2. Article 95 of the Treaty must be interpreted as meaning that, in order to qualify for a tax advantage available to domestic products which is permissible under Community law because it is not discriminatory inasmuch as the national provisions do not prescribe for its grant a condition which only domestic production is capable of fulfilling, spirits imported from other Member States must satisfy all the conditions of the provisions establishing the tax advantage in question.

In Case 38/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the VIIth Senate of the Bundesfinanzhof [Federal Finance Court] for a preliminary ruling in the action pending before that court between

HAUPTZOLLAMT FLENSBURG

and

FIRMA HANSEN GMBH & CO., Flensburg,

on the interpretation of Article 95 of the EEC Treaty,

THE COURT

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

Advocate General: G. Reischl
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of 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

Hansen GmbH & Co. (hereinafter referred to as "Hansen"), which has its registered office in Flensburg, manufactures spirits intended for human consumption. It is the proprietor of a warehouse from which it withdrew in 1974 light rum coming from the French overseas departments and from Suriname. In connection with that withdrawal the Hauptzollamt [Principal Customs Office] Flensburg charged the monopoly equalization duty (Monopolausgleich) at the usual rate, amounting at the material time to DM 1 500 per hectolitre of wine-spirit. Hansen challenged that assessment on the ground that under Article 95 of the Treaty the monopoly equalization duty must not exceed the lowest tax imposed on German production of spirits distilled from fruit, which at the time amounted to DM 1 210.60 per hectolitre of wine-spirit.

The Finanzgericht [Finance Court] Hamburg before which proceedings were brought referred five questions to the Court of Justice to which the following answers were given:

"1. Article 227 (2) of the EEC Treaty, interpreted in the light of Article 227 (1), must be taken to mean that the tax provisions of the Treaty, in particular the prohibition of discrimination laid down in Article 95, apply to goods coming from the French overseas departments.

2. Where national tax legislation favours certain classes of producers or the production of certain types of spirits by means of tax exemptions or the grant of reduced rates of taxation, even if such advantages benefit only a small proportion of domestic production or are granted for special social reasons, those advantages must be extended to imported Community spirits which fulfil the same conditions, taking into account the criteria which underlie the first and second paragraphs of Article 95 of the EEC Treaty.

3. The EEC Treaty does not include any provision prohibiting discrimination in the application of internal taxation to products imported from non-member countries, subject however to any treaty provisions which may be in force between the Community and the country of origin of a given product."

Following that judgment of the Court the Finanzgericht Hamburg held that light rum imported from the French overseas departments and from Suriname should be assessed at a rate of DM 1 210.60 per hectolitre of wine-spirit.

The Hauptzollamt Flensburg submitted an appeal on a point of law against that judgment to the Bundesfinanzhof [Federal Finance Court], arguing on the one hand that the first paragraph of Article 95 does not require the

application to imports of the most favourable national rate of tax since that rate constitutes a tax advantage for the benefit of specified categories of domestic producers which may not be extended without discrimination to imported spirits; accordingly imported spirits must comply with the substantive conditions in order to qualify for the tax advantage in question. Furthermore the only comparison which can possibly be made is with blended domestically-produced rum and not with spirits distilled from fruit.

The German Law on the Monopoly in Spirits (Gesetz über das Branntweinmonopol), in the version prior to 1978, laid down that spirits distilled from fruit on German territory were liable to the spirits surcharge (Branntweinaufschlag), which, at the normal rate, corresponded to the rate of the monopoly equalization duty imposed on imported products.

However under paragraph 79 (2), No 1, of the Law on the Monopoly in Spirits, in the version in force at the material time, that surcharge was reduced in the case of spirits produced in a cooperative fruit farm distillery (Obstgemeinschaftsbrennerei).

According to paragraph 37 of the Law on the Monopoly in Spirits such distilleries constitute bonded distilleries run by a cooperative, the spirits being distilled exclusively from fruit produced by the members of the cooperative themselves.

Finally, the reduction in the surcharge is accorded only if the production of the said distilleries does not exceed 300 litres of wine-spirit distilled from products of any one member of the cooperative in the course of one financial year.

