2. Where a national system of taxation at different rates is found to be incompatible with Community law, the Member State in question must apply to imported products a rate of tax which eliminates the margin of discrimination or protection prohibited by the Treaty. Article 95 accords such treatment only to products which are imported from other Member States.
3. In application of the principle of co-operation laid down in Article 5 of the Treaty, it is the courts of the Member States which are entrusted with ensuring the legal protection which subjects derive from the direct effect of the provisions of Community law.
4. In the absence of Community rules concerning the refunding of national charges which have been levied in breach of Article 95 of the EEC Treaty, it is for the Member States to arrange for the reimbursement of such charges in accordance with the requirements of their domestic legal system; it is for them to designate to this intent the courts having jurisdiction and to determine the procedural conditions governing actions at law.

   Such conditions cannot be less favourable than those relating to similar actions of a domestic nature and must not make it impossible in practice to exercise the rights conferred on individuals by the Community legal system.

   Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled. Thus it does not prevent account being taken of the fact that it has been possible for the burden of such charges to be passed on to other traders or to consumers.

   It is equally compatible with the principles of Community law for account to be taken in accordance with the national law of the State concerned of the damage which an importer may have suffered because the effect of the discriminatory or protective tax provisions was to restrict the volume of imports from other Member States.

In Case 68/79

REFERENCE to the court under Article 177 of the EEC Treaty by the Østre Landsret [Eastern Division of the High Court] for a preliminary ruling in the action pending before that court between

HANS JUST I/S, an undertaking which produces and imports spirits, with registered offices in Copenhagen,

and

THE DANISH MINISTRY FOR FISCAL AFFAIRS

on the interpretation of Article 95 of the EEC Treaty in relation to the Danish Law of 4 April 1978 on the taxation of spirits,

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: G. Reischl,
Registrar: A. Van Houtte,

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

The Danish legislation on excise duties on alcoholic beverages and related products (the provisions currently in force are to be found in Consolidated Law No 151 of 4 April 1978) provides for the levying of excise duty on alcohol, the rate of which varies according to whether it is applied on aquavit and schnapps, to which a preferential rate applies, or on other spirits.

According to Articles 3 and 4 of the Law, products are to be considered as aquavit (and schnapps) according to Articles 3 and 4 of the Law if they are products manufactured from neutral alcohol with the addition of vegetable flavourings, have an alcoholic strength of at least 40% but not exceeding 49.9% of the initial volume and a vegetable extract content not exceeding 2 grammes per 100 millilitres; they must not be in the nature of gin, vodka, geneva, wacholder and other liqueurs, punch, bitters and related beverages, aniseed spirit or rum, spirits distilled from fruit and other products whose typical taste is traditionally produced through distillation or maturation.

From 7 September 1977, Law No 437 of 6 September 1977 increased the excise

duty on spirits, which was Dkr 130.30 for aquavit (and schnapps) and Dkr 185.75 for other alcoholic drinks, to Dkr 167.50 per litre of pure ethyl alcohol for aquavit (and schnapps) and to Dkr 257.15 per litre of pure ethyl alcohol for other spirits.

Hans Just I/S, an undertaking which produces and imports alcoholic beverages and has its registered office in Copenhagen, has a very insignificant trade in goods which are classified as aquavit (and schnapps); on the other hand it has a considerable turnover in sales of other spirits.

Hans Just I/S is registered with the Danish customs authorities pursuant to Article 6 of the Law on excise duties on spirits. It is bound by that law to calculate every month the tax which it owes to the State on sales or re-sales made by it through undertakings which are not registered with the customs authorities.

Hans Just calculated its tax liabilities for the month of June 1978 as follows:

Aquavit and schnapps

5.88 litres of pure ethyl alcohol at Dkr 167.50 — Dkr 984.90

Other spirits

2 159.10 litres of pure ethyl alcohol at Dkr 257.15 — Dkr 555 212.55

Total

2 164.98 litres — Dkr 556 197.45

On 31 July 1978 Hans Just I/S claimed before the customs authorities that according to Article 95 of the EEC Treaty excise duty on other spirits should only be levied at the rate for aquavit (and schnapps) and consequently the amount lawfully owed by it for the month of June, calculated on the basis of 2 164.98 litres of pure ethyl alcohol and a rate of excise duty of Dkr 167.50 per litre, was only Dkr 362 634.15.

On notification from the customs authorities that if the full amount due under the Law was not paid it would be collected by distress and the firm struck off the customs authorities' register, the balance, amounting to Dkr 193 563.30, was paid by Hans Just I/S under protest and subject to reservation of the undertaking's right to claim recovery of the sums paid but not owed.

Hans Just I/S appealed to the Østre Landsret (court of appeal with jurisdiction for the eastern part of Denmark) claiming that the Ministry for Fiscal Affairs should be ordered to refund the sum of Dkr 193 563.30 with interest and reserving the right to claim repayment of the corresponding amounts which had been paid for the period from 1 January 1973 to 31 May 1978 and for the period after 1 July 1978.

The Fourth Chamber of the Østre Landsret made an order on 26 March 1979 under Article 177 of the EEC Treaty staying the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

Question 1A

Is it contrary to Community law that a national system of taxation should apply different rates of tax to "aquavit and schnapps" on the one hand and "other spirits" on the other, bearing in mind that:

(a) under national legislation the two categories are distinguished through a definition based on content in raw materials and extracts, and on strength and characteristics of taste?

(b) the distinction is not based on whether the relevant goods

constitute imported or domestic products and within the two categories of tax no distinction is drawn on the basis of the origin of the products?

Question 1B

Is it relevant to the answer to Question 1A to establish that, in proportion to the cost price, the tax burdens the lower-taxed class of spirits ("aquavit and schnapps") to the same degree as the highly-taxed class of spirits ("other spirits")?

