On those grounds,

THE COURT

in answer to the questions submitted to it by the Verwaltungsgericht of the Free Hanseatic City of Bremen by order of 18 January 1978, hereby rules:

Measures adopted by a Member State which make the use in connexion with a home-produced product of a designation of quality — even where such designation is optional — which is indicative neither of origin nor of source within the meaning of Article 2 (3) (s) of Commission Directive No 70/50/EEC of 22 December 1969 subject to the requirement that one or more stages of the production process prior to the preparation of the finished product have been carried out on national territory are measures having an effect equivalent to a quantitative restriction which are prohibited by Article 30 of the Treaty and not justified by Article 36 thereof.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 12 October 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 13 JULY 1978 [1]

Mr President,
Members of the Court,

1. The Court has frequently held (the last occasion was on 29 June 1978 in the Dechmann case (154/77), paragraphs 8 and 9 of the decision that within the framework of proceedings brought under Article 177 of the Treaty it is not for the Court to give a ruling

1 — Translated from the French

on the compatibility of rules of internal law with provisions of Community law, but that on the other hand the Court is competent to supply the national court with any criteria coming within Community law enabling that court to determine whether such rules are compatible with the Community rule evoked.

The present reference for a preliminary ruling once again makes it necessary for the Court to undertake this difficult task. In order to enable the national court to give the fullest possible effect to the Treaty — in this case to Articles 30 to 36 and consequently also to Articles 86 and 90 — we cannot avoid analysing certain aspects of the national rule at issue and its potential if not its actual effects. The Court has itself shown us the way by putting very searching questions to the "parties to the main action" and by requesting the Government of the Federal Republic of Germany and the Commission to produce certain documents and all of this is very like the preliminary exchanges in an action for a finding of failure to fulfil an obligation under the Treaty.

The Commission after it had stated that it was considering the "possibility" of having recourse to Article 169, a possibility which it appears to have contemplated as far back as May 1971, has only just sent *in extremis* on 3 July 1978 a letter signed by its Vice-President to the Federal Government in which it places on record that when the latter adopted the provisions at issue in the main action it failed to fulfil the obligations imposed upon it by Article 30 of the Treaty. It reserves the right, after having taken note of the observations which that government may submit to it within a period of one month, to deliver the reasoned opinion as provided for in Article 169 of the Treaty. It will perhaps be saved from taking such an extreme step, which is always a delicate operation, if the Court gives a preliminary ruling with its customary speed when dealing with such references.

The facts giving rise to the main action are as follows.

The applicant, a German company in Bremen, produces spirits made from wine (Branntwein) which it markets under its own brand names. It buys the distilled wine necessary for their production because it does not possess a distillery of its own; it markets its spirits without any processing or treatment other than maturing and coupage that is to say the addition to undiluted spirits of ethyl alcohol coming from the same substance as the one from which the undiluted spirits are extracted, the reduction of their strength and marking them.

At the beginning of 1976 it imported a certain quantity of French distilled wine (Weindestillat), fresh from the still; for at least six months it stored this distillate in oaken casks under customs supervision at its own undertaking and then processed it into spirits made from wine (Branntwein aus Wein). The wine and spirits stores of the city of Bremen are in fact well known for maturing wines and spirits.

It intended to market its product in Germany or abroad under the designation "quality spirits made from wine" (Qualitätsbranntwein aus Wein) or "Weinbrand", without any other indication of origin, to be more precise, under the appellation "Qualitätsbranntwein aus Wein Weinbrand (Anno 1773, Prominent Dreistern Royal)". As provided for in subparagraph 8 of Article 40 (1) of the German Law on wine (Weingesetz) of 14 July 1971 it could only use this designation if the competent national authority had assigned it a certification number for the spirits thus produced.

In January 1977 the applicant therefore requested the competent authority of Bremen to assign it a certification

number for its spirits. The authority in question assigned it the number requested.

However this authority, having noticed that the applicant had merely stored the French distilled wine in oaken casks for six months before calling it "quality spirits made from wine" or "Weinbrand", withdrew in April 1977 its decision to assign the certification number on the ground that the requisite conditions, prescribed by subparagraphs (1) and (4) of the German law, for entitlement to use this designation were not present.