Accordingly that tax advantage applies only to spirits distilled from fruit on the national territory and is in part conditional on following the technical procedures peculiar to German law with regard to the taxation of spirits.

According to the Bundesfinanzhof the case-law of the Court of Justice shows that, in that version, the provision is not compatible with Article 95 since the prescribed conditions cannot be fulfilled by the producers of other Member States whose legal systems do not contain equivalent provisions.

The Bundesfinanzhof however recalls that, according to the established case-law of the Court of Justice, Member States may grant reductions in taxation provided that they are for legitimate economic or social purposes and that such advantages are extended to imported products which fulfil the same conditions; it is thus necessary to apply to imported products "such conditions ... as constitute, in their totality, a true equivalent to the rules applying to domestic products so that the imported products may effectively benefit from the same advantages".

The Bundesfinanzhof continues that, in this case, the application of those principles as a whole to the extension of the tax advantage in question causes difficulties in establishing what specific requirements must be prescribed.

In view of the fact that the Court has not yet given "any clear answer to that question" since even the judgment given in Case 153/80 (judgment of 7 May 1981, *Hansen*, [1981] ECR 1165) does not provide a reply the Bundesfinanzhof "finds it necessary to make a fresh reference to the Court of Justice", submitting to it two questions:

"1. Has the importer of spirits distilled from fruit or similar spirits from other Member States an unrestricted legal right under the first paragraph of Article 95 of the EEC Treaty to a domestic tax advantage in respect of spirits the grant of which depends on the spirits' being produced in a distillery operated in common by

several persons to process agricultural raw materials produced by themselves and annually producing no more than 300 litres of wine spirit from the raw materials of any *one* member? Or does the right to that advantage depend upon the requirement that the imported spirits should originate in a distillery satisfying in whole or in part the conditions laid down in the provisions governing the grant of the advantage? If partial fulfilment is sufficient, with which of those conditions may compliance be made a requirement for extending the advantage to similar spirits imported from other Member States if the first paragraph of Article 95 of the EEC Treaty is not to be infringed? May the extension of the advantage be made subject to the requirement that the production of the distillery in which the imported spirits originate should be no greater than the maximum production of the domestic cooperative distillery during a comparable period?

2. In a case where light rum imported from other Member States is similar both to domestic spirits distilled from fruit and to domestic blended rum or domestic spirits distilled from grain and the national law provides, by way of legitimate differentiation, for different duties for the three kinds of products, does Article 95 of the EEC Treaty require that the most favourable of the three relevant duties on spirits should be applied to the imported rum? Or is the determinant criterion with which of the three kinds of products the imported rum has most characteristics in common? Is comparison with the duty on blended rum excluded because the latter is produced by the use of an imported product (rum)?"

In the grounds for its order the Bundesfinanzhof recalls with regard to the first question that the national provisions in question "served to protect the traditional use to which fruit is put by small-scale farmers in Germany". The tax differentiation was thus made on economic and social grounds, and especially to maintain the use of fruit by small-scale farmers, as is traditional in Germany. This is the framework within which, the Bundesfinanzhof continues, it is necessary to raise the question of establishing whether the first paragraph of Article 95 of the Treaty is satisfied if similar imported spirits qualify for the tax benefit in question only in so far as they originate in distilleries which on the whole satisfy the conditions mentioned in the Law on the Monopoly in Spirits. That is why the court making the reference requests the Court of Justice to provide a specific reply to the first question and points out that large-scale German producers would suffer discrimination if all importations of similar spirits qualified for the advantage reserved to small-scale German producers and that the German legislature is obliged, in order to mitigate the consequences, to abolish that tax advantage which it is entitled to grant under Community law.

With regard to the second question the Bundesfinanzhof is of the opinion that it concerns the problem of coordinating the conditions regarding similarity laid down by Article 95 of the Treaty and the conditions for justified differentiation in

taxation. In so far as the Court has ruled that although two products were similar different tax systems might nevertheless be justified (cf. in this connection in particular the judgment of 14 January 1981 *Chemial* Case 140/79 [1981] ECR 1) the greatest similarity should be taken as the basis for according the tax advantage in question in respect of imported products.