Question 2

If it is lawful to have different rates of tax, as mentioned in Question 1, does Community law establish requirements for the application of such rates to imported products?

(a) Must imported spirits be taxed at the same rate as identical domestic products or those bearing the greatest similarity to such imported products?

(b) Must all imported spirits be taxed at the lower national rate although "other spirits" of home origin are taxed at the higher rate?

Question 3

A. If it is unlawful to have different rates, on what criteria shall it be established which rate is applicable?

B. May Article 95 be relied upon by Danish producers or only by importers?

Question 4

If the matter is relevant, does Community law contain any rules of significance for deciding the question of the repayment of taxes, payment of which was contrary to Article 95? In this connexion is it of any relevance that a trader can establish that he has suffered loss?

The order of the Østre Landsret was lodged at the Registry of the Court on 26 April 1979.

Written observations were submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC on 29 June 1979 by the Commission of the European Communities, represented by its Legal Adviser, Johannes Føns Buhl, on 19 July 1979 by Hans Just I/S, the plaintiff in the main action, represented by Peter Alsted, and on 20 July 1979 by the Government of the Kingdom of Denmark, represented by Per Lachman, Head of the Secretariat of the Common Market Department of the Ministry for Foreign Affairs, assisted, on behalf of Poul Schmith, Government Advocate, by Georg Lett, Advocate.

After hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preliminary inquiry.

II — Written observations submitted to the Court

Hans Just I/S, the plaintiff in the main action, considers that the Danish legislation concerning duty on spirits runs counter to the first paragraph and, especially, to the second paragraph of Article 95 of the EEC Treaty by reason of the protection which the lower taxation on aquavit (and schnapps) indirectly affords to domestic production, which dominates the Danish market, and that the duty which has

been levied in breach of the Treaty should be repaid.

First question, Point A

(a) A system of taxation such as that applied in Denmark is quite patently an instance of disguised discrimination against foreign products based on their origin and prohibited by Article 95.

(b) Two facts support this:

— Aquavit (or schnapps) represents, according to the applicant, approximately two-thirds of the total domestic consumption of spirits in Denmark; 99 % of the total consumption of that product is covered by domestic production.

— The definition of aquavit (or schnapps) shows that the distinction drawn by the law between the various types of spirits does not depend on any objective criterion. The Danish authorities were unable to define aquavit (or schnapps) otherwise than by excluding by name a range of other products which would otherwise have fulfilled the definition. In this way an artificial definition of the products subject to a preferential rate of duty has enabled a range of products normally produced abroad to be excluded, to such an extent that the preferential treatment applies only to a single product, 99% of which is produced within the national territory.

(c) It is true that the Danish legislation does not use the origin of the product as a distinguishing criterion; it is clear however that it uses criteria which obviously lead to the same result. That is a clear attempt to circumvent the prohibition against discrimination based on origin.

Article 95 prohibits not only obvious and overt discrimination based on origin but also any disguised discrimination dependent on origin; the purpose, and in any case the effect, of the Danish rules on the taxation of spirits is to give most spirits produced in Denmark treatment for tax purposes which is more favourable than that for foreign spirits.

(d) Article 95 does not require global equal tax treatment for all spirits; it merely prohibits discrimination based on the origin of the product. That prohibition is an absolute one; according to the case-law of the Court of Justice, especially the judgment of 10 October 1978 in the *Hansen* case, Case 148/77 [1978] ECR 1787, it does not, however, preclude the possibility of different treatment for tax purposes on grounds other than the origin of the products. The present case is concerned only with the question whether rules such as those in force in Denmark give rise to discrimination based on the origin of the goods and prohibited by the Treaty.

The Court of Justice has always interpreted the rules in the Treaty prohibiting discrimination in the light of their purpose, which is to guarantee a real, not purely formal, equality between domestic and foreign products. Discrimination occurs not only when the national rules expressly rely on the origin of the products as the distinguishing criterion but also when, without openly having recourse to this prohibited criterion, they are drawn up in such a way as to have the same effect in practice. Discrimination in the field of the system of taxation on spirits cannot be exempt from the scope of the prohibition purely because the national rules ensure equal treatment between

goods which are produced abroad on a very limited scale and goods produced domestically on a large scale if at the same time those rules determine rates which are substantially higher for products originating primarily from abroad. To concede the legality of such procedures would be to open the way to tax discrimination based on the origin of the products.

The concept of "similar products" within the meaning of the first paragraph of Article 95 merely reflects a very general condition which is common to all the provisions relating to discrimination: the products must be comparable. That is not a condition independent of the established existence of discrimination on the ground of origin; whether or not the products are "comparable" must be decided on the basis of the particular circumstances of each case.

The second paragraph of Article 95 is intended to ensure that the prohibition against discrimination is applied as widely as possible, especially whenever the national rules do in fact result in tax discrimination linked to the origin of the goods. That would be so if the national rules contain detailed rules the effect of which, from a purely practical point of view, is specifically to impose on foreign products a system of taxation which is less favourable than that accorded to domestic products. Such a difference in treatment may only be justified on objective grounds having no relation to the origin of the goods. The fact that the products are similar or in competition with each other is an important part of the test whether the difference in treatment is technical and objective.

(e) The data on the place of origin of the spirits consumed in Denmark by themselves establish that the Danish rules result in giving an advantage to domestic spirits products over foreign spirits. Moreover, the development in the rate of customs duty and of the consumer price index confirms that the distinction between the two categories favours domestic production of aquavit (and schnapps) to the detriment of other spirits.

(f) The Danish custom of drinking aquavit mainly with meals has no relevance whatsoever in the present context: the Treaty does not seek to preserve or encourage the patterns of consumption in various countries. A national tradition which is connected with certain consumer trends has no significance for Community law.

(g) It is also obvious that Danish legislation has attempted over a number of years to protect domestic production of aquavit (and schnapps).

