within the meaning of Article 97, because the very expression thus used prevents it from being accepted that such rates were established in application of Article 97. When, exceptionally, such a rate satisfies the requirements of Articles 95 and 97, it does so quite by chance; but even in such a case this rate could not be regarded as an 'average rate' within the meaning of Article 97 unless a legislative measure adopted after the entry into force of the Treaty had given it this character. It is possible to establish average rates only for the future; it is impossible to do so with retroactive effect. Article 97 constitutes a true 'power' conferred on the legislatures of Member States; it is proper for the Finanzgericht to require that the legislative body concerned 'should also have, within the context of the exercise of [that] power . . . , the intention substantially to modify the previous state of the legislation'. It is necessary that this intention should have been expressed in the law.

(2) The Milchkontor company goes on to state that Article 97 is applicable only when the following conditions are fulfilled:

— it is necessary that the legislature (and not merely certain Ministries) should have had knowledge of the charge imposed upon similar national products in respect of turnover tax at each stage of their production;

— it is necessary that the legislature should have calculated the charge imposed in respect of turnover tax on similar national products, or that it has had at its disposal calculations which it has checked;

— it is necessary that the rate should have been fixed on the basis of these calculations (and it is not sufficient that the legislature should have known of these calculations); in other words, it is not permissible that the basis for the fixing of the rates should amount to no more than general and arbitrary estimates;

— it is necessary that these calculations should be reliable and capable of being checked and that they should enable the charge imposed upon similar domestic products to be determined with all possible accuracy;

— it is necessary that these calculations should not refer to too remote a time in the past, otherwise they would not be representative. What is important is that there should not have been any noticeable change in conditions since the end of the period to which the calculations refer;

— it is permissible to classify

within the same group only products which are comparable and which, further, are liable to charges which are approximately equal.

(3) The Milchkontor company continues that it is doubtless theoretically possible that, by chance, the 'rate of tax imposed upon a single stage' may be equal to an average rate, as it should be calculated to satisfy Article 97. But a coincidence of this type is extremely unlikely in a cumulative multi-stage tax system. For products which at the time of their production on the national territory are liable to normal turnover tax at every stage, the amount of the general rate can never correspond to that of an average rate within the meaning of Article 97. Even for products which at one or more stages or preliminary stages are not liable to turnover tax on the national territory, or are subject there only to a reduced rate of turnover tax, it must be accepted that 'it would be an extremely rare coincidence for the general rate to correspond to the average charge imposed on national products'. It follows in any case that, to be permitted to convert into an average rate a general rate which corresponds to the normal charge imposed on a single production stage, the national legislature must previously have checked in a particularly careful manner what is the cumulative taxation levied on domestic products.

(4) The Milchkontor company states that the national legislature cannot content itself with a statement that a particular rate amounts to an average rate. What is necessary is that it should 'show by means of documents' ('erkennbar dokumentieren') that it is acting on the basis of the power made available by Article 97.

It is necessary either that the legislature should with full knowledge of the matter and intentionally fix a fresh rate (by altering the level of the tax in force until then), or that it should at least have ascertained whether it was possible to change the rate into an average rate without altering the amount.

It must appear that, on the basis of reliable statistical data, sufficiently recent to be representative, the legislature has itself checked whether the rate corresponds to the requirements of Articles 95 and 97.

(b) The *Federal Government* stated the following in particular:

— It appears from the operative part of the judgment given by the Court in Case 28/67 that rates of tax which the national legislature itself regards as average rates amount to such rates within the meaning of Article 97. The decision whether the rate of a tax has been established as an average rate must be taken on the basis of the peremptory wording of the law or on the basis of objectives which it has set within the framework of the cumulative multi-stage tax system. Where, as in Germany, a law has declared that rates of equalization tax are average rates, it must be accepted that, at the latest as from the entry into force of that law, they have been established as average rates within the meaning of Article 97.

— Already at the time of the signing of the EEC Treaty, turnover tax was collected in accordance with a cumulative multi-stage tax system in five of the signatory States. Under this system, tax is collected on turnover at each

stage of the production process; in order to calculate the total charge imposed on a product by way of this tax, it is necessary to add the amount imposed on the last stage to those amounts already imposed at previous stages. In a taxation system of this type, a charge imposed by way of equalization tax on an imported product cannot be approximated to the level of the charge imposed by way of turnover tax on a similar domestic product unless the rate of equalization tax takes into account various charges imposed by way of turnover tax on comparable domestic products at earlier stages; in other words, unless the rate of equalization tax is an average rate.