The applicant therefore lodged an objection against this decision on the ground that the conditions so prescribed were incompatible with Article 30 *et seq.* of the Treaty.

The competent authority rejected the applicant's objection in June 1977.

The latter brought an action against the decision before the Verwaltungsgericht der Freien Handelsstadt Bremen (Administrative Court of the Free Hanseatic City of Bremen) which has put to the Court the questions to be dealt with in this reference for a preliminary ruling.

II — The Law of 16 July 1969 which replaced the Law on wine of 25 July 1930 was itself replaced by the Law of 16 July 1971 "on wine, liqueur wine, sparkling wine, wine-based beverages and spirits made from wine". The draft of the text which became this law was substantially modified in order to take account of Regulations (EEC) Nos 816 and 817/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine.

There was close consultation about the matter between the Commission and the Federal Government and the Commission was led to send to the Federal Government on 11 December 1968 a recommendation concerning certain aspects of what was at that time only a draft law.

An exhaustive account of the manufacture of spirits from wine would fall outside the scope of these proceedings. Let me just recall that, *leaving out of account questions of designation*, in order to be able to produce spirits from *wine* it is necessary to distill wine, wine fortified for distillation (Brennwein) — these terms being understood within the meaning given to them by Regulation No 816/70, Annex II — *crude* distillate (Rohbrand) which has been distilled once, or simply to use distilled wine (within the meaning of Article 4 of Regulation No 2893/74 of 18 November 1974) which has already been processed or other spirits made from wine. In the last-mentioned case the "production" does not include any processes other than maturing, coupage and reduction in the strength of the distillates or the spirits used and, if necessary, some "colouring" or "flavouring" in so far as this is allowed by national regulations.

Since German wine by reason of its price or for some other reason does not lend itself to the production of distillates, all spirits produced in the Federal Republic of Germany are made from foreign wines or foreign wines fortified for distillation, distillates or foreign spirits. Even the German distilleries which in fact use crude imported distillate (Rohbrand) merely "treat" them in order to give them the designation "home-produced" which, as we shall see, is required by law, even though they dilute them in the proportion allowed with foreign distillates or spirits just as they are.

Wine fortified for distillation is wine to which spirits made from wine have been added and which has an alcoholic strength of between 18° and 24°. This product, which is classified under tariff heading 22.05 C of the Common Customs Tariff, is treated for customs

purposes in the same way as undenatured ethyl alcohol of a strength of 80° or higher, spirits, liqueurs and other spirituous beverages of heading number 22.09. Before the introduction of the full Common Customs Tariff the Federal Republic of Germany imported at a reduced rate large quotas of wine fortified for distillation, intended for the production of spirits, from Mediterranean non-Member countries. The Court had to deal with this situation in Case 24/62 *Government of the Federal Republic of Germany* v *Commission of the European Communities* [1963] ECR 63 in which judgment was delivered on 4 July 1963. Again on 22 May 1978 a quota of 500 000 hectolitres opened for wine of fresh grapes intended for fortifying, originating in Algeria, was allocated among the Member States (Council Regulation (EEC) No 1130/78 of 22 May 1978).

The German law on wine comprises eight parts. In the part which is of special relevance to the dispute in the main action (Part II, "wine-based beverages, spirits made from wine") a distinction is drawn between spirits made from wine produced on national territory ("home-produced spirits", Article 36 of Title 1), that is to say "produced" in the Federal Republic of Germany in the manner I have just described and spirits made from wine of foreign origin (Article 42 of Title 2): this expression refers to spirits the "production" — still giving this word the same meaning — of which has been effected abroad.

Unlike *ordinary* spirits home-produced spirits of this category must carry an indication of the country of origin.

In order to earn the designation of *quality* spirits made from wine ("Qualitätsbranntwein aus Wein") or of "Weinbrand", with the price advantages which enure for the benefit of such an appellation, home-produced spirits must in particular, according to subparagraphs 1 and 4 of Article 40 (1), satisfy the following conditions:

(1) At least 85 % of the alcoholic strength (Alkoholgehalt) (within the meaning of Annex I to Regulation No 816/70) is derived from wine distillate home-produced by distillation;

(2) The whole of the distillate used has been kept for at least six months in oaken casks at the home establishment which has produced by distillation the distilled wine extracted on national territory.

