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

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 27 February 1980.

A. Van Houtte
Registrar

H. Kutscher
President

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

Mr President,
Members of the Court,

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

1 — Translated from the German.

to fulfil its obligations under the Treaty (Case 171/78) on which I gave my opinion on 28 November 1979. As far as the taxation of the products in question and the situation on the Danish market in spirits is concerned, I may refer the Court in that respect to my explanation of the facts in that opinion and limit myself to observing the following points:

As we saw in Case 171/78, according to Article 2 (1) of the Law on the taxation of spirituous drinks and related products (Bekendtgørelse af Lov om afgift af spiritus m.m.) most recently amended by Law No 437 of 6 September 1977, with effect from 7 September 1977 the tax on spirits amounts to Dkr 167.50 for aquavit and Dkr 257.15 for other spirits per litre of pure ethyl alcohol. According to the Law the rate of duty for aquavit applies to products which:

1. Are manufactured from neutral spirits with added vegetable aromatic material;

2. Have an alcoholic strength of between 40% and 49.9% and an extract content not exceeding 2 grammes per 100 millilitres; and finally

3. Do not resemble gin, vodka, geneva, wacholder and related drinks, liqueur, punch, bitters and similar drinks, aniseed spirit or rum, spirits distilled from fruit, and other products whose typical taste is traditionally produced through distillation or maturation.

Hans Just I/S, the plaintiff in the main action, has only an insignificant trade in goods which are taxed as aquavit by the definition given above, but has a considerable turnover in other spirits.

For the month of June 1978 the tax payable amounted to Dkr 984.90 for 5.88 litres of pure ethyl alcohol at Dkr 167.50 for the production of aquavit, and Dkr 2 555 212.55 for 2 159.10 litres of pure ethyl alcohol at Dkr 257.15 for the production of other spirits. The total to be paid therefore on 2 164.98 litres of pure alcohol was Dkr 556 197.45.

Concerning this tax settlement Hans Just I/S maintained *vis-à-vis* the customs authorities and the Ministry for Fiscal Affairs that having regard to Article 95 of the EEC Treaty the tax on other spirits could only be claimed at the rate for aquavit. Accordingly, the tax should amount to only Dkr 362 634.15 for 2 164.98 litres of pure alcohol. As the customs authorities and the Ministry gave notice that if the full amount due under the Law was not paid it would be collected by distress and the firm struck off the customs authorities' register, the balance of Dkr 193 563.30 was paid under protest and subject to the undertaking's right to claim a refund.

Hans Just I/S then instituted proceedings in the Østre Landsret [Eastern Division of the High Court] against the Ministry for Fiscal Affairs asking for a declaration that the Ministry was obliged to refund the sum of Dkr 193 563.30 with interest thereon and reserving the right to claim a refund of the corresponding amount paid for the tax periods from 1 January 1973 to 31 May 1978 together with the period after 1 July 1978.

The Fourth Chamber of the Østre Landsret stayed the proceedings by order of 26 March 1979 and submitted the following questions under Article 177 of the EEC Treaty for a preliminary ruling:

Question 1A

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

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

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

Question 1B

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

Question 2

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

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

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

Question 3

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

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

Question 4

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

My opinion on these questions is as follows:

I — Questions 1 to 3 concern the interpretation of Article 95 of the EEC Treaty, which I discussed in detail in my opinions in Cases 168/78, 169/78, 170/78, 171/78 and 55/79. I dealt thoroughly in those cases with all the arguments put foward by Hans Just I/S, the Kingdom of Denmark and the Commission in the present proceedings, and I do not therefore need to examine

in detail the submissions of the parties to the proceedings.

Permit me, therefore, merely to summarize the most important conclusions which the court making the reference requires to know in order to decide the main action.