— Average rates owe their existence therefore to the fact that, in the case of a cumulative multi-stage tax system, they are the only means of compensating between, on the one hand, the charge imposed by way of equalization tax on imported products and, on the other hand, the charge imposed by way of turnover tax on comparable products. It is in consequence to the extent to which States which have a cumulative multi-stage tax system have tried to compensate in this way that average rates existed before the signing of the EEC Treaty.

— It follows from this that, far from applying only to the future, the expression 'may . . . establish average rates' which appears in Article 97 must also be regarded as sanctioning average rates existing at the time when the Treaty was signed. If it were not so, the Member States would have had to cancel almost all existing rates of equalization tax and fix fresh rates; but it is inconceivable that such was the intention of the States which signed the Treaty.

— The Federal Government adds that it is not possible to draw any other inference from the fact that, in certain of its judgments, the Court has spoken of the 'exercise of a discretion'. That type of expression can be explained only by the fact that the Court wished, in the grounds of its judgment, to emphasize the distinction to be made between Articles 95 and 97.

— It is irrelevant to look for the considerations which led the German legislature to declare that under the law the rates of equalization tax applicable to goods equivalent to similar or comparable domestic goods are average rates. Furthermore, the wish to sanction existing legislation is equally likely to prompt a legislative measure as the wish to modify the state of that legislation.

— Although it is only in relatively recent times that the German legislature has used the expression 'average rate', it cannot be concluded from this that it has not fixed genuine average rates.

— In a cumulative multi-stage tax system, the average rate can be only a median value, 'which, although not totally correct for one or more cases considered in isolation, is approximately correct for a range of cases'.

(c) The observations of the *Commission* may be summarized as follows:

The statement of the Court that in Member States which have exercised the power made available by Article 97 'average rate' means any rate established as such by the State in question lends itself to differing interpretations.

— According to one of the two extreme arguments, Member States have not 'regularly' exercised the

power made available to them unless, by referring expressly to Article 97 and giving that article substantive effect, they immediately converted the rates of equalization tax in force until then into average rates; the consequence of this would be that hardly any equalization tax would come within the ambit of Article 97. That is a sense in which none of the Member States to which Article 97 may apply ever understood that provision.

— The other extreme argument consists in claiming that where Member States maintained the rates of equalization tax applicable at the time of the entry into force of the Treaty that sufficed to satisfy the requirements of Article 97. According to this argument all such rates 'automatically became average rates in 1958.

The truth is to be found more or less midway between these two extremes: it is necessary that the Member State concerned has shown, either by a legislative or regulatory measure or by some significant behaviour, that it wished to exercise the power made available by Article 97 and to fix as average rates either the equalization rates which existed at the time of the entry into force of the Treaty, or newly created equalization rates. The authorities competent to take such action and the formal conditions which must be fulfilled for this purpose must be decided in accordance with national law. Community law does not require that in addition this measure should refer expressly to Article 97.

Taking account of the judgments of the Court in Cases 25/67 and 28/67, Question 1(b) must be answered in the affirmative.

In conclusion, the Commission states that it is in accordance with national law that it should be decided whether the measure by which an average rate is fixed must conform to the requirements set out in Questions 2(b) and 2(c).

B — Questions 3 and 4

(a) The *Milchkontor company* puts forward the following arguments in particular:

— It is permissible to classify in the same group only products which are comparable by reason of their physical properties, of the number of stages of production through which they pass and of the use for which they are intended. It is further necessary that the taxes to which they are liable should be approximately the same.

— Technically, it is perfectly possible to make up small groups.

— In repect of Question 4, it should be stated that the argument of the Federal Government would result in *one and the same group of products* within the meaning of Article 97 including a whole series of headings of the German customs tariff, the number of which is somewhat in excess of 9 000. It is self-evident that this cannot be correct, all the more so since the majority of tariff headings also include numerous subdivisions at two levels, so that the argument in question would imply that more than 100 000 categories of product could constitute one and the same group. Furthermore, in such a case, it is not possible that the cumulative charge imposed by way of turnover tax on each of the categories of product or each of the groups of products should have been checked on the basis of calculations which are correct and sufficiently recent to be representative.

(b) The *Federal Government* contends that it is appropriate to give the

following answers to Questions 3 and 4:

To Question 3:

'All products which a Member State grouped together when it established average rates constitute a group of products within the meaning of Article 97 of the EEC Treaty.'

