JUDGMENT OF THE COURT
16 DECEMBER 1970[1]

Francesco Cinzano & Cia GmbH v Hauptzollamt Saarbrücken[2] (Reference for a preliminary ruling by the Bundesfinanzhof)

Case 13/70

Summary

Quantitative restrictions — Elimination — State monopolies of a commercial nature — Field of application of Community law — Standstill — New restrictive measure — Concept (EEC Treaty, Article 38)

The expression 'measure' appearing in Article 37 (2) of the EEC Treaty is closely linked to the definition of the activities constituting a State monopoly of a commercial character as set out in paragraph (1) of the same article.

The application of Article 37 is not limited to imports or exports which are directly subject to the monopoly but covers all measures which are connected with its existence and affect trade between Member States in certain products, whether or not subject to the monopoly. The introduction, after the entry into force of the Treaty, of an import duty on a product, a constituent part of which is subject to the monopoly, may thus amount to a 'new measure' within the meaning of Article 37 (2).

A duty levied on imports of products from other Member States linked to the existence of a State monopoly and applied for the first time after the entry into force of the Treaty does not amount to an infringement of Article 37 (2) as long as such new charge is imposed on the imported product only to the same extent as on domestic products affected by the monopoly.

In Case 13/70

Reference to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof (Federal Finance Court) (the highest court in taxation matters in the Federal Republic of Germany) for a preliminary ruling in the action pending before that court between

FRANCESCO CINZANO & CIA GMBH, Saarland branch at Güdingen (Saar)

and

1 — Language of the Case: German.
2 — CMLR.

HAUPTZOLLAMT (Principal Customs Office) SAARBRÜCKEN,

on the interpretation of Article 37 (2) of the EEC Treaty,

THE COURT

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

Advocate General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

It appears from the statement of the Bundesfinanzhof that the facts which gave rise to the main action are as follows:

1. Under the terms of the 'Branntweinmonopolgesetz' (the German law concerning the monopoly of ethyl alcohol obtained otherwise than by natural fermentation — hereinafter referred to as 'ethyl alcohol'),

— the import of 'Branntwein' (alcohol and potable spirits) with the exception of rum, arrack, cognac and liqueurs, is subject to a State monopoly;

— alcohol and potable spirits produced in national territory are subject to the tax known as 'Branntweinsteuer' or to the surtax called 'Branntweinaufschlag';

— imports of alcohol and potable spirits as well as products containing spirits of wine are subject to the Monopolausgleich (monopoly equalization), that is to say, to a tax corresponding to the fiscal charges imposed on domestic ethyl alcohol.

In 1963 the Bundesfinanzhof decided that products (such as wine) which were not themselves 'products containing spirits of wine' within the meaning of the Branntweinmonopolgesetz were to be classified as such when by the addition of spirits of wine they lost their original nature.

A law of 1965 added to the Branntweinmonopolgesetz a provision which entered into force on 1 April 1966 and according to which wine, drinks with a wine base and drinks assimilable to wines were regarded as coming within the category of 'products containing spirits of wine', when the spirits of wine which they contained originated totally or partially from the addition of alcohol; at the same time the legislature

decided that the amount of the Monopolausgleich should be laid down,

— as regards wines (strengthened by spirits) and drinks assimilable to wines: on the basis of the quantity of spirits of wine corresponding to a content exceeding 14% by volume,

— as regards drinks with a wine base: on the basis of the quantity of spirits of wine corresponding to a content exceeding 10.5% by volume.

A law of 1966 which came into effect on 1 April 1967 modified the Branntweinmonopolgesetz in such a way that, henceforth (and without further details), the following are also regarded as 'products containing spirits of wine': wines and drinks assimilable to wine having a content by volume of spirits of wine exceeding 14% as well as drinks with a wine base having a content by volume of spirits of wine exceeding 10.5%.

