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.

Hansen case [1] and since the tax systems arising from the German Gesetz über das Branntweinmonopol [Law on the Monopoly in Spirits] have been set out in detail *inter alia* in the *Schneider-Import*, [2] the third *Hansen* [3] and the *Andresen* [4] cases, I need make only the following remarks as to the facts and law:

Hansen GmbH & Co., previously H. Hansen jun. & O. C. Balle GmbH & Co. (hereinafter referred to as "Hansen"), which has its place of business in Flensburg, in September 1974 withdrew from its spirits warehouse *inter alia* light rum from the French overseas departments and Suriname. The Hauptzollamt [Principal Customs Office] Flensburg charged on the spirits the Monopolausgleich [monopoly equalization duty] at the ordinary rate, which then amounted to DM 1 500 per hectolitre of wine-spirit. Hansen challenged that assessment on the ground that pursuant to Article 95 of the EEC Treaty the monopoly equalization duty must not exceed the lowest rate of tax on domestic spirits distilled from fruit, which then amounted to DM 1 210.60 per hectolitre of wine-spirit.

The Finanzgericht [Finance Court] Hamburg, before which the dispute was brought, made a reference to the Court of Justice which, by judgment of 10 October 1978, *inter alia* ruled that Article 95 of the EEC Treaty applied to goods coming from the French overseas departments and that, even where only a small proportion of domestic production qualified for national tax advantages or where such advantages were granted for special social reasons, these advantages must be extended to imported Community spirits which fulfilled the same conditions, regard being had to the criteria laid down in the first and second paragraphs of Article 95 of the Treaty.

The Finanzgericht thereupon decided by judgment of 23 May 1979 that, in view of Article 95 of the EEC Treaty and Council Decision 70/549/EEC of 29 September 1970 on the Association of the Overseas Countries and Territories with the European Economic Community (Official Journal, English Special Edition, Second Series, I, External Relations (2) p. 164), light rum imported from the French overseas departments and from Suriname could not be rendered liable to a higher spirits tax than that attracted by similar domestic products. It held that the imported light rum was similar to domestic spirits distilled from fruit. The tax advantage granted under Article 79 (2) of the Law on the Monopoly in Spirits, in its former version, might be extended to light rum only if it was distilled in distilleries with an annual production not exceeding 4 hectolitres of wine-spirit. With regard to the question whether comparable conditions existed in particular with regard to the amount which might be produced attention must instead be directed — in so far as the matter was at all relevant — to the Obstgemeinschaftsbrennereien [cooperative fruit farm distilleries] mentioned in paragraph 79 (2) No 1 of the Law on the Monopoly in Spirits, in its former version, and without regard to the maximum production limit of 300 litres for each member of the cooperative fruit farm, prescribed in Article 37 of the Law on the Monopoly in Spirits. The quantities laid down in that provision for small-scale producers were linked, the Finanzgericht stated, to the existence of certain characteristics, such as that the producers in question should constitute Abfindungsbrennereien [distilleries for which production is estimated at a standard level], Stoffbesitzer [owners of raw materials used to produce spirits], Verschlußbrennereien [bonded distilleries] or Obstgemeinschaftsbren-

1 — Judgment of 10 October 1978 in Case 148/77 *H. Hansen jun. & O.C. Balle GmbH & Co.* v *Hauptzollamt Flensburg* [1978] ECR 1787.

2 — Judgment of 30 October 1980 in Case 26/80 *Schneider-Import GmbH & Co. KG* v *Hauptzollamt Mainz* [1980] ECR 3469.

3 — Judgment of 7 May 1981 in Case 153/80 *Rumhaus Hansen GmbH & Co.* v *Hauptzollamt Flensburg* [1981] ECR 1165.

4 — Judgment of 25 November 1981 in Case 4/81 *Hauptzollamt Flensburg* v *Hermann C. Andresen GmbH & Co. KG* [1981] ECR 2835.

nereien; these requirements could be met only within the framework of the monopoly in spirits existing in the Federal Republic of Germany and not by producers abroad. This meant that the domestic producers in question were protected by the form of their undertaking against foreign competition from producers of similar products. On the basis of the foregoing Hansen was entitled to claim that the imported light rum should attract only the lowest rate of tax applicable to domestic products, DM 1 210.60 per hectolitre of wine-spirit.