The effect of the combined provisions of subparagraph 1 of Article 44 (1) and of subparagraph 1 of Article 40 (1) is that, in order to reap the benefit of the appellation "Weinbrand", spirits of foreign origin must satisfy the following conditions:

(1) 85 % at least of the alcoholic strength of the finished product has been distilled in the Federal Republic;

(2) The whole of the distillate used has been kept for six months in oaken casks at the enterprise which carried out the distillation.

By virtue of the last sentence of Article 44 (1) the appellation "Weinbrand" may only be combined with that of "Qualitätsbranntwein aus Wein" if the product is entitled to this latter designation and the whole of the production process took place in a German-speaking country.

If these conditions are not fulfilled spirits made from wine of foreign origin must also carry an indication — which is awkward — of the name of the producing country or of the adjective derived from that name.

This is what has been called the principle of the "concentration of production within the same undertaking" or of individual responsibility", the aim of the legislature being to make

these two categories of alcohol for drinking subject to the same system so that consumers enjoy the same guarantees.

According to the plaintiff in the main action on the other hand crude distillate (Rohbrand) imported by German distillers is in fact ready prepared distillate (fertiges Destillat) which is only described by exporters as "crude" distillate in order to comply with German legislation. The most obvious consequence of this system is that distilled wine (Weindestillat) imported by the plaintiff which would have qualified to become "Qualitäts-branntwein aus Wein" or "Weinbrand", without any indication that it was of foreign origin, if only because it had ostensibly undergone distillation for the purpose of satisfying the requisite conditions under German law, is deprived of this advantage if it is "treated" by operators, who, like the plaintiff in the main action, do not possess distilleries of their own and merely store it in their establishment.

In fact the effect of these provisions is to hinder the free movement of distilled wine; this effect is not justified by the provisions of Article 36 and it discriminates between those German producers of "Weinbrand" who possess distilleries of their own and those who do not. All things considered the aim and effect of these rules is to favour domestic distillers by giving them in practice the monopoly of the designations of quality highly valued by consumers.

III — Before proceeding to deal with the questions referred it is appropriate to recall that the Commission has had the following confirmed by the Court's judgment of 20 February 1975 in Case 12/74 *Commission of the European Communities* v *Federal Republic of Germany* [1975] 1 ECR 181, namely that in order to be protected by law registered designations of origin and indications of origin must describe a product coming from *a specific geographical area*. These appellations only fulfil their specific purpose if the product which they describe does in fact possess qualities and characteristics which are due to the fact that it originated in a specific geographical area and this must, particularly in the case of indications of origin, confer on the product a specific quality and specific characteristics of such a nature as to distinguish it from all other products.

An area of origin which is defined on the basis either of the extent of the *national* territory or of a *linguistic* criterion cannot constitute a geographical area within the meaning referred to above, capable of justifying an indication of origin, particularly as the products in question (sparkling wines and spirits made from wine) may be produced from grapes of indeterminate origin.

The Court has expressly held that the appellation "Weinbrand" was simply a generic term and that *reserving* the protection provided for indications of origin to spirits produced in any country throughout which *German* was the official language amounted to the adoption of a *new* measure having effects equivalent to quantitative restrictions which is arbitrary and unjustified under Article 36.

It is true that that case was concerned with the designation of *foreign* spirits whereas it is another aspect of this law, found in those provisions relating to the designation of *home-produced* spirits, which is now at issue: the question to be determined is whether the requirements prescribed by a law such as the German law to enable home-produced spirits to earn a designation of quality are justified under Article 36. Nevertheless there is a close connexion between these two aspects since both the conditions at issue laid down by subparagraphs 1 and 4 of Article 40 (1) for designations of home-produced spirits are substantially

the same as those laid down by subparagraphs 1 and 4 of Article 40 (1) for designations of home-produced spirits are substantially the same as those laid down by subparagraphs 2 and 3 of Article 44 (1) for designations of foreign spirits.