(h) Regard must be had in this context to the artificial distinction drawn between aquavit (or schnapps), on the one hand, and other spirits, on the other. For "other products" the law lays down both a condition regarding alcohol content and a condition relating to taste, the purpose being to distinguish products which, like aquavit (or schnapps), are principally consumed at meal times, in such a way as to enable them to be treated more favourably than other spirits. The condition relating to the alcohol content referred to by the law — an ethyl alcohol content of between 40% and 49.9% — like the taste criterion, appears to be wholly arbitrary in relation to the classification of the product in one or other tax category.

The reply to the first question, point A, should be as follows:

A national system of taxation applicable to spirits which accords different treatment to groups of products in such a manner that a group of products which are manufactured principally in the Member State concerned is given tax advantages over another group of products which are manufactured principally abroad is contrary to Article 95 of the EEC Treaty unless objective technical reasons may be shown which justify that different tax burden, that is to say, reasons which do not depend on the usual origin of the product. It is all the more necessary to impose strict conditions regarding such objective technical justification where a relatively greater proportion of the products subject to the lower rate is manufactured in the country concerned.

First question, point B

This question is, according to Hans Just, a purely hypothetical one.

Even supposing that the Danish system of taxation is really a system of *ad valorem* duties it would still be possible for it to result in disguised discrimination contrary to Article 95. In any case the deciding factor is that many products with a manufacturing cost which is no higher than that of aquavit (or schnapps) are, apparently, subject to the higher rate applicable to "other spirits". The Danish taxation system cannot therefore be treated as an *ad valorem* tax system.

Second question

(a) This question is irrelevant: the tax discrimination applied pursuant to rules such as those in force in Denmark is contrary to Article 95.

(b) It follows from the judgment of the Court of Justice in Case 148/77 *(Hansen)* that there is no prohibition against maintaining several rates of internal taxation where there are special circumstances to justify this and that the lowest rate must be applied equally to domestic products and to imported products of the same type.

(c) In any case the duties should be the same for imported products and domestic production within each fiscal category laid down by the law and, where necessary, endorsed by Community law.

Third question

(a) Article 95 prohibits any discrimination based on origin; the only requirement it makes regarding the rates of tax is that they must not be discriminatory. An infringement of Article 95 entitles the undertaking concerned to demand that the effects of the discrimination be annulled; it is entitled to be placed in the position in which it would have been if the discrimination had not existed. It must therefore be treated as if, since the date on which the infringement of the Treaty occurred, it was only required to pay the lower of the two rates of tax.

(b) To reserve solely to importers the right to rely on Article 95 would lead to the creation in Denmark of two new tax categories in place of those which exist at present; it is clear in advance that such a distinction would be wholly unreasonable. If domestic producers were unable to demand equality of treatment in situations such as the present one they would be exposed to tax discrimination compared with imported products; that would be a kind of "reverse discrimination" which is contrary to the fundamental principles of the common market.

Fourth question

(a) A claim for recovery of sums paid but not owed based on the incompatibility with Community law of national tax rules should be decided, in principle, on the basis of national rules; according to the case-law of the Court of Justice this would only cease to apply if the procedure and time-limits prescribed by domestic law make it impossible in practice to exercise the rights which national courts are under an obligation to protect. In that context consideration must be given to the fact that the principles of Danish law concerning the recovery of charges levied unlawfully are somewhat obscure and, in particular, to the uncertainty as to the requirements of Community law on the subject regarding the legal protection afforded to Danish citizens.

(b) Under Danish law tax-payers cannot avoid paying taxes so long as a definitive judgment has not been delivered; moreover, they have no claim whatsoever to the repayment of charges which were paid in the mistaken belief that they had a tax liability in that respect. That is a legal situation which is quite unacceptable from the point of view of Community law.

(c) As to the question of proof, the damage suffered as a result of the collection of the disputed charge can only be demonstrated indirectly. In that connexion consideration should be given to the fact that the greater the price difference between two categories of product, the more difficult it becomes to sell the expensive product; it can also be established that the increase in the rates of excise duty on 7 September 1977 caused a drop in sales of "spirits other than aquavit (or schnapps)". This drop in sales not only caused a serious reduction in the profits of Hans Just but also compelled it to reduce its staff.

As the Danish law stands at present a claim for recovery has little chance of success if the charge which has been wrongfully levied may be presumed to have been passed on to the consumer.

The principles implied by Community law do not exist in Danish legislation: of course an undertaking may seek to assert its rights before the national courts but the absence of any legal foundation and previous case-law may lead the latter to dismiss the claim.

(d) In the absence of legal provisions and case-law on the subject it may be assumed that in Danish law a complaint made before bringing an action does not, in itself, give the undertaking a wider right to repayment; the decisive point is therefore whether Community law acknowledges the significance of the fact that the collection of the charge was contested, when the latter was levied contrary to the provisions of Community law.

(e) The fact that the disputed Danish law has been in conflict with the Treaty since 1 January 1973, the date of Denmark's accession to the EEC, is irrevelant: the Court's objectivity cannot be influenced by the considerable economic consequences its decision may have for a Member State.

(f) In view of the need to make Community law effective it seems proper to acknowledge in a case such as the present one that the undertaking in question has an absolute right to recovery of the sums paid but not owed; at the very least repayment should be

allowed which covers, in principle, the sums paid but not owed from the day on which the national rules came into conflict with Community law, or alternatively in any case from the date of the complaint or the commencement of legal proceedings.

(g) The reply to the fourth question should be as follows: Community law requires, or at least implies, that repayment of charges levied contrary to Article 95 is permitted under national law. To protect the conditions laid down by the EEC Treaty it is not necessary specifically to investigate whether the party claiming repayment is able to establish that he has suffered actual damage, because the protection which Community law must give to the undertakings concerned would be illusory if national provisions could set aside the rights which are guaranteed by the EEC Treaty to those entitled thereunder.