The Hauptzollamt Flensburg lodged an appeal on a point of law against that judgment with the Bundesfinanzhof [Federal Finance Court], claiming *inter alia* that the first paragraph of Article 95 of the EEC Treaty did not require the application to imports of the rate of tax which Article 79 (2) No 1 of the Law on the Monopoly in Spirits in its former version prescribed for the benefit of certain groups of domestic producers. It was true that according to the judgment in the first *Hansen* case, cited above, that advantage must be extended without discrimination to imported spirits but in that connection the only relevant characteristics were those which constituted substantive grounds for the tax benefit. In that respect only the production limit was relevant as a criterion. Furthermore it was necessary in the present case to make a comparison with blends of domestic rum which attracted a higher rate of tax than spirits distilled from fruit.

In the view of the VIIth Senate of the Bundesfinanzhof, before which the appeal came, the previous case-law of the Court of Justice does not provide an unambiguous reply to the question what specific requirements may be laid down for the applicability of the characteristics justifying the tax advantage conferred by Article 79 (2) No 1 of the Law on the Monopoly in Spirits in its former version. The Court of Justice has indeed stated in the third *Hansen* case, cited above, in which the same question was at issue, that the decisive point was that the imported products were in fact able to qualify for the same advantages as similar domestic products even though they did not meet the same technical or legal requirements. It was also established that if the imported products fulfilled the quantitative criterion in accordance with national law no supplementary requirements concerning conditions of production might be prescribed which, by reason of natural or legal factors, could not be met by a product from other Member States. Those statements, however, contain a series of concepts whose meaning is not immediately clear to a court applying the law.

The Bundesfinanzhof goes on to say that if the tax advantage available for cooperative fruit farm distilleries until 1978 are divested of the requirements peculiar to the monopoly which cannot be extended to goods produced in other Member States because of the conditions there, a scheme is produced which provides an abatement of tax for fruit spirits produced in a distillery run jointly by a number of persons for processing the agricultural raw materials which they themselves have produced, which does not produce more than 300 litres of wine-spirit annually from the raw material of any one member. The decisive question is accordingly whether

the transposition of that scheme to similar spirits imported from other Member States constitutes an equivalent to the scheme applicable to domestic products, that is to say whether the prohibition of discrimination contained in the first paragraph of Article 95 of the Treaty has been observed if imported similar spirits can only qualify for these advantages if they come from distilleries which in general comply with the said requirements.

The Court seised of the main action further points out that, for spirits produced from fruit or grain, and for blended rum, which must be considered as "similar" within the meaning of the first paragraph of Article 95 of the EEC Treaty, there is a differentiated scheme of domestic taxation. It is accordingly necessary to settle the category of product which must be taken as the criterion of comparability for taxing imported products where various similar products, which resemble the imported product in different degrees, attract different rates of tax.

Since, in view of the VIIth Senate of the Bundesfinanzhof, the Court of Justice has not yet provided any unequivocal answer to these questions, that court, by order of 17 December 1981, stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"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 kind 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)?"

My opinion on the foregoing is as follows:

I — First question

The main action turns principally on the question whether the tax advantage for which spirits produced in a cooperative fruit farm distillery qualified in the Federal Republic of Germany until 1978 must also be extended to imported rum. The court making the reference accordingly wishes to ascertain whether the first paragraph of Article 95 of the EEC Treaty must be interpreted as meaning that fruit spirits or similar spirits imported from other Member States qualify directly for the tax advantage available to domestic spirits, or whether, in order to do so, the other conditions on which the tax privilege depends must be complied with, wholly or at least in part. The court in the grounds of its order making the reference rightly concludes, on the basis of the previous case-law of the Court of Justice, in particular of the judgment in the *Schneider-Import* case, cited above, that paragraph 79 (2) No 1 of the former version of the Law on the Monopoly in Spirits is incompatible with Article 95 of the EEC Treaty in so far as the tax advantage provided for in that provision is made dependent on compliance with technical procedures peculiar to German provisions on the taxation of spirits which cannot be fulfilled by producers in other Member States whose legal systems do not contain anything equivalent to these provisions. The question which has been submitted thus deliberately excludes the conditions peculiar to the monopoly and concentrates on the criteria which, in accordance with paragraph 79 (2) No 1 of the former version of the Law on the Monopoly in Spirits, in conjunction with paragraph 37 thereof, constitute the justification for the tax advantage in favour of cooperative fruit farm distilleries. The point should be stressed again that the spirits must come from a distillery which is run jointly by a number of persons. A further condition is that such a distillery distils spirits only from the raw materials produced by the members of the cooperative themselves, as mentioned in paragraph 27 of the Law on the Monopoly in Spirits. Finally the advantage is granted only if the raw materials in question are those of a member who in one business year does not produce more than 300 litres of wine-spirit.

In relation to the question how far these requirements may be extended to similar imported products the Bundesfinanzhof also rightly supposes that, in accordance with the settled case-law of the Court of Justice (see its judgments, cited above, in the first *Hansen* case, the *Schneider-Import* case and the third *Hansen* case), under Community law in its state at the present time Member States are not prohibited from granting tax advantages, in the form of exemption from or reduction in tax for certain types of spirits or to certain classes of producers. In this connection the Court of Justice has stressed by way of clarification, in the first *Hansen* case, cited above, that "... tax advantages of this kind *may*

serve legitimate economic or social purposes, such as the use of certain raw materials by the distilling industry, the continued production of particular spirits of high quality or the continuance of certain classes of undertakings such as agricultural distilleries". That was the approach adopted by the Court of Justice in *Bobie*,[1] *Commission* v *Italy* (regenerated petroleum products),[2] *Chemial Farmaceutici*[3] and *Vinal*[4] in which it was established that Community law did not restrict the freedom of Member States "to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the products and processes employed". It was further stated in both of the last-mentioned judgments that such differentiation was compatible with Community law if it pursued objectives of economic policy which were themselves compatible with the requirements of the Treaty and secondary Community law.

The plaintiff in the main action considers that the provisions of tax law adopted by the German legislature conferring a privileged position on cooperative fruit farm distilleries do not correspond to legitimate social or economic purposes within the meaning of that case-law. In its view the tax advantage which operated in favour of cooperative fruit farm distilleries until 1978 was not intended, contrary to the statements of the Bundesfinanzhof, to protect the disposal of the fruit of small-scale growers. Apart from that, measures to ensure the existence of employment may not be achieved by means of tax advantages, as is shown by Article 37 (4) of the EEC Treaty. The plaintiff further considers that the judgments, cited above, in the first *Hansen* case and the third *Hansen* case with regard to the cooperative fruit distilleries in question, may be taken as meaning that the Member States may impose differential taxation only on the basis of quantitative factors. The cooperative fruit distilleries, however, in reality constitute commercial distilleries of unlimited scale, having their own distilling rights, which must be considered independent commercial entities. Cooperative fruit farm distilleries accordingly may not be assimilated for tax purposes to small-scale distillers.

However, this view, which the plaintiff has in substance already advanced in the third *Hansen* case, is, in my opinion, based on a misunderstanding of the judgments which the plaintiff invokes.

In this connection it must be borne in mind from the outset that the case-law of the Court of Justice takes account of the fact that in principle legislative powers in tax matters continue to belong to the Member States in areas which have not been harmonized. It follows that in the present state of Community law the Member States may in principle determine independently the economic or social reasons for which they wish to provide tax exemptions or abatements for domestic goods. As the Court of Justice has pointed out in its settled case-law (see in particular the judgment

1 — Judgment of 22 June 1976 in Case 127/75 *Bobie Getränkevertrieb GmbH* v *Hauptzollamt Aachen-Nord* [1976] ECR 1079.