To Question 4:

'It may be that a group of products within the meaning of Article 97 of the EEC Treaty may be made up of all goods equivalent to similar or comparable domestic goods, for which the rate of equalization tax applicable does not differ from the general rate.'

In this connexion it is necessary to state in particular the following:

The power made available to Member States to establish average rates was extended to groups of products because in practice it is impossible not to classify products in groups. The only limit placed on the right to form groups is that in grouping products together the principles set out in Article 95 must be respected; this amounts to saying 'that the average rate applicable to a group of products must not lead to a burden greater than the average charge imposed by way of turnover tax on domestic products included in the group'. Subject to that restriction, the national legislature is free to make up groups as it thinks fit. According to the wording of the second paragraph of Article 97 it is not for national courts but for the Commission to ascertain whether the principles set out in Article 95 have been adhered to in the forming of groups.

(c) In respect of the answer to be given to Question 3 the *Commission* refers to the observations which it submitted in Case 25/67.

In respect of Question 4, it points out that it appears from these observations that the mere fact that the importation of certain products is taxed only at the general rate does not justify combining all such products into a group within the meaning of Article 97.

C — Question 5

(a) The *Milchkontor company* states that it regrets that the Court did not reply in its judgment in Case 25/67 to the questions now put forward again.

It mantains that these questions also received an unsatisfactory reply in the judgment which the Court gave in Case 28/67.

It states that the wording used in that judgment to explain the meaning of the expression '[internal taxation] imposed directly or indirectly on similar domestic products' (loc. cit., pp. 229 and 232) requires an interpretation; it mentions particularly in this respect the expression 'actually and specifically imposed';

(b) The *Federal Government* begins by stating that, according to the argument that it has put forward in respect of the first four questions, it is not necessary for the Court to reply to Question 5, which was asked only in the alternative.

It points out next that in its judgment in Case 28/67, the Court replied unequivocally to the questions which are now raised again.

It refers further to the directive of the Council of 30 April 1968 on a common method for calculating the average rates provided for in Article 97 of the Treaty (Official Journal No L 115 of 18 May 1968, p. 14) which in its view shows clearly that it is permissible to take the fullest possible account of all indirect charges.

(c) The *Commission* states that if Question 2 is answered in the way which it recommends, it would become purposeless to reply to the first part of Question 5; in respect of the second part, it refers to the considerations which it set out in Case 25/67.

D — The interpretation of the first paragraph of Article 7 and the second subparagraph of Article 40(3) of the EEC Treaty

(a) The *Milchkontor company* states in particular that individuals in the Member States may reply on the provisions in question before national courts since they contain clear and unconditional obligations, the execution of which does not require the adoption of any measure by the Member States or by the Community institutions.

It then states the reasons why it considers that in the present case the Federal Republic and the Commission are guilty of discrimination.

It alleges that Article 95 et seq. do not preclude the application of Articles 7 and 40, because these three provisions are subject to different standards of evaluation and different conditions of application.

(b) The *Federal Government* maintains that although it is undeniable that Article 7 is directly applicable, it does not apply to situations such as those postulated in the present case.

It points out that in no case does German legislation concerning turnover tax make any distinction based on the nationality of undertakings liable to the tax; as regards the second subparagraph of Article 40(3), the Federal Republic states that it is not possible to see this article as an immediately applicable provision of such a character as to create individual rights, because it is addressed to the Community institutions which have the task of establishing a common organization of agricultural markets.

It adds that the provision in question must furthermore give way before the *leges speciales* represented by Articles 95 et seq.

(c) The *Commission* too considers that Article 7 is directly applicable, but that it applies only in the absence of special rules set out in other provision of the Treaty.

In this respect of the second subparagraph of Article 40(3) it states this provision has no effect with regard to individuals.

Grounds of judgment

[1] By an order dated 4 October 1968, received at the Registry of the Court of Justice on 29 November 1968, the Finanzgericht of the Saarland, under Article 177 of the Treaty establishing the EEC, has submitted several questions for the purpose of obtaining an interpretation of Article 97 of the said Treaty.

I — The jurisdiction of the Court

[2] (1) The Government of the Federal Republic of Germany contends that Questions 1(a), 1(b), 2(a), 2(c) and 5 are inadmissible.

It points out that the Court has already replied to these questions in its preliminary ruling of 4 April 1968 given in Case 25/67 on a reference made by the same court in the same main proceedings.