The *Government of the Kingdom of Denmark* observes that the proceedings for a preliminary ruling are an extension of Case 171/78 *(Commission of the European Communities* v *Kingdom of Denmark)* which is pending before the Court and it refers to a great extent to the pleadings submitted by it in that case.

First question, point A

(a) It follows from the judgment of the Court in Case 148/77 *(Hansen)* that Article 95 does not prohibit the application of several rates to spirits within a national system of taxation. The Danish law on the taxation of spirits contains no discrimination with regard to imported products as the same rules apply equally to domestic products and foreign products. Since the division into two rates applies as much to foreign products as to domestic products it is not discriminatory because it is not based on any criterion which makes importation more difficult or expensive. Foreign aquavit (or schnapps) is imported into Denmark and is subject to duty at the same rate as Danish aquavit; in the same way, other spirits produced in Denmark, which account for one-third of Danish consumption of such drinks, are taxed at the higher rate.

The current position of aquavit on the Danish market is irrelevant to the present case; it cannot be the consequence of discrimination, but is due to the fact that Danish consumers prefer Danish aquavit.

(b) As to the question of "similarity" between various products, it should be remembered that the first paragraph of Article 95 should not be understood as an abstract division of all groups of products, in such a way that Member States are obliged to observe fiscal neutrality within each category of products which might be considered similar. On the contrary, Member States may grant tax advantages by means of exemptions or reduced taxes for certain types of spirits or to certain classes of producers; the first paragraph of Article 95 merely requires that where there is different taxation domestic products and imported products should be treated uniformly.

In any case aquavit (or schnapps) and other spirits are not, in the view of the Kingdom of Denmark, similar products.

The second paragraph of Article 95 is also inapplicable. The higher rate of duty applicable to spirits other than aquavit (or schnapps) cannot be treated as protection for Danish products *vis-à-vis* products from other Member States.

Indeed, spirits other than aquavit cannot be considered as "products from other Member States", since a large quantity of spirits other than aquavit is also manufactured in Denmark; furthermore, aquavit and other spirits are not interchangeable. Lastly, the difference in taxation does not imply that aquavit is being protected against other spirits; it corresponds to the average difference in value between the various products.

(c) The first question, point A, should therefore be answered in the negative.

First question, point B

A pure *ad valorem* system of taxation does not run contrary to Community law. There has been no discrimination between products within the meaning of the first paragraph of Article 95 nor has protection of any kind been afforded to aquavit within the meaning of the second paragraph of Article 95, for the tax burden imposed on the category of spirits subject to the lowest rate of duty is the same as that applicable to spirits falling within the highest tax category.

Second question

The Court has held in the judgment in the *Hansen* case that a preferential system applied on the national level must apply equally, without distinction, to spirits from other Member States which fulfil the same conditions as the domestic products; that is the case of the Danish system concerning the taxation of spirits.

The reply to point (a) of the second question should therefore be in the affirmative. As a result the reply to point (b) of the second is obvious.

Third question

(a) Point A of the third question rests on the assumption that it is contrary to Community law to apply different rates of tax to spirits; however, the judgment in the *Hansen* case shows that that is a misconception. Thus there is no need to come to any conclusion based on the criteria which would apply if the law were otherwise. Besides, a system such as this can only be the result of the harmonization of the various national legal systems and not of a decision of the Court.

(b) As to point B of the third question, it should be borne in mind that Article 95 solely concerns the question of the treatment of imported products for tax purposes. Manufacturers of spirits other than aquavit cannot rely on Article 95 to require that their products be accorded the same treatment for tax purposes as aquavit. In the present case, moreover, it should be noted that a significant proportion of the spirits concerned in the dispute has been manufactured by Hans Just itself.

The reply to point B of the third question should be that Article 95 may only be relied on by importers as regards imported products.

Fourth question

(a) This question is groundless: the Danish system of taxation on spirits is compatible with Community law.

(b) In so far as it may be relevant it may be stated that although on the Community level the question of the right to repayment of charges which have been levied contrary to Community law has not been settled either in the Treaty or by any provision of secondary law and that although, moreover, national rules relating to refunds have not been harmonized, it follows from the case-law of the Court that, in principle, the right to claim the refund of charges levied contrary to Community law is implied in the protection of the direct effect of Community law. Pursuant to the principle of co-operation set out in

Article 5 of the Treaty it is for national courts to ensure that protection, according to the procedure laid down under national rules. In particular the question whether the sums paid must be repaid and, if so, to what extent, lies within the jurisdiction of the national courts. Community law does, however, impose certain restrictions on the way in which national law regulates questions concerning refunds. In the first place, the procedure and time-limits laid down by national law must not make it impossible in practice to exercise the rights which the national courts must protect: however, the prescribing of reasonable time-limits for claims in tax matters constitutes an application of the fundamental principle of legal certainty. In the second place, the procedural requirements for bringing an action must not be less favourable than those which apply to similar actions of a domestic nature.

As regards, more particularly, the relationship with Article 95, it is also for the national courts to decide whether internal taxation which is discriminatory within the meaning of Article 95 should be considered as wrongfully levied as a whole or only in part.

(c) Since the provisions of national law concerning refunds are to apply, subject to the requirements inherent in Community law, the assessment of any damage comes within the jurisdiction of the national court.

Hans Just sold its products at normal prices, so that it covered, apart from the cost price, the amount of the disputed duty, with the addition of a normal profit margin. The truth is that the duty was paid by consumers and Hans Just merely served as a collection body for the charge. Therefore it has not suffered any damage as a result of the levying of the disputed duty: on the contrary, it would benefit from an unjust enrichment if the Ministry for Fiscal Affairs were bound to repay it the difference between the highest and the lowest rate of tax.