2 — Judgment of 8 January 1980 in Case 21/79 *Commission* v *Italian Republic* [1980] ECR 1.

3 — Judgment of 14 January 1981 in Case 140/79 *Chemial Farmaceutici SpA* v *DAF SpA* [1981] ECR 1.

4 — Judgment of 14 January 1981 in Case 46/80 *SpA Vinal* v *SpA Orbat* [1981] ECR 77.

in *Compagnia Generale Interscambi* [1]) the prohibition of discrimination in taxation contained in Article 95 of the EEC Treaty, which ensures the free movement of goods, is merely intended to guarantee "the complete neutrality of internal taxation as regards competition between domestic products and imported products". Accordingly tax differentiation, as the Court of Justice has decided, *inter alia* in the *Chemial Farmaceutici* and *Vinal* cases, cited above, is compatible with Community law if it pursues objectives which are not contrary to the requirements of the Treaty and secondary Community law and "if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products". In other words, tax provisions are compatible with the Treaty if they are based on objective criteria and are neither discriminatory nor protective in nature.

In the light of that case-law it is accordingly impossible to contend that the privilege of the small-scale distillers contained in paragraph 79 (2) of the former version of the Law on the Monopoly in Spirits, which is based on objective grounds, is as such incompatible with Community law. Within the framework of the legislative powers in tax matters which the Member States still retain it must instead be possible, on grounds of social, agricultural and structural policy, to differentiate in tax matters. If the Federal Republic of Germany in this matter has made provision for an abatement of taxation for small-scale distillers in order to ensure that small-scale growers may continue in business and to provide sensible opportunities for the disposal of fruit, no objection can be raised from the point of view of Community law, as the Bundesfinanzhof, the Federal Government and the Commission all stress.

Furthermore that objective, pursued by means of national tax law, was expressly upheld *inter alia* in the *Schneider-Import* case, cited above, which concerned the lawfulness of the tax abatement for Abfindungsbrennereien provided for in paragraph 79 (2) of the former version of the Law on the Monopoly in Spirits. However, if these small-scale producers, whose production does not exceed a certain annual limit, may be accorded favourable tax treatment it appears in any case proper that the same tax advantage should be accorded to a cooperative of small-scale producers who process their products jointly. Regardless of the question of ownership of the distilling right the decisive matter in this connection is that the quantitative restriction on each individual member and the requirement that the member himself should produce the raw materials were not abolished. In addition paragraph 37 of the Law on the Monopoly in Spirits provides that the members of a cooperative fruit distillery must share the profit or loss of the distillery in accordance with their share of the annual production. In this way it was ensured that the members of the cooperative share the tax abatement in the same proportion as the corresponding small-scale distillers.

1 — Judgment of 15 July 1982 in Case 216/81 *Compagnia Generale Interscambi* v *Amministrazione delle Finanze dello Stato* [1982] ECR 2701.

Accordingly in my opinion there is likewise no ground for objection if a Member State, within the framework of its independence in tax matters, accords the tax advantage not only to individual small-scale producers but also to cooperative fruit distilleries which meet the said criteria in order to achieve more logical disposal of raw materials and a financially less expensive administrative control of small-scale producers.

Finally the court making the reference is correct in pointing out that the Court has indeed considered lawful differentiated taxation in which standards other than quantitative criteria in fact apply, as is shown in particular by the judgments, cited above, in the *Bobie* case, the first *Hansen* case, *Commission* v *Italy,* the *Chemial Farmaceutici* case and the *Vinal* case. Contrary to the statements of the plaintiff, the judgment of the Court of Justice in the third *Hansen* case shows unequivocally that not only quantitative criteria but the structure of an undertaking and the form which its organization takes may be relevant in the context of the application of Article 95 of the EEC Treaty. In that case the plaintiff also claimed that light rum imported from Guadeloupe was suffering discrimination, contrary to Article 95, since, under paragraph 79(2) of the former version of the Law on the Monopoly in Spirits, certain kinds of domestic spirits qualified for a reduced rate of tax. It wished to obtain for its imported products the most favourable rate of tax applicable to domestic fruit spirits, likewise referring to the tax provisions then applicable to spirits from cooperative fruit distilleries, and claiming that the concentration of individual distilling rights in such distilleries really constituted an undertaking of an industrial character which might be compared to producers of rum. The Finanzgericht Hamburg, which dealt with that case, entertained doubts whether reference to the similarity of *conditions of production* was compatible with the prohibition of discrimination in tax matters since Article 95 concerns the similarity of the goods and not the conditions for their manufacture.