The order making the reference was received at the Court Registry on 27 January 1982.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by Hansen, represented by Mr Ehle, Rechtsanwalt, Cologne, by the Government of the Federal Republic of Germany, represented by Mr Sedemund, Rechtsanwalt, Cologne, and by the Commission of the European Communities, represented by its Legal Adviser, Mr Zimmermann, acting as Agent, assisted by Mr Krause-Ablass, Rechtsanwalt, Düsseldorf.

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

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — The first question

According to the *plaintiff and respondent to the appeal* the reply to the first question must be based not only on the wording but also on the grounds of the order of the court making the reference and on the substantive legal situation created by the Law on the Monopoly in Spirits.

The judgment delivered by the Court on 10 October 1978 (Case 148/77 *Hansen*, cited above) and the judgment delivered on 7 May 1981 (Case 153/80, *Hansen*, also cited above), show that the tax advantages granted in favour of cooperative fruit farm distilleries must be extended to similar imported spirits, unlike the advantages for which small-scale units qualify. In the plaintiff's view these judgments show that whilst differentiation is permitted its limit is attained, at least when it defines the circumstances so restrictively in terms of specific national characteristics that factors in other Member States — particularly overseas States — are thereby excluded.

The Court has also established in its judgment in Case 148/77 that a quantitative relationship between the domestic products which qualify for the tax advantage and the imported products to which the tax advantage must be extended is of little importance.

After recalling these principles which, according to it, follow from the case-law of the Court Hansen advances its principal argument to the effect that the tax difference established by the Law on the Monopoly in Spirits is not lawful. In fact the Bundesfinanzhof has not shown the real objectives pursued by the German Law; it does not have as its objectives any social aim — whilst such reasons do in fact exist with regard to the producers in the French overseas departments — but such objectives comprise reasons relating to the competitive capacity of distilleries, an objective which is valid with regard to Article 37 of the Treaty but which has, however, discriminatory effects in the tax field which are contrary to Article 95 of

the Treaty. That is confirmed by the fact that the German legislature abolished the tax advantage in question in 1978.

Consequently the plaintiff in the main action considers only in the alternative the specific problems raised by the court making the reference in its first question.

Hansen recalls that the Bundesfinanzhof has considerably restricted the criteria to be extended in its order for reference in relation to the conditions which it listed in its interlocutory judgment of 9 July 1981 in the main procedure and considers that of the three criteria listed by the Bundesfinanzhof in its order making the reference only the quantitative criteria may be extended to imported products. The requirement that the distillery should be run in the form of a cooperative cannot in fact be extended to imported products because, on the view taken by German law, the distilling right belongs to the cooperative and not to its members. Accordingly it is likewise impossible to treat the cooperative as equivalent from the point of view of tax law to the small-scale distillers.

Even the quantitative criterion can be extended to imported products only where it constitutes an objective criterion, the production capacity, and not a subjective criterion, the actual production.

Furthermore it should be borne in mind that, even though little use was made of that privilege, it was nevertheless established for all spirits distilled from fruit in the Federal Republic of Germany.

According to the plaintiff in the main action the application of Article 95 is not dependent on the number of persons exercising a national tax privilege.

Finally that criterion — which must be modified in terms of the conditions in the exporting country — causes a considerable problem of fact for the national courts.

With regard to the question raised by the Bundesfinanzhof of possible discrimination against German large-scale producers the plaintiff recalls first of all that the tax advantage in question is not directed to the small-scale producers but to the cooperative fruit farm distillery which, as has been explained above, cannot be treated as equivalent to such producers. Furthermore Article 95 of the Treaty does not prohibit Member States from imposing upon imported products lower taxes than those applied to similar domestic products and all discrimination contrary to Article 95 of the Treaty must be abolished by the legislature without the need to take into consideration the quantity of spirits qualifying for the national tax advantages.

In those circumstances the plaintiff in the main action suggests that the Court should reply as follows to the first question submitted by the Bundesfinanzhof:

"The importer of spirits distilled from fruit or of similar spirits (rum) from other Member States enjoys an unrestricted right under the first paragraph of Article 95 of the EEC Treaty to enjoy the tax advantage which is granted to cooperative fruit farm distilleries under paragraph 79 (2) of the German Law on the Monopoly in Spirits."