A judgment given by the Court under Article 177 is binding on the national court hearing the case in which the decision is given.

[3] An interpretation given by the Court of Justice binds the national court in question but it is for the latter to decide whether it is sufficiently enlightened by the preliminary ruling given or whether it is necessary to make a further reference to the Court.

This objection cannot therefore be sustained.

[4] (2) The German Government points out further that some of the questions raised concern only the application of the Treaty or the interpretation and application of national law.

The judgment mentioned above held that 'according to Community legislation currently in force, in States which have exercised the power made available to them by Article 97, rates are considered as 'average rates' if they are established as such by the States in question' and the German Government deduces from this that it is for each national law to determine the scope of the concept 'average rates' and to lay down the conditions in accordance with which such a rate must be established.

[5] The concept 'average rate' used in Article 97 of the Treaty has a Community scope.

Whether this article leaves the solution of problems wholly or partly to the national law of Member States is another question.

If the Court were to hold that such is the case this decision would none the less involve an interpretation of the Treaty and would not therefore go outside the scope of Article 177.

[6] This objection cannot therefore be sustained.

II — The substance of the case

[7] Although Article 95 creates direct individual rights which national courts must protect, the same is not the case with Article 97.

[8] Consequently, in order to ascertain whether or not they are faced with internal taxation the conformity of which with the Treaty they are bound to ascertain, the said courts must be in a position to decide whether the Member State in question has or has not applied Article 97.

It is therefore solely in the light of this requirement that the questions submitted should be considered.

Question 1(a)

[9] In Question 1(a) the court making the reference asks the Court of Justice to give an interpretation of the expression used in the first paragraph of Article 97 of the Treaty, according to which the Member States may establish average rates, provided that there is no infringement of the principles laid down in Article 95.

[10] The abovementioned power, made available to Member States which levy a turnover tax calculated on a cumulative multi-stage tax system, must be understood in the light of the difficulties encountered in the application of the provisions of Article 95 within the framework of such a system.

[11] In fact in such a system the aggregate amount of successive impositions of turnover tax directly or indirectly borne by domestic products, which constitutes the legal ceiling on the charge to be imposed on the imported product, may vary from one case to another, particularly by reason of the number of transactions to which various different types of a particular product are subject up to the time when they are delivered to the final consumer.

In these circumstances the power made available by Article 97 permits the States concerned to tax an imported product at a single rate deemed to correspond to the aggregate tax burden borne by domestic products.

[12] In order to enable the national court to decide whether the case before it is governed by Article 97, it is only necessary for it to be in a position to decide, on the one hand, whether the said case involves a turnover tax calculated on a cumulative multi-stage tax system and, on the other hand, whether the Member State has actually exercised the power made available to it by the said article.

If the national court can establish the existence of these two factors, it merely remains for the Commission and the other Member States to put into operation the machinery provided for them by the second paragraph of Article 97 and by Articles 169, 170 and 173, to review the legality of the measures adopted or to have it reviewed.

If, in a particular case, it appeared possible that there were an infringement of Article 97, since national courts are deprived of such power of review, it would be the responsibility of the Commission, under the system instituted by the Treaty, to ensure with even greater vigilance the protection of persons concerned.

[14] It is, therefore, solely for the purpose of enabling the national court to decide whether the Member State has actually exercised the power that it is necessary to interpret the provisions of the said article which seem necessary and sufficient for the performance of that examination.

[15] The question whether the power made available by Article 97 has actually been exercised in a particular case is, from the point of view of Community law, a question which national courts must decide within the context of national law.

[16] If a State has exercised the power made available to it by Article 97, the rates which it has established are governed by that provision, even where it could be shown that they do not correspond to the aggregate tax burden borne by domestic products.

This is clear from the second paragraph of Article 97, which mentions a case 'Where the average rates . . . do not conform to these principles'.

[17] Nevertheless, that does not mean that Article 97 authorizes Member States to make an arbitrary estimate of the tax burden borne by domestic products.

It is, therefore, for the Commission in particular to confirm the accuracy of such an estimate and, if need should arise, to take the steps provided for in the second paragraph of Article 97, subject to review by the Court.

Question 1(b)

[18] Question 1(b) asks whether, under a cumulative multi-stage tax system, it may be stated that a rate of tax introduced before the entry into force of the EEC Treaty and imposed upon a single stage of marketing constitutes an average rate within the meaning of Article 97 of the said Treaty.