In that case the Court of Justice held that the problems raised had in large measures been settled in the *Schneider-Import* case, cited above, which concerned tax abatement for small-scale distillers. On the basis of its settled case-law the Court of Justice repeated that in the present state of Community law the Member States were not prohibited from granting tax advantages, in the form of exemption from or abatement of tax, for certain types of spirits or to certain classes of producers. However, under Article 95 such preferential systems must be extended without discrimination to imported products *"conforming to the same conditions* as preferred domestic products".

The Court repeated its statement in the first *Hansen* case, cited above, to the effect that the natural phenomena of production posed particular problems in the case of products from outside the European climatic zone and expressly emphasized that the essential point was "that imported products may in fact enjoy the same advantages as comparable domestic products even though the technical or legal conditions prescribed for domestic products qualifying for a specified tax advantage are not fulfilled'. The Court added by way of further explanation that it would be contrary to the requirement that domestic and imported products should enjoy real equality to prescribe, for imported products covered by the quantitative criterion laid down by national legislation, "other requirements on the basis of conditions of production which, by reason of natural or legal elements, cannot be fulfilled by a product coming from another Member State".

That passage was intended first of all to make clear that the application of the national tax advantages to similar products from the Member States must, in its practical effects, be equivalent to the system applicable to domestic products, that is to say that in order to qualify for a tax advantage it is sufficient that the kind, structure or form of organization of an undertaking from which the imported spirits come is in principle comparable to that of the corresponding domestic undertakings. However, despite what the plaintiff in the main action considers, the Court of Justice did not decide that, apart from the quantitative criterion, no other requirements concerning conditions of production might be taken into consideration: it merely established that in this sphere no additional *conditions peculiar to the State in question* may be prescribed which cannot be fulfilled by comparable undertakings in other Member States. In such a case, as the Court of Justice decided in the case of *Commission* v *Italy*, cited above, the only means of preventing direct or indirect discrimination against imported goods would be to abolish these requirements.

The Court of Justice accordingly ruled in the operative part of the judgment in Case 153/80 that in principle all tax advantages granted under the legislation of a Member State must be extended to imported products which fulfil both the criterion of similarity and the conditions laid down under its national legislation for qualifying for the tax advantage in question. If these conditions are fulfilled a Member State may not refuse the tax advantage on the basis of supplementary conditions derived from its legislation which a production unit situated in another Member State cannot fulfil by reason of its geographical situation or of the legislation on the production of spirits in force in that State.

With regard to the claim advanced at that time by the plaintiff in the main action to the effect that imported rum

must be taxed at the most favourable rate of domestic tax, which in particular was that prescribed for spirits from cooperative fruit distilleries, the Court of Justice decided that is was necessary to point out the existence of a further limitation on the scope of Article 95. It emphasized that although it must in fact be possible for an imported product to qualify for the same favourable tax treatment as a comparable domestic product, Community law on the other hand did not oblige the Member States to accord more favourable treatment to imported products than to their own domestic products. It even added for the avoidance of doubt that in particular the Treaty did not require Member States to accord tax advantages to imported spirits of that kind from production units which did not fulfil the specific quantitative criteria required for comparable domestic products as a condition of obtaining preferential tax treatment. That reference to *"specific quantitative criteria"* — in the *Schneider-Import* case, cited above, in which tax abatements for Abfindungsbrennereien were at issue, only quantitative criteria were involved — moreover shows clearly, in my opinion, that the Court of Justice considered that the criterion existing for cooperative distilleries, in accordance with which each individual member of the cooperative may not produce more than 300 litres of spirit per year, may be extended, within the framework of Article 95 of the EEC Treaty, to similar imported products on the conditions stated in the *Schneider-Import* case and did not intend, contrary to the view of the plaintiff in the main action, to refer to comparison of the total capacity of such cooperative fruit distilleries with undertakings in other Member States.