The test of "enrichment" constitutes the cornerstone of the rules in Danish law which govern the refund of taxes which have been paid in error or paid but not owed. No claim to recovery of such sums can lie unless the enrichment works to the detriment of the party which paid the sum. It is not excessive in any way to take into consideration the damage as a condition for the application of a claim to a refund. Protection of the direct effect of Community law means safeguarding the rights of citizens under Community law, but not imposing requirements in relation to national law which would lead to a series of unjust enrichments.

The reply to the last part of the fourth question should be that whether consideration should be given to the criterion of damage depends on the actual provisions of domestic law, in so far as there is no provision in Community law which prevents recourse to such a test, as long as the manner in which it is applied, in the context of judicial proceedings based on Community law, is not less favourable than it would be in the context of actions based on domestic law, provided that, moreover, taking into account such a test does not have the effect of prejudicing the protection which is afforded by the direct effect of Community law.

The Commission also notes that the questions which have been referred to the Court in the present case are closely connected with the proceedings brought by it against the Kingdom of Denmark (Case 171/78) which concerns solely the failure to fulfil its obligations under Article 95 of the EEC Treaty which the Commission considers is constituted by the application of a discriminatory tax system on spirits in Denmark.

Points A and B, first question

(a) The criteria which have been put forward in justification of the discriminatory taxation cannot be considered in isolation. The lawfulness of discriminatory taxation must be considered in the light of whether or not it influences the consumer, in such a manner as to give a discriminatory advantage to similar domestically manufactured products.

(b) As far as the consumer is concerned spirits obtained from cereals, wine or fruit have similar characteristics and meet the same needs. The latter may be determined or influenced by various factors: habit, individual preferences, local or national tradition; that does not alter the fact that from the point of view of consumers spirits, as manufactured products, are parallel products, in other words, products which are similar in nature.

(c) The difference between aquavit (or schnapps) on the one hand, and gin, vodka and geneva, on the other, rests solely in the flavouring employed; a different flavouring alone is insufficient to cast doubt as to the similarity of the products. The same applies in respect of alcoholic beverages obtained by distillation, such as cognac, whisky and spirits obtained from fruit; such products can equally be considered as similar to aquavit.

(d) The purpose of Article 95, which contains an absolute prohibition, is to prevent the retention, once customs duties and charges having an equivalent effect have been abolished, of other trade barriers to the importation not merely of identical products, but also of similar or competing products. It is applied on the basis of objective criteria, without regard to economic or social considerations. The prohibition against all discriminatory treatment in the sphere of taxation will admit of no exception; any other interpretation would prevent Article 95 from guaranteeing and preserving the transparency of the common market and enforcing the principle of tax neutrality within the Community.

Second question

(a) Article 95 applies to all internal taxation imposed on similar products which are imported from other Member States.

The judgment in the *Hansen* case makes it clear that Community law does not prohibit Member States from giving different treatment for tax purposes to certain kinds of alcohol or certain categories of producers; however, that different treatment must be extended to spirits from other Member States.

(b) Article 95 does not permit the application of discriminatory treatment on economic, social or other grounds which may be at the origin of a national system of discriminatory taxation. In the case of products which are "similar", all imported spirits must therefore be subject to the lowest national rate, notwithstanding the fact that "other spirits" of national origin may be subject to a higher rate.

Third question

(a) The decisive test is that the taxation does not have a discriminatory effect on products which are imported from other Member States in favour of similar domestic products. Article 95 implies in that respect only an obligation as to the result; it does not indicate the tests which Member States must apply in order to fix internal taxation. The quantity of pure alcohol therefore seems in this respect to be the most appropriate criterion.

(b) The question whether only importers may claim under Article 95

appears to be obscure: Article 95 prohibits any form of discriminatory taxation on products imported from other Member States. On the other hand it does not comment on the theoretical case in which a Member State taxes goods produced in its own country more heavily than similar foreign products.

Fourth question

(a) Article 95 has direct effects and confers on individuals rights which national courts are bound to protect. It follows from the case-law of the Court that actions concerning charges which have been wrongfully levied must be brought in accordance with the rules in force under domestic law. Thus as Community law stands at present compensation may be subject to the application of rules which differ from one Member State to another. According to the principle of co-operation set out in Article 5 of the Treaty national courts must uphold the judicial protection resulting for individuals from the direct effect of the provisions of Community law.

(b) Reference should also be made to the national provisions applicable on the subject in order to see whether it is particularly important to show the existence of damage in order to decide the question of the repayment of such charges.

Conclusions

The replies to the questions which have been referred to the Court should be as follows:

Question 1A

It must be stated that "aquavit and schnapps" and "other spirits" are similar products or similar in nature. By virtue of Article 95 of the EEC Treaty which has direct effects in the Member States and confers rights on individuals, it is therefore contrary to Community law for a national system of taxation to provide for differing rates of tax for aquavit and schnapps, on the one hand, and spirits other than aquavit on the other.

Question 1B

Application of a discriminatory system of taxation, whereby the fiscal charge is calculated *ad valorem* on the basis of the manufacturing cost of the product, does not relieve Member States of the obligation laid down by Article 95 of the EEC Treaty to refrain from imposing directly or indirectly on the products of other Member States taxation which amounts to discrimination against those products compared with similar domestic products.

Question 2

The suggested interpretation of Community law is rejected since Article 95 of the EEC Treaty does not refer solely to "identical" products imported from other Member States but to any taxation on "similar" products imported from other Member States.

Question 3

A. The factor enabling the decision to be made as to whether or not a system of taxation is compatible with Article 95 of the Treaty is that the taxation does not have a discriminatory effect on imports of products from other Member States to the advantage of similar domestic products.

B. Article 95 of the EEC Treaty does not as such prohibit a producer from relying on its provisions, but the latter are designed solely to guarantee conditions which are not discriminatory for imports from other Member States.