It is also true that the Federal Constitutional Court of Karlsruhe in a judgment of 7 January 1976 called attention to the fact that the Federal Minister for Youth, Family Affairs and Health had "requested" the authorities responsible for the implementation of the rules for wine-growing to see to it that the judgment of the Court of Justice of 20 February 1975 be complied with and that it found that the "rule attacked", that is to say subparagraph 3 of Article 44 (1), "was no longer applied" or was at least applied without discrimination.

However the Commission, by a letter of 16 July 1976 signed by its President to the Government of the Federal Republic of Germany, informed the latter that it was necessary, in the interest of "legal certainty", that "the legal situation be henceforth fully remedied, as it is now fifteen months since the judgment was delivered". "In order to remove, in the eyes of the parties concerned and the general public, the appearance of legality of texts still formally in force, it is not enough" the letter went on, "to issue internal instructions to departments inviting them to stop applying the provisions held to contravene Community law". The Commission went out of its way to remind the Federal Government of its obligations under Articles 171 and 5 of the Treaty. It added that it is under a duty to check that these obligations are fulfilled and, if necessary, to exercise the powers conferred upon it by the Articles 155 and 169 *et seq.* of the Treaty. It has now gone one step further by sending the German Government its letter of 3 July 1978.

Since the conditions laid down by Article 44 have been clearly held to be unlawful by the Court's judgment of 20 February 1975 it may be asked whether the similarity between that judgment and the present application for a preliminary ruling does not already establish that the Federal Republic has not always complied with that judgment.

However since the Federal Government asserts that "with regard to the provisions of Article 171 it has taken the measures necessary to comply with the Court's judgment" of 20 February 1975, since the Commission has not so far brought an action before the Court for failure to fulfil an obligation which such non-compliance amounts to and since the Court is not asked in the present application to find that the Federal Republic has failed to fulfil its obligations by not complying with the Court's judgment we need go no further in this matter.

IV — As the German Government and the Commission have done in their respective submissions I think that it is appropriate to take and consider together the first two questions relating to the measure having an effect equivalent to quantitative restrictions resulting from the "indirect indication of origin" established by the German law.

Distilled wine produced in the Member States may be imported into the Federal Republic without any quantitative restriction. But, apart from a percentage of 15 % of the alcoholic strength, foreign distilled wine may only be used directly for the production of foreign spirits; ordinary "Weinbrand" can only be produced, up to an amount of 85 % of alcoholic strength, from "nationalized" distilled wine.

Imports of distillate from other Member States will not develop in the same way according to whether these rules apply

or do not apply. *Home-produced* quality spirits or Weinbrand sell at a higher price than foreign spirits with the exception of course of designations such as cognac and armagnac, and the price is "made" by the producers of these home-produced spirits, whereas, if the foreign distillates could be "processed" without having to satisfy any other special conditions, the spirits produced directly from these distillates would be in a position to compete with quality home-produced spirits and the demand for these foreign distillates would for that reason be increased.

Moreover the German Government does not seriously dispute the fact that, even if the rules in question do not affect the total volume of imports of foreign distillates into the Federal Republic, they affect the "pattern" of these imports.

The real problem is whether the restrictive effect inherent in such national rules is absolutely necessary for attainment of the objectives — in themselves lawful — aimed at by these rules or whether this effect is out of all proportion to the aim pursued.

I have frequently had occasion to state that such an investigation can only be brought impartially and completely to a successful conclusion by the Commission subject to review by this Court. In the case in point the Court's judgment of 20 February 1975 in Case 12/74 and the Commission's observations provide important presumptions that such a procedure works well.

The German Government submits that reserving the appellation "Weinbrand" for high quality products is in keeping with the aim of improving this quality in so far as the consumer is inclined to regard an alcohol with such a designation as a finer product than an ordinary brandy. The differentiation thus established is ***absolutely necessary*** for attainment of such an objective. The effect of concentrating the distilling and storage process at a single establishment — which is a decisive factor (it being possible for the subsequent treatment and production to be carried out at another establishment — is to allow the official departments which are responsible to check these operations.