Against this background of abstract delimitation, it is now necessary to explain to the court making the reference, in specific terms, how far the criteria in question may be extended without discrimination to imported spirits originating outside the European climatic zone.

In this connection it must first of all be stated, in agreement with the Federal Government and the Commission, that the cooperative form of undertaking, which is not related to any given legal form, does not constitute a specifically national condition but is on the contrary directly capable of fulfilment by undertakings in other Member States. That also applies to the second condition, to the effect that spirits distilled in the cooperative fruit distillery must be derived from raw materials produced by the members of the cooperative themselves, that is to say must not be bought in from other large-scale suppliers. The same must also apply, finally, to the third condition which, in order to ensure that only small-scale producers may qualify for the tax advantage, prescribes a maximum quantitative limit of 300 litres of spirit per year per member.

Whilst the court making the reference and the Commission wish the examination of the extensibility of these provisions to be restricted to these criteria, in the view of the Federal Government a fourth factor should be added, namely that if imported spirits are to qualify for the tax advantage they must be distilled from fruit properly so-called. Even on a wide interpretation of the concept, however, sugar cane and in particular molasses derived from sugar cane cannot be classified as fruit.

With regard to this argument it must be borne in mind from the outset that the types of fruit which qualify for favourable tax treatment when distilled in cooperative fruit distilleries are expressly listed in paragraph 27 of the German Law on the Monopoly in Spirits. According to that provision only fruit, berries, wine, wine-yeast, must, roots or residues thereof constitute raw materials. Likewise these items do not constitute typically domestic goods but are agricultural products which are also widely produced in other Member States. A further point militating in favour of the possibility of the extension of that condition to imported goods is that according to the case-law of the Court of Justice differentiated taxation is permissible on the basis of objective criteria, for example on the basis of the raw materials used. It must be borne in mind in this connection that the Court of Justice has already expressly stated in the first *Hansen* case that such tax alleviations may serve legitimate social or economic purposes such as the use of given raw materials by distilleries.

It might of course be objected against such an extension that the Court of Justice has in its judgments of 27 February 1980 in the "spirits cases", [1] and in *Compagnia Generale Interscambi* cited above, decided that differentiated taxation of spirits which are to be regarded as similar within the meaning of the first paragraph of Article 95 or at least as interchangeable products for the purposes of the second paragraph of Article 95 of the EEC Treaty on the basis of the raw materials used was incompatible with the prohibition of discrimination in taxation.

Closer examination of these cases however reveals that their characteristic feature was that the goods, with regard to their raw material, were typical domestic products, were classified under the tax provisions in force at the time in the most favourable tax brackets whilst the other groups of products, which were almost exclusively imported from other Member States, attracted heavier taxation. Accordingly the Court of Justice ultimately considered that the tax provisions in question were not compatible with Article 95 of the Treaty since their *protective nature* was evident. On the other hand, however, in so far as the provisions in question are neither discriminatory nor protective in nature, those judgments contain nothing to cast doubt on the permissibility of taxation which is differentiated on the basis of the raw materials.

Strictly speaking it is not for the Court of Justice within the framework of a reference for a preliminary ruling to declare whether or not there is a protective effect; that is a matter for the national courts. Nevertheless in this connection such courts must bear in mind that, as the Court of Justice has stated, Community law does not oblige the Member States to treat imported products more favourably than their own domestic

1 — Judgment of 27 February 1980 in Case 168/78 *Commission* v *French Republic* [1980] ECR 347.
Judgment of 27 February 1980 in Case 169/78 *Commission* v *Italian Republic* [1980] ECR 385.
Judgment of 27 February 1980 in Case 170/78 *Commission* v *United Kingdom of Great Britain and Northern Ireland* [1980] ECR 417.
Judgment of 27 February 1980 in Case 171/78 *Commission* v *Kingdom of Denmark* [1980] ECR 447.

goods. When it is clear, however, that only a very small proportion of domestic production qualifies for the tax advantage available to small-scale producers, whilst the largest proportion of domestic production, from large-scale undertakings, does not qualify for the tax privilege, it cannot be claimed that there is a protective effect as against imported products which also come from large-scale undertakings. Otherwise, as the court making the reference properly points out, either the national legislature would be obliged to abandon the tax differentiation, which is in principle permissible under Community law, or the domestic large-scale producers would be placed at a disadvantage in comparison with corresponding undertakings in other Member States.