Question 4

Article 95 confers directly on individuals rights which the national courts are bound to protect. As Community law

stands at present, there are no common provisions governing the repayment of charges levied by Member States contrary to the provisions of that article. Moreover, it follows from the provisions of the EEC Treaty that Member States must provide the judicial protection afforded to individuals by the direct effect of the provisions of Community law and ensure that the disparities in this respect between the provisions of the Member States are not such as to give rise to distortions in or to damage the functioning of the common market.

III — Oral procedure

Hans Just I/S, the plaintiff in the main action, represented by Peter Alsted, the Government of the Kingdom of Denmark, represented by Georg Lett, and the Commission, represented by Johannes Føns Buhl, presented oral argument and replied to the questions asked by the Court at the hearing on 10 October 1979.

The Advocate General delivered his opinion at the hearing on 4 December 1979.

Decision

1 By order of 26 March 1979 which was received at the Court on 26 April 1979, the Østre Landsret, Copenhagen, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions concerning the interpretation of Article 95 of the EEC Treaty, in order, first, to determine the compatibility with that provision of the tax difference created by the Danish Consolidated Law No 151 of 4 April 1978 on excise duty on spirits and, secondly, in order to decide to what extent a tax-payer liable to pay charges levied contrary to Community law may claim the right to repayment of the charges levied.

2 According to Article 2 of Consolidated Law No 151 to which the court making the reference alludes excise duty has been fixed as follows:

(1) In respect of aquavit and schnapps (products hereinafter referred to merely as "aquavit", owing to the similarity of the two words), at Dkr 167.50 per litre of pure ethyl alcohol, and

(2) in respect of "other products" at Dkr 257.15 per litre of pure ethyl alcohol.

3 According to Article 3 of the same law the products to which the rate of duty laid down under subparagraph (1) of Article 2 applies are defined as those "manufactured from neutral alcohol with the addition of vegetable aromatic material" and, in addition, as "not resembling gin, vodka, geneva, wacholder or other similar products, nor having the same characteristics as liqueurs, punch, bitters or aniseed spirit, rum, spirits distilled from fruit and other spirits whose typical flavour is obtained by distillation or maturation".

4 According to the order making the reference, Hans Just I/S, the plaintiff in the main action, imports wine and spirits and also produces alcoholic beverages. It markets only negligible amounts of products taxed as aquavit but sells on the other hand large quantities of other spirits. In its monthly return for June 1978, sent to the customs authorities, the applicant declared a consignment of imported alcoholic beverages with a view to the application of excise duty. A small proportion of that quantity was made up by aquavit, which is taxed at Dkr 167.50 per litre of pure ethyl alcohol, the larger part consisting of spirits other than aquavit, taxed at the rate of Dkr 257.15 per litre of pure ethyl alcohol.

5 When Hans Just I/S submitted its tax return to the authorities it claimed that the duty levied on spirits other than aquavit could only be levied according to the rate applicable to the latter. The customs authorities informed the plaintiff that if the duty was not paid in full in accordance with the law, the duty payable would be collected by distress and the undertaking would be liable to be struck off the customs register. The plaintiff therefore paid the duty in full but under protest, and reserved the right to claim repayment of the difference between the two rates of tax. Subsequently it brought the action which is pending at this moment before the Østre Landsret, claiming that the tax on imported spirits other than aquavit at a higher rate than that applied to the latter is contrary to the provisions of Article 95 of the Treaty. It therefore claimed repayment of the sums which it considers it was liable to pay contrary to the provisions of Community law.

6 Bearing in mind that the Commission has brought against the Kingdom of Denmark an action, Case 171/78, for failure to fulfil its obligations under the EEC Treaty questioning the compatibility of the legislation in question with the Treaty, the national court decided to stay the proceedings and to

refer to the Court of Justice for a preliminary ruling a series of questions, the first three of which concern the compatibility with Article 95 of the tax system which forms the subject-matter of the dispute, whilst the fourth question relates to the possibility of repayment of the charges levied.

Compatibility with Article 95 of the disputed tax system (Questions 1, 2 and 3)

7 The first three questions are worded as follows:

Question 1A

Is it contrary to Community law that a national system of taxation should apply different rates of tax to "aquavit and schnapps" on the one hand and "other spirits" on the other, bearing in mind that:

(a) under national legislation the two categories are distinguished through a definition based on content in raw materials and extracts, and on strength and characteristics of taste;

(b) the distinction is not based on whether the relevant goods constitute imported or domestic products and within the two categories of tax no distinction is drawn on the basis of the origin of the products?

Question 1B

Is it relevant to the answer to Question 1A to establish that, in proportion to the cost price, the tax burdens the lower-taxed class of spirits ("aquavit and schnapps") to the same degree as the highly-taxed class of spirits ("other spirits")?

Question 2

If it is lawful to have different rates of tax, as mentioned in Question 1, does Community law establish requirements for the application of such rates to imported products?

(a) Must imported spirits be taxed at the same rate as identical domestic products or those bearing the greatest similarity to such imported products?

(b) Must all imported spirits be taxed at the lower national rate although "other spirits" of home origin are taxed at the higher rate?

Question 3

A. If it is unlawful to have different rates, on what criteria shall it be established which rate is applicable?

B. May Article 95 be relied upon by Danish producers or only by importers?

8 The provisions contained in the law the application of which forms the basis of the action brought before the Østre Landsret gave rise to an action for failure on the part of a Member State to fulfil its obligations under the EEC Treaty which has been brought by the Commission under Article 169 of the EEC Treaty and which forms the subject-matter of Case 171/78. The points of law examined in the context of that action are identical in substance to those which have been raised by the first three questions from the Østre Landsret.