We must bear in mind that Article 36 does not strictly speaking envisage promotion of the quality of products. However since in the German Government's view such promotion of quality is associated with protection of the health of humans we will take up a position within the confines of this provision.

(1) The German Government attaches considerable importance to the fact that in its recommendation of 11 December 1969 concerning the "draft German law on wines" the Commission "approved at the time the principle of carrying out the entire production at the same undertaking".

The fact that the Commission stated that it accepted this principle does not seem to me to emerge from this recommendation at all. It points out that the position which it took up related only to "beverages based on wine". In the case of "Weinbrand" — unlike the ordinary product "spirits made from wine" (Article 38 (1)) — the Commission was and still is of the opinion that the requirement under German law of production of the primary product, that is the distilling and the maturing of the distillate on national territory and at the same national undertaking (subparagraphs 1 and 4 of Article 40 (1)) is not justified.

On the other hand it would not object to the requirement that "the treatment of the distillate and the subsequent operations for the production of spirits as well as the treatment designed to make the product fit for consumption have been carried out at the same establishment" (subparagraph 2 of

Article 40 (1)). It merely contends that there should not be any restriction of the free movement of the primary products at the stage where the distillate is used for the purpose of producing spirits.

In any case as from 12 December 1968 the provisions of the German law have been modified in many respects and the fact that the Commission only made a specific reservation in connexion with Article 8 of the draft law (which forbade the production, preservation, decanting or bottling of foreign wines on the same premises as those where German wines are produced) does not preclude it from reconsidering its assessment ten years later taking into account the development of Community law and case-law.

(2) The Federal Government goes on to assert that the restrictive effect on imports of distilled wines stems from the disparity between the national laws on guaranteed designation of origin (appellation contrôlée) or the protection of consumers and that the only way of removing this restriction lies in the approximation of the said laws as provided for in Article 100 of the Treaty and in establishing a "Community system of quality spirits".

It is true that there is no Community definition of what must be understood by "spirits made from wine". A common designation will possibly be found only within the framework of a common organization of the market in alcohol excluding all discrimination between producers and consumers of the Community (Article 40 (3)).

I say "possible", because Regulation (EEC) No 7a of the Council of 18 December 1959 (Official Journal, English Special Edition 1959-62, p. 68) specifically removed from the sphere of the Common Agricultural Policy "liqueurs and other spirituous beverages and compound alcoholic preparations (known as "concentrated extracts") for the manufacture of beverages", and the Treaty does not appear to have provided the necessary powers to lay down a definition of spirits *within the framework of the common organization of the markets in ethyl alcohol of agricultural origin.*

(3) The crucial issue is whether the protection of producers against unfair competition and of consumers against confusion and deception which may have a bearing on public health entitles Member States to organize as they think best a system of designations of spirits made from wine and the protection of such designations, and whether the absence of a *"Community* quality mark" justifies the introduction of a *"national* designation of quality", notwithstanding the ostensible restrictions on trade between Member States which such protection entails.

Unlike French law under which cognac and armagnac are protected on the same basis as well known wines German law does not aim at promoting products well known by reason of their origin, because the Federal Republic does not produce spirits having the same repute and coming within specific geographical definitions.

The term "Weinbrand" was invented at the beginning of the century in order to replace the designation "cognac", which was the everyday word for spirits of this kind but reserved by Article 275 of the Treaty of Versailles, and to designate spirits intended for consumption and prepared in Germany by the same method as that used for cognac. Like the term "Weinbrand", the designation "quality spirits made from wine" simply indicates a specific category of spirits and does not comprise any indication of the area where it was prepared or of the geographical origin of the primary materials used: it is a "generic" designation or simply an indication of "their nature".

Professor Robert Plaisant who had given the German Government an opinion in Case 12/74 had already stated (Le droit des appellations d'origine, l'appellation "cognac", 1974 p. 148 *et seq.*) that designations and other indications relating to spirits made from wine of foreign origin referred to in Article 44 of the German law are not registered designations of origin or indications of origin.