The same result would ultimately be brought about if the tax abatement were also made available to imported spirits which meet the criterion of small-scale production but whose raw materials cannot be regarded as being included amongst the products listed in paragraph 27 of the Law on the Monopoly in Spirits. In such a case too small-scale producers in other Member States of spirits distilled from potatoes or wheat in a cooperative would obtain preference over corresponding domestic small-scale producers who could not qualify for a tax abatement.

It appears however from the particulars given by the Federal Government, the substance of which was not challenged by the plaintiff in the main action, that the quantity of spirits produced in cooperative fruit distilleries and qualifying for favourable tax treatment is really only an insignificant proportion of the total domestic production of spirits. Thus on average for the years 1972 until 1978, the total production of domestic spirits amounted to some 1 500 000 hectolitres per year, the average production of other small-scale distillers not operating in cooperatives amounted to some 65 000 hectolitres, whilst the total production of cooperative fruit distilleries only came to some 4 100 hectolitres for that period. On the other hand according to the particulars provided by the Federal Republic in the period in question imports amounted to an average quantity of 600 000 hectolitres per year, of which, according to the statements of the plaintiff in the main action, rum imported from the French overseas departments accounted only for some 100 000 hectolitres. That ratio of the quantity of spirits distilled by cooperative fruit distilleries both to the other domestic production which does not qualify for tax advantages and to the amount of spirits imported shows clearly — even if we disregard the fact that the effects of the tax privilege on the market may actually be less in view of the delivery of the bulk of the spirits produced in cooperative fruit distilleries to the German Spirits Monopoly — that the tax privilege in favour of cooperative fruit distilleries, which exists for the protection of the small-scale grower's place in the production of spirits, is not capable of discriminating, directly or indirectly, against similar imported products which do not come from corresponding undertakings. In view of the absolutely insignificant share of the market belonging to products which qualify for tax benefits, it is therefore impossible to say that the tax abatement served to protect competing domestic products.

Finally it is also necessary to reject the view advanced by the plaintiff that, instead of the above-mentioned criteria it must be sufficient if the economic situation of production in the country of export is comparable with the situation

in the Federal Republic of Germany. It is impossible to deduce such a principle from Article 95 of the EEC Treaty which, in the interest of the free movement of goods, serves exclusively to ensure neutrality in competition and does not pursue any objectives of social or economic policy. As the Commission properly points out, neither can an argument for the opposing view be deduced from the Commission's proposal for a decision of the Council whereby the French Republic is to be empowered, on the basis of Article 227 of the EEC Treaty, to apply in its overseas departments and in metropolitan France, precisely in derogation from Article 95, an abated rate of tax on the consumption of so-called "traditional" rum produced in such departments.

In conclusion it remains for me to concur with the Commission in pointing out a general limit to the application of these conditions which follows from the fact that difficulties may arise in certain circumstances in proving them in practice if such requirements do not exist in the same way in other Member States and consequently appropriate evidence cannot always be provided. In this matter it must suffice, regard being had to the considerations underlying the judgments in *Commission* v *Italy*, cited above, and *Essevi and Salengo* [1] that the evidence of compliance with the said conditions is provided on appropriate conditions which may be met in practice by the importer.