2. On 11 October 1967 Francesco Cinzano & Cia GmbH (hereinafter referred to as 'Cinzano') deposited a consignment of 1200 litres of vermouth of French origin in a bonded warehouse; according to the information provided by the importer in its declaration, the content of spirits of wine in the goods was 15.7% by volume. In respect of the extent to which the content of spirits of wine exceeded 10.5% by volume, the customs office levied DM 806.83 by way of Monopolausgleich. Having failed in the administrative objection ('Einspruch') which it had lodged against this imposition with the Hauptzollamt (Principal Customs Office) at Saarbrücken, Cinzano then brought proceedings in the Finanzgericht (Finance Court) of the Saarland before which it did not succeed either. The Finanzgericht considered that Article 37 (2) of the EEC Treaty did not apply in this case, as the ethyl alcohol monopoly had neither direct nor indirect effect upon the import of vermouth. As the Monopolausgleich did not have the effect of unilaterally and exclusively burdening the imported product, the Finanzgericht declared that it could not be regarded as a charge having an effect equivalent to a customs duty within the meaning of Article 12 et seq. of the EEC Treaty. According to the Finanzgericht, it must be accepted that the Monopolausgleich constituted internal taxation within the meaning of Article 95 of the Treaty and that the provisions of that article did not prevent its being levied. In the appeal on a point of law by Cinzano to the Bundesfinanzhof the company is maintaining that the levy of the Monopolausgleich is contrary to the provisions of Article 37 (2) of the EEC Treaty, because the levying of that duty after a long period during which vermouth was not taxed has an indirect influence on imports of that product. The defendant Hauptzollamt is of the same opinion as the Finanzgericht.

II — Terms and reasoning of the order making the reference

On 25 February 1970 the Bundesfinanzhof made an order by which it requested the Court to give a preliminary ruling on the following question:

> 'Is there an infringement of Article 37 (2) of the EEC Treaty when a Member State, in which imports of ethyl alcohol ("Branntwein") are subject to a State monopoly, imposes as from 1 April 1966 a tax (intended to offset the fiscal charge imposed on domestic ethyl alcohol) on drinks with a wine base imported from another Member State (for example vermouths) according to the content of spirits of wine exceeding a given maximum, whereas previously as a general rule it levied that tax only in cases where the original product (for example wine) had lost its particular characteristics through the addition of spirits of wine'.

It gives reasons for its order by stating that in the present case 'without prejudice to the problem of the compatibility of the Monopolausgleich with Articles 12 and 95', the solution of the question of the acceptability of such a levy is dependent on the reply to be given to the question set out above.

III — Procedure

The order making the reference was received at the Court Registry on 6 April 1970.

In application of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, Cinzano, the Government of the Federal Republic of Germany and the Commission of the European Communities submitted written observations.

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

At the hearing on 29 October 1970 Cinzano, the Government of the Federal Republic of Germany and the Commission of the European Communities presented oral argument.

The Advocate-General delivered his opinion at the hearing on 12 November 1970.

Cinzano was represented by Professor J. Kaiser, of Freiburg im Breisgau, and by G. B. Heinze and Klaus J. Rieker, Advocates of Frankfurt am Main, the Federal Government by Rudolf Morawitz, Ministerialrat, and the Commission by its Legal Adviser, Rolf Wägenbaur.

IV — Summary of the observations submitted under Article 20 of the Statute of the Court of Justice of the EEC

The observations put forward by *Cinzano* may be summarized as follows:

1. The question submitted to the Court originates in the fact that, as from a particular date in the course of the second stage of the Common Market, the import from other Member States of quality vermouths ready for consumption was subjected to the levy of an entry duty which had never previously been imposed. That measure had the effect of overcompensating for the gradual elimination of customs duties which had been achieved until then and of abruptly increasing the total charge payable as import taxes to approximately six times the level which it previously reached. The legislative technique used to put this measure into force consisted in making an addition to the Branntweinmonopolgesetz; the measure in question was consequently adopted by reference to the existence of the monopoly in ethyl alcohol. It follows from this that the question submitted to the Court should have been formulated in the following terms:

> 'Is there an infringement of Article 37 (2) of the EEC Treaty when, during the course of the second stage of the Common Market, a Member State takes advantage of the existence of a State monopoly to subject to it directly or at least indirectly the import of a group of products which were not governed by it until then, with the consequence that the total amount of the charge by way of entry duties is raised to approximately six times the previous level?'

Cinzano points out that it imports exclusively quality vermouths ready for consumption. Consequently, it says, the question submitted to the Court is irrelevant, to the extent to which it refers to the case-law which the Bundesfinanzhof has developed in respect of products to which the addition of spirits of wine has caused 'the loss of their original nature as wine', because the latter consist of basic vermouths intended to be subjected to a further stage of processing.