The fact that a product is manufactured in a particular Member State is no justification for providing this product with a specific designation different from the one adopted in other Member States for the *same* products, save in the case of a registered designation of *origin* or of an indication of geographical origin. This is what the Court held with regard to "Sekt" in Case 12/74.

Such differential treatment is likely to lower the value of the quality spirits produced in the other Member States in the mind of the consumer. The designation "Qualitätsbranntwein aus Wein" with the added indication of the country of origin in fact gives the impression that the product thus designated is not the same as "Weinbrand"; the fact that the designation "quality spirits made from wine" may also cover the home-produced product and the fact that the designation "Weinbrand" cannot be used in relation to foreign products are incommensurable.

The objection cannot be raised that German consumers think that the term "Weinbrand" relates to a product manufactured in Germany. In fact the earlier rules authorized the use of the designation "Weinbrand" for foreign spirits; the present rules themselves allow an exception in favour of those producing countries "throughout which German is the official language".

It cannot either be maintained that the properties which determine the quality known as "Weinbrand" are primarily dependent on the processing and, in particular, on the place where the same distilling process, maturing or coupage has taken place. The German Government submits that "when the second distillation, called refined distillation (Feinbrand) is carried out, the expert distinguishes the head, the heart and the tail of the alcoholic distillate ... Only the heart of the spirits — the part which is called the "heart" — is used in the case of quality products for the production of Weinbrand". That is what is said to give these spirits their special "aroma". I must confess that I do not have this expert knowledge and I think it would be advisable to "have a drink" before accepting what is said.

But it is impossible to assert that "re-treatment" of imported distillates gives to spirits "made up" in this way the organoleptic qualities prized by consumers; although even under German law up to 15 % of the "alcoholic richness" of the spirits nationalized in this way may be diluted with foreign distillates "as such", it must be presumed that the latter do not give rise to any objection from the point of view of quality or public health.

There is an existing provision which could provide the protection sought by the law: according to Article 42 (1) foreign spirits may only be imported if they conform to the standards in force in the producing country and if they are accompanied by a movement certificate issued by the official fraud investigation department of that country. The fact that the spirits have undergone a preparation making them fit for consumption outside the producing country or that they have been stored in oaken casks without being decanted does not, under this provision, preclude their importation into national territory.

(4) The Federal Government states that there is no *discrimination* between spirits whether they be home-produced or foreign, since the same requirement

of "distillation and storage on site at the same establishment" is applied without distinction to domestic and imported products.

However, according to your case-law (most recently in the judgment of 24 January 1978 in Case 82/77, *Openbaar Ministerie of the Kingdom of the Netherlands* v *Jacobus Philippus van Tiggele* [1978] ECR 25, at p. 39) measures applicable without distinction to domestic products and products imported into a Member State may be measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 *et seq.* if they have as their effect the reduction of imports coming from other Member States.

Although giving the imported distillate its final finish, that is to say diluting, colouring and flavouring it so as to render it fit for consumption is allowed at the establishment of a domestic distiller, and therefore outside the country where the distillate is produced, there does not appear to be any risk of deterioration if the same finishing is carried out at an establishment such as the applicant's.

As the German Government asserts, there would only in practice be no discrimination if in the Federal Republic quality home-produced spirits could not be prepared by a German producer from distillates coming from other German distilleries and if, again so far as the Federal Republic only is concerned, distillate could not be stored either by distillers other than the producer. Now both these possibilities exist. The prohibition of coupage and "treatment" only applies to products imported from Member States whereas a German distillery is free to dilute or treat distillates from its branches situate in different parts of Germany. Consequently, as the German Government itself concedes, the principle of the "concentration of production at the same establishment" admits of exceptions "by reason of special demands having regard to the average traditional structure of the establishments".

To sum up on this point I think that measures such as the ones in this case which are ostensibly applicable without distinction to home-produced and imported products "lower the value of an imported product in particular by causing a reduction in its intrinsic value, or increase its costs"; they hinder the purchase by private individuals of imported products only or encourage, force, or give preference to the purchase of domestic products only"; "they confine names which are not indicative of origin or source to domestic products only" within the meaning of subparagraphs (f), (k) and (s) of Article 2 (3) of Commission Directive of 22 December 1969 based on the provisions of Article 33 (7) (Official Journal, English Special Edition 1970 (I), p. 17).