II — Second question

On the basis of the premise that imported light rum is similar both to domestic fruit spirits and domestic blended rum and to domestic grain spirits and that the national law prescribes, by way of legitimate differentiation, different duties for the three kinds of products, the Bundesfinanzhof raises the further question whether on every occasion the most favourable of the three relevant duties on spirits must be applied to imported rum or whether the question is rather with which of the three kinds of products imported rum has most characteristics in common. The court considers that it may be deduced from the case-law of the Court of Justice on Article 95 which has been cited above, together with the judgment in the *Andresen* case, cited above, that in cases in which a comparison may be made with several domestic products, the comparison required in accordance with Article 95 of the EEC Treaty must be carried out on the basis of the charge on that domestic product which has the most characteristics in common with the imported product, and which therefore resembles it to a greater extent than the other relevant products.

In my opinion this view is based — and here I concur with the Federal Government and the Commission — on an incorrect comprehension of the case-law of the Court of Justice on the concept of "similar ... products" within the meaning of the first paragraph of Article 95 of the EEC Treaty. As it has been stated in the constant case-law of the Court of Justice since the *REWE* judgment, Case 45/75, [2] that criterion can only be interpreted uniformly to the

1 — Judgment of 27 May 1981 in Joined Cases 142 and 143/80 *Amministrazione delle Finanze dello Stato* v *Essevi SpA and Carlo Salengo* [1981] ECR 1413.

2 — Judgment of 17 February 1976 in Case 45/75 *REWE-Zentrale des Lebensmittel-Großhandels GmbH* v *Hauptzollamt Landau/Pfalz* [1976] ECR 181.

effect that all products which "have similar characteristics and meet the same needs from the point of view of consumers" must be regarded as similar within the meaning of the first paragraph of Article 95 of the EEC Treaty. That case-law accordingly must not be understood as meaning that within the criterion of "similarity" it is further necessary to distinguish between completely similar, partly similar and slightly similar products.

On the contrary the judgments cited above in *Chemial Farmaceutici* and *Vinal* show that if an imported product is to qualify for a domestic tax advantage, in addition to the criterion of similarity it is also necessary for the other conditions for the tax advantage legitimately prescribed within the framework of Article 95 of the EEC Treaty to be met. The imported products must thus be classified in the most favourable tax category whose applicable conditions it completely fulfils and it is irrelevant whether the national system of taxation draws a distinction on the basis of raw materials, method of production, quantities produced or the structure of the undertaking.

The national court next raises the supplementary question, whether comparison of the duty on imported light rum with that on blended rum is excluded because imported rum is employed in the production of the latter.

If I have properly understood the position — the order making the reference does not provide any special indications in this matter — the German Law on the Monopoly in Spirits does not, however, provide for any tax abatement in favour of blended rum or grain spirits so that during the period in question the latter products were taxed in the same way as imported rum. Accordingly this case cannot turn on a comparison between the tax on imported light rum and that on blended rum.

Let me also say on that point, however, that comparison of taxes within the framework of Article 95 of the EEC Treaty may not be excluded on the ground that imported goods are used in the manufacture of the domestic product. If domestic goods might be accorded a more favourable tax position on the mere ground that imported goods were used in their manufacture the principle that there must be no discrimination in taxation would be only partially complied with. If the imported similar product meets the requirements for an abatement of taxation it must receive the same proportionate tax benefit as the domestic product whose manufacture involves the use of the imported goods.

III — To sum up, it is my opinion on the basis of the foregoing considerations that the questions which have been submitted should be answered as follows:

1. Article 95 of the EEC Treaty must be interpreted as meaning that a tax advantage in favour of domestic spirits which is dependent on the fact

that the spirits have been produced in a distillery operated in common by several persons to process specific agricultural raw materials and annually producing no more than 300 litres of wine-spirit from the raw materials of any one member, must be applied to such products from other Member States as meet the criterion of similarity and all the other conditions mentioned above. It must be possible to establish proof of the foregoing on conditions which in practice may be complied with.

2. Where national tax law provides by way of legitimate differentiation for different duties for various similar products the tax imposed on a similar product imported from a Member State does not depend upon the question with which of the domestic products the imported product has most characteristics in common. Instead the imported product should be classified in accordance with Article 95 of the EEC Treaty in the tax class whose requirements it fulfils.