The *Federal German Government* recalls first of all that, according to it, the objective of the Law of the Monopoly in Spirits is to promote the use of fruit by small-scale undertakings and that the tax advantage in question applies on average to only 0.013% of the agricultural production of spirits in the Federal

Republic of Germany. That tax advantage moreover constitutes a reasonable supplement to the individual privilege granted to small-scale distillers.

In view of these facts it is impossible to require the Federal Republic of Germany to grant the tax advantage in question in respect of imported spirits the more so since under Article 3 of the Grundgesetz [Basic Law] it would then be necessary to withdraw that advantage, since imported spirits may not be favoured in relation to domestic spirits, and thus to refrain from benefiting the small-scale producers even though that would be perfectly legal from the point of view of Community law. It is thus a necessary consequence that imported products cannot, according to the Federal Government, enjoy an unlimited right to benefit from the tax advantage in question since it would be mistaken to consider that a tax advantage is incompatible with Article 95 of the EEC Treaty when that advantage affects only an infinitesimal percentage of domestic production and does not produce any effect on the taxation of more than 99% of such production.

The case-law of the Court of Justice also shows that it is not only quantitative criteria which may be extended to imported products but other criteria as well, provided nevertheless that their extension does not lead to an objective impossibility of extending the tax advantage in question.

The German Government next considers each condition laid down by paragraph 79 (2), No 1, of the German Law on the Monopoly in Spirits. It considers in this connection that by its nature that task is for the national court and does not come within the jurisdiction of the Court of Justice but nevertheless submits the following observations.

With regard first of all to the first criterion relating to the cooperative form of the organization of these distilleries it considers that such a criterion may easily be extended to the other Member States, particularly since such forms of cooperative or collective organization of small-scale agricultural producers are widespread throughout the European Community.

The same applies to the criterion that the raw materials must be produced by the members of the cooperative themselves since that criterion complements the foregoing criterion and limits the persons qualifying for the tax advantage in question to smallscale agricultural producers and since the objective possibility of extending that additional criterion appears clear.

Since the third condition prescribed by the German Law on the Monopoly in Spirits constitutes a quantitative criterion it should be possible to extend it without difficulty to imported products.

Finally according to the Federal Government there remains one last condition for obtaining the tax advantage in question which consists in the requirement that the spirits must be produced from fruit. In this connection the Federal Government observes that the Court of Justice has already on a number of occasions expressly recognized as lawful a tax differentiation on the basis of the nature of the raw materials used. Light rum produced from molasses and not from fruit could thus qualify for the tax advantage in question only if the production of genuine fruit spirits were objectively impossible in the other Member States for reasons of law or of fact.

Accordingly the Government of the Federal Republic of Germany proposes that the answer to the first question submitted to the Court of Justice should be as follows:

"Article 95 of the Treaty must be understood as meaning that the tax advantages which the legal system of a

Member State grants in respect of certain alcoholic products may not be extended to similar products from other Member States unless they fulfil the objective conditions which national law lays down as a qualification for the tax advantages in question. That does not apply to conditions which it is objectively impossible to fulfil in another Member State by reason of its geographical situation or of the laws, regulations or administrative provisions applicable to the manufacture of spirits in force in that State.

Tax advantages for which only small-scale distillers organized as cooperatives qualify and which are conditional upon compliance with quantitative criteria and on the nature of the raw materials used are in principle lawful in the present state of Community law in so far as the relevant conditions which must be fulfilled as a qualification for the tax advantage may also be fulfilled in the other Member States."

The *Commission* puts forward a point of view broadly similar to that expressed by the Federal German Government and emphasizes that the Court, in its judgment of 30 October 1980 *(Schneider,* Case 26/80 [1980] ECR 3469), has recognized the lawful nature of granting tax advantages to small-scale undertakings and that it is thus logical to grant the same advantages to a group of small-scale undertakings, the more so when they constitute agricultural distilleries. Apart from what the German Government has termed the fourth condition, concerning the requirement of the use of fruit for distilling, the Commission also considers that the three other conditions indicated by the Bundesfinanzhof must be extended to imported products. It nevertheless adds that it must be made possible for proof of fulfilment of these conditions to be provided in accordance with appropriate procedures with which importers are able in practice to comply.