9 In a judgment delivered today the Court acknowledged that by applying discriminatory taxation on spirits such as that laid down by the law in dispute the Kingdom of Denmark has failed to fulfil its obligations under Article 95 of the EEC Treaty as regards products imported from other Member States. It is therefore sufficient to refer to that extent to the judgment in Case 171/78, the text of which is annexed to this judgment. In view of the reasons set out in that judgment the reply to the questions which have been referred to this Court by the national court should be as follows:

10 The first question, referring to various features of Danish tax legislation, seeks a reply from the Court to the question whether such a tax system is compatible with the requirements of Community law. In its judgment in Case 171/78 the Court examined the characteristics of that system and came to the conclusion that it discriminates against an indeterminate number of products which have been imported or which might be imported into Denmark and that, moreover, it is of such a nature as to afford protection to domestic production of aquavit.

11 However, the Court did not exclude the possibility, in principle, that national tax legislation might draw a distinction between various alcoholic beverages, it being understood, however, that such a distinction may not be used for the purposes of tax discrimination or in such a manner as to afford protection to domestic products. The Court found that the distinction made in the Danish

legislation between aquavit and all other alcoholic beverages was discriminatory and protective in nature.

12 The reply to the first question should therefore be that whilst the Treaty does not exclude, in principle a difference in the taxation of various alcoholic products, such a distinction may not be used for the purposes of tax discrimination or in such a manner as to afford protection, even indirect, to domestic production. A tax system which consists in conferring a tax advantage on a single product which represents the major proportion of domestic production to the exclusion of all other similar or competing imported products is incompatible with Community law.

13 The second and third questions are alternatives. Bearing in mind the reply which has been given to the first question, only the third requires an opinion. The question is in two parts.

14 The first part asks what rate should be applied to imported products where a system of taxation at different rates has been found to be incompatible with Community law. Since Community law, as it stands at present, does not restrict the freedom of Member States regarding the fixing of rates of tax in this respect, it follows from Article 95 that the rate to be applied to imported products must be fixed in such a manner as to abolish the margin of discrimination or protection which is prohibited by the Treaty.

15 The second part of the third question asks whether Article 95 may be relied upon only by importers or whether Danish producers may likewise avail themselves of that provision. The reason for this question is that a certain proportion of domestic production of spirits is subject to the highest rate of tax, as was stated in the decision in the judgment in Case 171/78. As Article 95 refers expressly to "products of other Member States", the provision cannot be relied on by domestic producers of the Member State in question.

16 The reply to the third question is therefore that where a national system of taxation at different rates is found to be incompatible with Community law, the Member State in question must apply to imported products a rate of tax which eliminates the margin of discrimination or protection prohibited by the

Treaty. Article 95 accords such treatment only to products which are imported from other Member States.

Repayment of taxes which have been levied contrary to Community law (Question 4)

17 The fourth question referred to the Court by the Østre Landsret is worded as follows:

If the matter is relevant, does Community law contain any rules of significance for deciding the question of the repayment of taxes, payment of which was contrary to Article 95? In this connexion is it of any relevance that a trader can establish that he has suffered loss?

18 The plaintiff in the main action states in this respect that for a long period, assuming that the Danish legislation was in conformity with Community law, it paid duty on the imported spirits in good faith and in complete confidence. From 1978, when it became aware that the Danish legislation might be contrary to Community law, it raised objections. However, subject to threats of distraint and removal of its name from the register of the Directorate General for Customs, it was obliged to pay the duty claimed in order to be able subsequently to claim a refund of it by legal action. The undertaking acknowledges that the claim for recovery of sums paid but not owed must be decided in accordance with national law, but recalls that according to the case-law of the Court (the judgments in the *REWE* and *Comet* cases of 16 December 1976) such provisions must not be applied in such a manner as to make it impossible in practice to exercise the rights which the national courts are obliged to protect.

19 The plaintiff asserts that Member States have a duty to provide the legal protection which individuals derive from the direct effect of the provisions of Community law. The most appropriate solution would be to confer, in a case such as the present one, a simple right to recover the sums paid but not owed. However, the rules of Danish law concerning the recovery of charges unlawfully levied are somewhat obscure. As the law stands at present it is to be expected that a Danish court will not allow a claim for recovery of such sums whenever it reaches the finding that a tax or other charge which has been wrongfully levied may be presumed to have been passed on to the consumer. As to the question whether a person wrongfully obliged to pay a

charge may be required to show damage, the plaintiff points out that the bigger the difference in price between the two categories of products, the more difficult it is to sell the expensive product. In any case, the effect of the increase in the rates of duty on spirits on 7 September 1977 by Law No 437 of 6 September 1977 was to reduce sales of spirits other than aquavit: not only did this drop in sales entail a serious reduction in the undertaking's profits but it also compelled it to reduce its staff. A similar fall in sales of spirits other than aquavit affected the entire industry in Denmark.

20 The Danish Government acknowledges that the protection afforded by the direct effect of Community law implies, in principle, that tax-payers are entitled to claim a refund of charges which have been levied in breach of Community law. In its opinion, the sums should be refunded in accordance with the rules of national law, it being understood, however, that the latter may not counteract the direct effect of Community law and that the procedure laid down by those rules must not be less favourable than similar ones governing domestic actions. Under Danish law the criterion of unjust enrichment forms the cornerstone of the rules relating to the refunding of taxes paid in error and paid but not owed. From that point of view, the Danish Government observes that the plaintiff in the main action sold its products after paying the taxes, at the normal prices, so that the undertaking has covered, besides the cost price, the amount of the disputed charges with the addition of a normal profit margin. Thus the charges have in fact been paid by the consumer and therefore the plaintiff has suffered no damage. Refunding the charges would therefore amount to an unjust enrichment of the undertaking. If the duty were refunded to the undertaking which in fact merely served as a collection body for the charge, the Member State might subsequently force complaints from those who have ultimately borne the burden of the tax, thus having to repay the same amount twice.