2. Cinzano then sets out the reasons for which it considers that the monopoly in ethyl alcohol instituted in Germany constitutes a monopoly of a commercial character within the meaning of Article 37 (1) of the EEC Treaty.

It points out that although in *German* law the contested taxation intended to offset the effect of domestic charges imposed on products subject to the monopoly (and which it calls 'Monopolausgleichsabgabe' —monopoly equalization charge) amounts to a special tax on consumption (an excise duty), on the contrary in respect of Community law it is necessary to refer to the case-law of the Court (Case 57/65, *Alfons Lütticke GmbH* v *Hautpzollamt Saarlouis* [1966] E.C.R. 205), according to which a charge intended to offset the effect of internal taxation thereby takes on the internal character of the taxation whose effect it is

intended to offset. The disputed charge is intended to offset the effect of certain taxes imposed on domestic products, namely the Branntweinsteuer and the Branntweinaufschlag, which from a basic point of view are monopoly taxes (as Cinzano endeavours to show in detail); consequently, it says, the compensatory duty is also a monopoly tax.

3. Cinzano maintains that the German legislation which is in question here is contrary to the provisions of Article 37 (2) of the EEC Treaty because it has greatly raised the level of the tax burden by way of import duties, which had been lowered by the abolition of customs duties achieved within the Community, and that in this manner it 'restricted the scope of the articles concerning the elimination of customs duties'. The objective of Article 37 (2), which is clearly to prevent the standstill obligation laid down in Article 12 from being evaded by means based on rules of law concerning monopolies, and the place which that provision occupies in the general context of the Treaty show that monopoly taxes must be regarded as charges having an effect equivalent to that of customs duties within the meaning of Article 12.
Cinzano states that furthermore the contested legislation infringes the standstill obligation set out in Article 37 (2); the company gives factual details intended to prove this.
It comes to the conclusion that the question submitted to the Court must receive an affirmative reply.
It asks the Court to regard as being a part of its observations the opinion of Professor Kaiser which it produced during the main action and which deals with points which are important in respect of the reply to be given to the question raised within the framework of the present proceedings.
The considerations set out by the *Government of the Federal Republic of Germany* may be summarized as follows:

1. The Federal Government begins by describing the legal situation existing in Germany as well as the development of legislation within the sphere here in question by making the following points in particular:

— the old rules gave rise to difficulties because there was controversy on whether certain drinks, including vermouths, came within the category of drinks upon which the Branntweinmonopolgesetz imposed the compensatory duty;

— judgments given in 1963 by the Bundesfinanzhof (see I, 1 above) did not decide the decisive question of when a wine loses its particular nature through the addition of spirits of wine;

— the 1965 legislation (see I, 1 above) eliminated that uncertainty but led to other disadvantages: as the legislature made liability to the tax dependent on proof that there had been an addition of alcohol, there were to be seen as from April 1966 massive imports of wines with a high alcohol content which, if the certificates of the countries of origin were to be accepted, had not had alcohol added; although there were reasons to doubt the truth of those certificates, it was not possible on most occasions to prove the addition of alcohol;

— this was the situation which the 1966 legislation remedied (see I, 1 above); it fixed the threshold value so high that as a general rule only added alcohol was taxed, whilst the alcohol resulting from fermentation in the wine was not; in comparison to that imposed on spirits for consumption the fiscal charge resulting from these rules reaches in general a level lower than that reached in the other Member States.

2. The question submitted to the Court must be understood as seeking to determine whether the institution of new fiscal measures applied at the frontier with a view to offsetting internal taxation may constitute an infringement of the standstill rule set out in Article 37 (2). Put like this, the question allows of a negative reply according to the Federal Government.
It states that the German monopoly of ethyl alcohol is of course a State monopoly of a commercial nature within the meaning of Article 37 (1) but its field of application does not extend to vermouths produced by

the fortification of wine. Further the disputed legislation should be considered exclusively in relation to Article 95 of the EEC Treaty, as it is not equivalent to a new measure within the meaning of Article 37 (2). This legislation has filled a gap in the tax system relating to ethyl alcohol. It would not be justifiable to tax the whole of the ethyl alcohol contained in medicines and potable spirits whilst letting the additional ethyl alcohol contained in wines and wine-based drinks with a high alcohol content escape the tax, as the latter are precisely the products which compete with potable spirits.