Consequently the Commission proposes that the reply to the first preliminary question submitted should be as follows:

"A national tax advantage granted in respect of spirits distilled from fruit on condition that the spirits are produced in a distillery which is operated in common by several persons to process agricultural raw materials produced by themselves and which does not manufacture more than 300 litres of wine-spirit per year from the raw materials of any one member of that group must, in accordance with the first paragraph of Article 95 of the EEC Treaty, be granted also in respect of similar spirits imported from other Member States provided that such spirits originate in a distillery which fulfils the above-mentioned conditions. It must be made possible for proof of fulfilment of these conditions to be provided in accordance with appropriate procedures with which importers are able in practice to comply."

B — The second question

The *plaintiff in the main action* considers first of all that the wording of that question does not cover a factor of decisive importance for the specific subject-matter of the main action as only domestic fruit spirits qualify for the tax advantage provided for in paragraph 79 (2), No 1, of the German Law on the Monopoly in Spirits. The question raised by the Bundesfinanzhof may at the most be relevant in another context — and in other cases — that is, with regard to the marginal rate of monopoly equalization duty (Monopolausgleichsspitze). In the plaintiff's opinion, within the framework of the procedure for obtaining a pre-

liminary ruling under Article 177 of the EEC Treaty questions which are not decisive for the procedure in the main action may not be submitted to the Court of Justice.

Nevertheless in order to reply to the second question the plaintiff in the main action emphasizes first of all that the concept of similarity within the meaning of the first paragraph of Article 95 of the EEC Treaty can only be a uniform one since it concerns Community consumers; thus the most favourable rate must be applied when similarity exists with a number of domestic spirits.

Consequently the reply to the second question should be as follows:

"Where imported spirits are similar to several domestic products to which differentiated taxation is applied the most favourable rate of taxation must be extended."

With regard exclusively to the reply to be given to the second question the *Government of the Federal Republic of Germany and the Commission* share the point of view of the plaintiff in the main action.

The Federal Government suggests to the Court that the reply to the second question should be as follows:

"If the tax provisions of national law provide different rates of taxation for a number of similar products the rate applied to a similar product imported from another Member State does not depend on ascertaining to which of the similar domestic products the imported product displays the greatest similarity or with which it has most characteristics in common. In accordance with Article 95 of the EEC Treaty the imported product must instead be classified in the most favourable national tax category for which it fulfils the objective conditions."

The Commission suggests that the reply to the second preliminary question should be as follows:

"Where spirits imported from other Member States are similar to a number of domestic products and where national law, in drawing a lawful distinction, provides a tax benefit only for one of the kinds of similar domestic products the grant of the same tax advantage in respect of the imported spirits is subject to the sole condition that the imported spirits should fulfil the conditions for the grant of the tax advantage which are lawfully required within the framework of the provisions of Article 95 of the EEC Treaty; it is unnecessary to inquire in addition with which of the similar domestic products the imported spirits have most characteristics in common."

III — Oral procedure

At the sitting on 25 January 1983 replies were given to the question put by the Court and oral argument was presented by the following: Mr Ehle, Rechtsanwalt, Cologne, for the plaintiff in the main action; Mr Sedemund, Rechtsanwalt, Cologne, for the German Government; and Mr Zimmermann, acting as Agent, assisted by Mr Krause-Ablass, Rechtsanwalt, Düsseldorf, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 8 March 1983.

Decision

1 By order dated 17 December 1981 which was received at the Court on 27 January 1982 the Bundesfinanzhof [Federal Finance Court] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two preliminary questions on the interpretation of Article 95 of the Treaty in order to permit it to determine whether the Gesetz über das Branntweinmonopol [the Law on the Monopoly in Spirits] in the version existing prior to 1978, was compatible with Community law.