21 The Danish Government also emphasizes the financial consequences for the Danish State of an obligation simply to refund the charges which have been levied to the extent to which they are found to be contrary to Community law. The difference in taxation between imported spirits and aquavit accounts for annual revenue of approximately 200 million Kroner; since the limitation period applicable to claims for refunds is five years, the Danish State could find itself faced with claims for refunds amounting to approximately 1 thousand million Kroner.

22 A comparison of the national systems shows that the problem of disputing charges which have been unlawfully claimed or the refunding of charges paid but not owed is settled in the various Member States, and even within a single Member State, in different ways, according to the various kinds of taxes or charges in question. In certain cases objections or claims of this type are subject to specific procedural conditions and time-limits under the law with regard both to complaints submitted to the tax authorities and to legal proceedings. It was with a view to the operation of such remedies that, in its jugdments in the *REWE* and *Comet* cases of 16 December 1976 (Case 33 and Case 45/76, [1976] ECR 1989 and 2043 respectively) the Court held that it was compatible with Community law to lay down reasonable limitation periods in the interests of legal certainty which protects both the tax-payer and the administration concerned.

23 In other cases claims for repayment of charges which were paid but not owed must be brought before the ordinary courts, mainly in the form of claims for the refunding of sums paid but not owed. Such actions are available for varying lengths of time, in some cases for the limitation period laid down under the general law, with the result that Member States involved may be faced with a heavy accumulation of claims when certain national tax provisions have been found to be incompatible with the requirements of Community law.

24 The system applied in this connexion in the Kingdom of Denmark belongs to the latter group for, in that country, refunding of charges paid but not owed is sought in the ordinary courts by means of an action for recovery of the sums paid but not owed subject to a limitation period which is, in principle, five years. According to Danish law the courts take into account in such cases the fact that the charges which were paid but not owed were incorporated in the price of the goods and passed on to subsequent stages in the economic chain; it also appears that those courts may take into consideration in deciding the amounts to be refunded any damage which may have been suffered by a tax-payer as a result of the incidence of unlawful taxation on his turnover.

25 It follows from the judgments of 16 December 1976, in the *REWE* and *Comet* cases, *supra*, that, applying the principle of co-operation laid down in Article 5 of the Treaty, it is the courts of the Member States which are entrusted with ensuring the legal protection which subjects derive from the

direct effect of the provisions of Community law. In the absence of Community rules concerning the refunding of national charges which have been unlawfully levied, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which subjects derive from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature and that under no circumstances may they be so adapted as to make it impossible in practice to exercise the rights which the national courts are bound to protect.

26 It should be specified in this connexion that the protection of rights guaranteed in the matter by Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled. There is nothing therefore, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers. It is equally compatible with the principles of Community law for courts before which claims for recovery of repayments are brought to take into consideration, in accordance with their national law, the damage which an importer may have suffered because the effect of the discriminatory or protective tax provisions was to restrict the volume of imports from other Member States.

27 The reply to the fourth question should therefore be that it is for the Member States to ensure the repayment of charges levied contrary to Article 95 in accordance with the provisions of their internal law subject to conditions which must not be less favourable than those relating to similar actions of a domestic nature and which in any case must not make it impossible in practice to exercise the rights conferred by the Community legal system: Community law does not prevent the fact that the burden of the charges which have been unlawfully levied may have been passed on to other traders or to consumers from being taken into consideration; lastly, it is compatible with the principles of Community law to take into consideration, if appropriate, in accordance with the national law of the Member State concerned, the damage suffered by the person liable to pay the charges, by reason of the restrictive effect of the latter on the volume of imports from other Member States.

Costs

The costs incurred by the Government of the Kingdom of Denmark and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Østre Landsret, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Østre Landsret by order of 26 March 1979, hereby rules:

1. **Whilst the Treaty does not exclude, in principle a difference in the taxation of various alcoholic products, such a distinction may not be used for the purposes of tax discrimination or in such a manner as to afford protection, even indirect, to domestic production. A system which consists in conferring a tax advantage on a single product which represents the major proportion of domestic production to the exclusion of all other similar or competing imported products is incompatible with Community law.**

2. **Where a national system of taxation at different rates is found to be incompatible with Community law, the Member State in question must apply to imported products a rate of tax which eliminates the margin of discrimination or protection prohibited by the Treaty. Article 95 accords such treatment only to products which are imported from other Member States.**

3. **It is for the Member States to ensure the repayment of charges levied contrary to Article 95 in accordance with the provisions of their internal law subject to conditions which must not be less favourable than those relating to similar actions of a domestic nature and which**

in any case must not make it impossible in practice to exercise the rights conferred by the Community legal system. Community law does not prevent the fact that the burden of the charges which have been unlawfully levied may have been passed on to other traders or to consumers from being taken into consideration. It is compatible with the principles of Community law to take into consideration, if appropriate, in accordance with the national law of the Member State concerned, the damage suffered by the person liable to pay the charges by reason of the restrictive effect of the latter on the volume of imports from other Member States.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 February 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 4 DECEMBER 1979 [1]

Mr President,
Members of the Court,

The dispute which lies behind this reference for a preliminary ruling concerns the question whether a distinction made in the Danish Law on the Taxation of Spirits, etc. (Lovbekendtgørelse) (Consolidation Act) No 151 of 4 April 1978) between aquavit and other spirits is at variance with the first and second paragraphs of Article 95 of the EEC Treaty and, if so, to what extent Hans Just I/S [Interessentskab, = partnership] is entitled to recover a sum paid in accordance with that law, corresponding to the difference between the two taxes. The first question is already the subject-matter of proceedings brought before the Court of Justice by the Commission of the European Communities against the Kingdom of Denmark under Article 169 of the EEC Treaty for a declaration that it has failed

1 — Translated from the German.