[19] In States which have exercised the power made available by Article 97, an 'average rate' is any rate established as such by the State concerned, even if it was established prior to the entry into force of the Treaty.

The opposite interpretation would subject the exercise of the power in question to the introduction of new measures, even in cases where the existing rates conformed to the principles of Article 95.

[20] With regard to the second part of the question, it follows from the above considerations that it is possible, although it depends on the circumstances of the case, that a rate applicable at a single stage of marketing may constitute an 'average rate' within the meaning of Article 97.

As far as national courts are concerned, infringement of Articles 95 and 97 would not mean that the rate in question was no longer an 'average rate', but would merely render it liable to the measures laid down in the second paragraph of Article 97.

[21] It follows from all these considerations that the answer to Question 1(b) must be in the affirmative.

Questions 2(a), 2(b) and 2(c)

[22] In answer to Question 2(a), the Finanzgericht wishes to be informed whether, in order to establish an average rate within the meaning of Article 97 of the EEC Treaty, it is sufficient that the body which is competent in accordance with the legal system of a Member State should declare that an existing rate of tax is an average rate.

[23] According to Community law, such a declaration would constitute a sufficient proof in law that the Member State has intended to exercise the power in question.

[24] Since Question 2(a) is therefore answered in the affirmative there is no need to deal with the alternatives formulated in Questions 2(b) and 2(c).

Questions 3 and 4

[25] The third question put by the Finanzgericht asks what is meant by 'groups of products' within the meaning of Article 97 of the Treaty.

In its fourth question it asks the Court to rule whether all goods corresponding to identical or comparable domestic products for which the rate of turnover equalization tax applicable does not differ from the normal rate, may form a group of products within the meaning of Article 97.

[26] By permitting Member States to establish average rates for groups of products the Treaty merely intended to indicate that the States are not bound to establish separate rates for each product.

Nothing in Article 97 allows the conclusion to be drawn that the status of 'average rate' depends on the composition of the groups covered by the rate in question.

[27] Consequently, Article 97 does not exclude the possibility that products liable to a rate of turnover equalization tax which does not differ from the general rate may form a group of products within the meaning of the said Article 97.

Question 5

[28] The fifth question, which repeats certain questions raised by the same court in its earlier reference, was formulated only in case the Court should give a negative reply either to Question 2(a) or to Question 4.

[29] As neither of these conditions has been fulfilled, there is no need to answer these questions.

The questions relating to Articles 7 and 40 of the Treaty

[30] In case the Court should consider that in establishing the disputed rate the German legislature has infringed Articles 7 and 40 of the Treaty, the Finanzgericht raises certain questions relating to the interpretation of these articles.

[31] In order to decide whether it was necessary to reply to these questions the Court would first be obliged to decide upon the validity, with regard to the Treaty, of a measure of national law, which it is not competent to do within the framework of Article 177.

[32] It cannot therefore admit them.

III — Costs

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

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 95, 97, 169, 173 and 177.
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Economic Community,

THE COURT

in answer to the questions referred to it by the Finanzgericht of the Saarland by an order of that court of 4 October 1968, hereby rules:

On Question 1(a):

(a) The power made available by Article 97 of the EEC Treaty permits the States concerned to tax an imported product at a single rate deemed to correspond to the aggregate tax burden borne by domestic products;

(b) The question whether, in a particular case, this power has actually been exercised is, from the point of view of Community law, a question which national courts must decide within the context of national law;

(c) If a State has exercised this power, the rates which it has established are governed by Article 97, even where it could be shown that they do not correspond to the aggregate tax burden borne by domestic products.

On Question 1(b):

Under a cumulative multi-stage tax system, a rate of tax introduced before the entry into force of the EEC Treaty may constitute an 'average rate' within the meaning of Article 97 and it is possible that a rate applicable to a single stage of marketing may constitute an 'average rate' within the meaning of that article;

On Question 2(a):

In order to establish an average rate within the meaning of Article 97, it is sufficient that the body which is competent in accordance with the legal system of a Member State has declared that an existing tax rate is an average rate.

On Questions 3 and 4:

Article 97 does not exclude the possibility that products liable to a rate of turnover equalization tax which does not differ from the general rate may form a group of products within the meaning of the said Article 97.

Lecourt Trabucchi Mertens de Wilmars

Donner Strauß Monaco Pescatore

Delivered in open court in Luxembourg on 24 June 1969.

A. Van Houtte
Registrar

R. Lecourt
President