2 That order was made in the course of an action before the Bundesfinanzhof between the Hauptzollamt [Principal Customs Office] Flensburg and Hansen GmbH & Co. (hereinafter referred to as "Hansen"). The action has already led to the reference to the Court of a first series of preliminary questions submitted by the Finanzgericht [Finance Court] Hamburg on the interpretation of Articles 227 and 95 of the Treaty, to which the Court replied in a judgment dated 10 October 1978 *(Hansen & Balle* v *Hauptzollamt Flensburg,* Case 148/77 [1978] ECR 1787).

3 It should be recalled that the main action concerns the rate of the Monopolausgleich [monopoly equalization duty] charged on light rum coming from the French overseas departments and from Suriname. In 1974 Hansen withdrew from its warehouse a quantity of light rum in order to market it in the Federal Republic of Germany. The revenue authorities imposed tax on the rum at the ordinary rate whereas Hansen claimed that under Article 95 of the EEC Treaty the monopoly equalization duty in respect of imported spirits must not exceed the lowest rate of tax imposed on German production of spirits distilled from fruit, and proceedings were subsequently brought before the Finanzgericht Hamburg.

4 In reply to the questions submitted by that court the Court of Justice ruled in particular that:

Where national tax legislation favours certain classes of producers or the production of certain types of spirits by means of tax exemptions or the grant of reduced rates of taxation, even if such advantages benefit only a small proportion of domestic production or are granted for special social reasons, those advantages must be extended to imported Community spirits which

fulfil the same conditions, taking into account the criteria which underlie the first and second paragraphs of Article 95 of the EEC Treaty.

5 Following that judgment of the Court the Finanzgericht Hamburg decided that the spirits in question were liable to tax at the reduced rate.

6 The Hauptzollamt Flensburg appealed against the judgment, arguing that the reduced rate of tax constituted a tax advantage for which only specified categories of domestic producers who fulfilled certain conditions qualified and that consequently only imported spirits fulfilling the same conditions might qualify for that rate.

7 According to the Bundesfinanzhof the conditions prescribed by the German Law on the Monopoly in Spirits were, apart from technical procedures peculiar to German law with regard to the taxation of spirits, as follows: the spirits in question must be distilled from fruit in a distillery managed in the form of a cooperative fruit farm from raw materials produced by the members of the cooperative themselves and the production of such a distillery must not exceed 300 litres of wine spirit distilled from the products of a single member of the cooperative in the course of one financial year.

8 The Bundesfinanzhof considers that certain domestic products may be promoted by the grant of a reduced rate of taxation in their favour provided that legitimate economic or social purposes are served thereby and that the reduced rate is extended to imported products fulfilling the same conditions. With regard to those conditions the Court stated in its judgment of 30 October 1980 *(Schneider-Import,* Case 26/80 [1980] ECR 3469) that in order to decide whether imported products may benefit from advantages granted for the domestic product it is necessary to apply to imported products conditions constituting a genuine equivalent to the arrangements applicable to the domestic product, but it did not give an unequivocal reply regarding the question which specific requirements must be laid down in order that imported products may qualify for the tax advantage in question.

9 For that reason the Bundesfinanzhof submitted the following questions to the Court of Justice:

"1. Has the importer of spirits distilled from fruit or similar spirits from other Member States an unrestricted legal right under the first paragraph of Article 95 of the EEC Treaty to a domestic tax advantage in respect of spirits the grant of which depends on the spirits' being produced in a distillery operated in common by several persons to process agricultural raw materials produced by themselves and annually producing no more than 300 litres of wine spirit from the raw materials of any *one* member? Or does the right to that advantage depend upon the fact that the imported spirits originate in a distillery satisfying in whole or in part the conditions laid down in the provisions governing the grant of the advantage? If partial fulfilment is sufficient, with which of those conditions may compliance be made a requirement for extending the advantage to similar spirits imported from other Member States if the first paragraph of Article 95 of the EEC Treaty is not to be infringed? May the extension of the advantage be made subject to the production of the distillery in which the imported spirits originate being no greater than the maximum production of the domestic cooperative distillery during a comparable period?