When the measures of the various legislatures have the same content, it is impossible that in one of the Member States, which has a monopoly system, they should be judged in relation to Article 37 (2) whilst in another Member State, where there is no monopoly, they should be judged in relation to other provisions of the Treaty, for example in the light of Article 95.

The Federal Government claims that even if it were possible to consider that the application of the Monopolausgleich to the fortified wines depended not noly on the provisions of Article 95 but also on those of Article 37, there still would not have been an infringement of paragraph (2) of that article because it is impossible to assert that the nationals of the Member States suffer discriminatory treatment with regard to the ethyl alcohol contained in imported fortified wine.

The observations put forward by the *Commission of the European Communities* may be summarized as follows:

The Commission begins by painting a picture of the legal situation existing in the Federal Republic of Germany in respect of the economic sector in question here.

As to the reply to be given to the question put by the Bundesfinanzhof, it points out that in order to understand paragraph (2) of Article 37 it is necessary to refer to paragraph (1). There would be discrimination within the meaning of Article 37 (1) from the fiscal point of view if the imported goods had to bear a fiscal charge higher than that imposed on similar domestic products.

The situation of act upon which the Bundesfinanzhof is required to decide comes within the field of application of Article 37, it states. No doubt in the case of the importation of vermouth, the intervention of the German customs is limited to levying the Monopolausgleich on the amount of the content of spirits of wine exceeding 10.5%; but even that form of action is capable of 'determining or appreciably influencing' imports under the provisions of Article 37. The same result would be reached, furthermore, if the situation wree to be judged in relation only to Article 95.

It will be for the Bundesfinanzhof to investigate whether the system newly introduced in 1966 has led to discrimination to the detriment of imported vermouths. Such is not the case if this system has the sole purpose and sole effect of putting these vermouths on the same footing as the corresponding domestic products, and the Commission appears to admit that this is really so. But, further, it will be for the Bundesfinanzhof to consider whether or not the fixing of a threshold value at a content of 10.5% by volume leads to discrimination contrary to the provisions of Article 37 (2). This would be so (and the Commission explains why) if it appeared that for the manufacture of vermouth domestic producers use wines of which the natural alcohol content exceeds 14% by volume, which is not the case, according to the information available to the Commission. From all these considerations it contends that there is reason to reply as follows to the question put by the Bundesfinanzhof:

> 'To the extent to which an interpretation of Article 37 (2) is requested, it must be held that that article of the EEC Treaty prohibits any new measure leading to discrimination between the nationals of Member States in the conditions under which goods are supplied or marketed. There is no discrimination within the meaning of that provision when a newly instituted tax has the purpose and effect merely of putting imported goods on a footing of fiscal equality with similar domestic products.'

Grounds of judgment

1 By an order of 25 February 1970 received at the Registry on 6 April 1970, the Bundesfinanzhof has requested the Court under Article 177 of the Treaty establishing the EEC to rule 'whether there is an infringement of Article 37 (2) of the EEC Treaty when a Member State, in which imports of ethyl alcohol are subject to a State monopoly, imposes as from 1 April 1966 a tax (intended to offset the fiscal charge imposed on domestic ethyl alcohol) on drinks with a wine base imported from another Member State (for example vermouths) according to the content of spirits of wine exceeding a given maximum, whereas previously as a general rule it levied that tax only in cases where the original product (for example wine) had lost its particular characteristics through the addition of spirits of wine'.

2 It may be seen from the file submitted that this question relates to a State monopoly which is mainly concerned with the marketing of domestic ethyl alcohol and imports of the same product. It is further stated in the grounds of the order referring the matter that the measure which is the subject of the main action is one by which after the entry into force of the Treaty the national legislature extended an existing tax to imports of products which had not hitherto been subject to it. These factors must be taken into account in deciding upon the reply to be given to the question put by the national court.

3 It was claimed that the introduction of the tax at issue does not come within Article 37 (2) because it is not covered by monopolies within the meaning of that article.

4 Article 37 (2) prohibits in particular any 'new measure' which is contrary to the principles laid down in paragraph (1) of the same article. Combined with one another these two paragraphs show that the expression 'measure' appearing in paragraph (2) of that article is closely linked to the definition of the activities constituting a State monopoly of a commercial character as set out in the previous paragraph.