Even though such measures are an integral part of a national organization of the market which has not yet been replaced by a common organization they have, since the end of the transitional period, been incompatible with Article 30 *et seq.* of the Treaty if they are only *ostensibly* applicable without distinction to home-produced and imported products.

The objective sought to be attained by protecting health (Article 36) and by the "institution of a system ensuring that competition in the common market is not distorted" (Article 3 (f)) or by "... concerted action in order to guarantee ... fair competition" (preamble to the Treaty) cannot justify the introduction of a system which is designed to ensure the success of national designations at home and abroad and is "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade"; consequently such a system "is to be considered as a measure having an

effect equivalent to quantitative restrictions" within the meaning of the Court's judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] 1 ECR 837.

V — Finally since the plaintiff in the main action has submitted that the effect of the designation "quality spirits made from wine" or "Weinbrand" and the rules relating thereto is to concentrate imports of distillates in a small number of undertakings "financially very sound which in fact have the monopoly of distillation", the national court asks this Court whether the German rules are incompatible with Articles 86 (b) and 90 (1).

Having regard to what I have just said from the point of view of freedom of movement I do not think that it is necessary for me to go fully into this question.

In so far as rules such as those at issue in this case would be justified by the provisions of Article 36 of the Treaty they would not contravene Article 86 by reason only of the fact that they favour one group of undertakings having a dominant position on the market, if they have not been used as an instrument for abusing such a position. Like Case 102/77 *Hoffmann-La Roche & Co. AG, Basel (1), Hoffmann-La Roche AG, Grenzach-Wyhlen (Federal Republic of Germany) (2)* and *Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH, Bentheim (Federal Republic of Germany)* (judgment of 23 May 1978) the present case is a reference for a preliminary ruling and the Court does not therefore have to consider whether all the conditions required for establishing a breach of Article 86 have been fulfilled in this case. The application of that article and also of Article 90 is subject to special procedural requirements and it is no more possible to associate the nature of Article 86 with that of Article 177 than it is to associate an application for failure to fulfil an obligation under the Treaty with a reference for a preliminary ruling.

I will also refrain from ascertaining whether a system favouring, especially or exclusively, certain categories of undertakings compared with producers of the sector as a whole may be a measure referred to by Article 90.

Spirits made from wine are not an "agricultural product" within the meaning of the Treaty and the provisions of the chapter relating to competition, and especially Article 90, apply to them. Moreover it is well known that German distilleries receive government subsidies. However as Mr Advocate General Capotorti recalled on 4 July last in his opinion in Case 148/77 *H. Hansen jun. and O. C. Balle GmbH & Co.* v *Hauptzollamt Flensburg* in connexion with aids granted by states in the chapter containing the rules on competition, the rules relating to special and exclusive rights granted to public or other undertakings have features which differ both from the rules on the free movement of goods and from the tax provisions of the Treaty.

Since Article 90, which the plaintiff in the main action invokes, itself refers *inter alia* to Articles 92 to 94, the conditions laid down by Article 93 which must be fulfilled before Article 90 gives rise to personal rights for the benefit of those persons thereby affected are not present (judgment of 19 June 1973 in Case 77/72, *Carmine Capolongo* v *Azienda Agricola Maya* [1973] 1 ECR 611).

I submit that the Court should rule:

— That rules enacted by a Member State so arranged that they make the benefit of the national designation "quality spirits made from wine" subject to two conditions, namely that:

— 85 % at least of the alcoholic richness of the finished product comes from the distillation, in that Member State, of distilled wine imported from the other Member States

and that

— the whole of the distillate thus used has lain in oaken casks for at least six months at the national establishment which extracted the distillate of home-produced wine by distillation

must be regarded as measures restricting trade between Member States and incompatible with Article 30 *et seq.* of the Treaty.

The provisions of Article 36 do not justify such rules if they go further than is strictly necessary for the reasonable protection by the Member State in question of the health and life of humans and also of fair competition.