2. In a case where light rum imported from other Member States is similar both to domestic spirits distilled from fruit and to domestic blended rum or domestic spirits distilled from grain and the national law provides, by way of legitimate differentiation, for different duties for the three kinds of products, does Article 95 of the EEC Treaty require that the most favourable of the three relevant duties on spirits should be applied to the imported rum? Or is the determinant criterion with which of the three kinds of products the imported rum has most characteristics in common? Is comparison with the duty on blended rum excluded because the latter is produced by the use of an imported product (rum)?"

10 These questions are in fact intended to establish whether Article 95 of the Treaty must be interpreted as meaning that spirits distilled from fruit or

similar spirits imported from other Member States must automatically qualify for the most favourable tax treatment accorded to certain spirits of domestic origin or whether such spirits must satisfy one or more, or all, of the prescribed conditions in order to qualify for that advantage.

11 With regard to the imported rum it should be mentioned that that kind of spirits has been charged the ordinary rate of tax and that the only problem raised by the national court is the question whether such rum must qualify for the favourable arrangements made only for a limited proportion of domestic production, namely spirits distilled from fruit.

12 It should be recalled that in the present state of Community law Member States are not prohibited from granting tax advantages in the form of exemption from or reduction in duty in respect of certain kinds of spirits or certain categories of producers. However, Article 95 requires that such preferential arrangements be extended without discrimination to imported products meeting the same conditions as the domestic products in respect of which the preferential treatment is granted and must not constitute indirect protection for domestic products.

13 As far as the quantitative conditions are concerned, in this case the limitation to 300 litres, the problem has been resolved by the judgment of 7 May 1981 *(Rumhaus Hansen,* Case 153/80 [1981] ECR 1165) in which the Court stated that: "If the tax advantage for domestic products is granted in terms of the quantities produced in each production undertaking the same advantage must be granted in favour of products from production units situated in other Member States which fulfil the same quantitative criteria."

14 Consequently, imported spirits cannot qualify for the reduced rate of taxation described above unless they fulfil the conditions concerning the limitation or production fixed in this connection by national legislation.

15 With regard to the condition that the spirits should be distilled by cooperatives consisting, as the Bundesfinanzhof has stated, of a group of small-scale farmers the requirement that the condition should be met by products imported from other Member States is not contrary to Article 95.

Such a requirement does not in fact constitute a specifically national condition but may be met by undertakings in all Member States provided that it is understood as referring to groups of the same economic and social groups as those envisaged by the national law.

16 For the same reasons it appears that the requirement that each member of the cooperative should be entitled to produce spirits only from his own raw materials also constitutes a condition which may be required in order that spirits imported from other Member States may qualify for the tax advantage in question.

17 With regard to the requirement that the spirits taxed at the lower rate must be produced from the raw materials specified by the national provisions, that is to say, fruit, berries, wine, wine lees, must, roots or their residues, it should be observed that such raw materials are also produced in other Member States. Consequently the national provisions do not prescribe a condition which only domestic products are capable of fulfilling and the legislation in question is not discriminatory.

18 The reply to the questions submitted by the Bundesfinanzhof should therefore be that Article 95 of the Treaty must be interpreted as meaning that, in the case of a national tax advantage which, since it is not discriminatory, is permissible under Community law, spirits imported from other Member States must, in order to qualify for that advantage, satisfy all the conditions of the provision by which it is established.

Costs

19 The costs incurred by the Government of the Federal Republic of Germany 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 national court, 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 Bundesfinanzhof by order of 17 December 1981, hereby rules:

Article 95 of the Treaty must be interpreted as measning that, in the case of a national tax advantage which, since it is not discriminatory, is permissible under Community law, spirits imported from other Member States must, in order to qualify for that advantage, satisfy all the conditions of the provision by which it is established.

Mertens de Wilmars Pescatore O'Keeffe Everling

Mackenzie Stuart Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 26 April 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 8 MARCH 1983 [1]

Mr President,
Members of the Court,

In the reference for a preliminary ruling which is to be considered today additional clarification of the case-law of the Court of Justice is sought as to the conditions on which, in view of Article 95 of the EEC Treaty, a national tax benefit must be provided for similar or competing imported products. Since the Court is already acquainted with the facts of the main action from the first

1 — Translated from the German.