5 This definition is worded in deliberately general terms so as to include activities by which the State concerned acts only '*de facto*' or 'indirectly' in trade between Member States as well as activities by which, far from 'supervising' or 'determining' such trade, it is satisfied merely by 'influencing' it. It follows from this that the application of Article 37 is not limited to imports or exports which are directly subject to the monopoly but covers all measures which are connected with its existence and affect trade between Member States in certain products, whether or nor subject to the monopoly.

6 It is therefore possible that the introduction, after the entry into force of the Treaty, of an import duty on a product, a constituent part of which is subject to the monopoly, may amount to a 'new measure' within the meaning of Article 37 (2).

7 However the aforementioned provision does not prohibit every 'new measure', but merely one which is either 'contrary to the principles laid down in paragraph (1)' of the same article—that is to say, which produces or aggravates 'discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States' or 'which restricts the scope of the articles dealing with the abolition of customs duties and quantitative restrictions between Member States'.

8 Thus it must first be ascertained whether the extension to imported products of a charge previously imposed only on similar domestic products subject to a monopoly may be regarded as amounting to discrimination regarding the conditions under which goods are procured and marketed.

9 In order to amount to discrimination regarding the conditions under which goods are procuted and marketed within the meaning of Article 37 (1), the new duty must have the effect of imposing higher charges on the imported product than on the similar domestic product. Such is not the case if the former is subject to the same charge as the second. There is therefore no discrimination within the meaning of the said article when the imported product is subjected to the same conditions as the domestic product subject to the monopoly.

10 It must, further, be established whether the new duty restricts the scope of the articles dealing with the abolition of customs duties and quantitative restrictions within the meaning of Article 37 (2).

11 As long as the said measure has the purpose merely of applying to intra-Community trade a duty which before the entry into force of the Treaty was imposed only on similar domestic products, that extension does not have the effect of putting it on the footing of a customs duty or a charge having equivalent effect. Lastly, the duty in question by its nature has nothing in common with a measure having an effect equivalent to that of a quantitative restriction.

12 It is therefore appropriate to reply to the Bundesfinanzhof that a duty levied on imports of products from other Member States linked to the existence of a State monopoly and applied for the first time after the entry into force of the Treaty does

not amount to an infringement of Article 37 (2), as long as such new charge is imposed on the imported product only to the same extent as on domestic products affected by the monopoly.

13 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.

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

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of Cinzano, the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 37 and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the question referred to it by the Bundesfinanzhof by an order of that court of 25 February 1970, hereby rules:

A duty levied on imports of products from other Member States linked to the existence of a State monopoly and applied for the first time after the entry into force of the Treaty does not amount to an infringement of Article 37 (2) as long

as such new charge is imposed on the imported product only to the same extent as on domestic products affected by the monopoly.

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 16 December 1970.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 12 NOVEMBER 1970[1]

Mr President,
Members of the Court,

In order to have a proper understanding of the origin and scope of the present case it is necessary, I believe, to recall briefly the main features and the evolution of the German legislation relating to alcoholic drinks.
I must apologize to those of you who are familiar with this legislation, but perhaps you are not all familiar with the topic to the same degree.
The German legislation relating to alcoholic drinks is, like most European legislation, based upon a fundamental and simple distinction, the distinction between:

— on the one hand, beverages obtained through natural fermentation, that is to say, essentially wines and beer; and

— on the other hand, beverages obtained by distillation or, generally, by any process other than fermentation.

The essential difference between the legal systems applicable to these two categories of beverages is as follows:
The first category is marketed freely.
The second, on the other hand, is subject to a monopoly in the purchase of the raw product established by a law of 8 April 1922, which has since been frequently amended. The State buys the raw product, subjects it to a process known as 'rectification' and then sells it to the consumers.
For the products subject to the monopoly, the fiscal system is at present as follows:

1. With regard to alcohols produced within the national territory the State has a monopoly in the purchase and treatment of the raw product but it may waive the exercise of that monopoly.
When it exercises its monopoly it levies a tax known as the Branntweinsteuer and when it exempts the producer from the obligation of delivery, it imposes a surtax called the Branntweinaufschlag.

2. With regard to imports, the monopoly has the exclusive right to import raw or rectified alcohol apart from certain exceptions which are confined to a restricted list. As for other spirits the purchasing monopoly does not apply, but a tax called the Monopolausgleich or monopoly equalization duty, which corresponds in principle to the fiscal charge imposed on domestic alcohols or potable spirits, is levied on such

1 — Translated from the French.