As a result of the jurisdiction in tax matters which has been left to the Member States they are themselves, in principle, responsible for the classification of goods for tax purposes. They may, therefore, determine the tax to be levied on spirits according to various criteria, for example content in raw materials, alcohol content or flavour (see Case 127/75 *Bobie Getränkevertrieb GmbH* v *Hauptzollamt Aachen-Nord*, judgment of 22 June 1976 [1976] ECR 1079 and Case 148/77 *H. Hansen jun. and O. C. Balle GmbH & Co.* v *Hauptzollamt Flensburg*, judgment of 10 October 1978 [1978] ECR 1787). Their autonomy in tax matters is only limited by Article 95 of the EEC Treaty to the extent "that the application of internal taxation in one Member State does not have the effect of imposing on products originating in other Member States taxation in excess of that imposed on similar domestic products or taxation of such a nature as to protect other domestic products referred to in the second paragraph of the same article" (see Case 31/67, *Firma August Stier* v *Hauptzollamt Hamburg-Ericus*, judgment of 4 April 1968 [1968] ECR 235). Thus the purpose of this provision is to avoid any discrimination in trade between Member States (see Case 148/77, *Hansen*). It follows that the first paragraph of Article 95 of the EEC Treaty has already been infringed if a product imported from other Member States is taxed at a higher rate than *any* similar domestic product.

It also follows from the principle of equality between the level of taxation imposed on the domestic and imported product required by the first paragraph of Article 95 that the effect of factors other than taxation on the production costs of the products to be compared may not be taken into account. This was the effect of what the Court declared in Case 45/75 *(REWE-Zentrale des Lebensmittel-Großhandels GmbH* v *Hauptzollamt Landau/Pfalz*, judgment of 17 February 1976 [1976] ECR 181) when it emphasized that the scope of that article could not be so extended as to allow any kind of compensation between a tax created so as to apply to imported products and a charge of a different nature imposed, for example, for economic purposes, on the similar domestic product. Thus it is the taxation imposed on the products which are to be compared which must be equal and it is inappropriate to consider the effect of this taxation on the final price of the nationally-produced and imported products.

The application of the first paragraph of Article 95 of the EEC Treaty which, as I have shown, requires that goods imported from Member States may be taxed at no more than the lowest domestic rate which is applicable to similar domestic products, may therefore have the effect of taxing other domestic products, which equally satisfy the criterion of similarity, at a higher rate under the national tax system than similar imported products. However, this disadvantageous treatment of similar domestic products is a consequence of the jurisdiction which has been left to the Member States and which is not covered by Article 95 of the EEC Treaty. In this regard the Court of Justice emphasized in Case 86/78 *(S.A. des Grandes Distilleries Peureux* v *Directeur des Services Fiscaux de la Haute-Saône et du Territoire de Belfort*, judgment of 13

March 1979), that although Article 95 prohibits Member States from imposing internal taxation on imported products in excess of that on national products, it does not prohibit them from imposing on national products taxation in excess of that on imported ones. A disparity of this kind does not come within the scope of Article 95, but results rather from special features of national legislation which has not been harmonized in spheres for which the Member States are responsible. Thus it is certain that domestic producers cannot rely on Article 95 if the products they manufacture are taxed more heavily than similar imported products.

But I also showed in my opinion, mentioned above, that all alcoholic beverages which fall under tariff heading 22.09 C of the Common Customs Tariff are to be regarded as similar products within the meaning of the first paragraph of Article 95 of the EEC Treaty. The fact is that all such beverages are distinguished by a relatively high alcohol content obtained by distillation following the alcoholic fermentation of raw materials which produce alcohol. In addition, owing to the presence of secondary substances, they display certain organoleptic features. As a result of these common features, the consumer regards the drinks as having similar properties and serving the same purposes, without any relevance being attached to the various raw materials, manufacturing processes, flavourings or a relatively insignificant variation in the alcohol content.

II — As to the fourth question, in which the court making the reference inquiries whether Community law contains any rules which are relevant in the present case for the purpose of deciding the question of the repayment of taxes paid contrary to Article 95 and whether in this connexion it is of any relevance that a trader can establish that he has suffered damage, the following comments may be made:

both parties in the main action agree that a claim for repayment based on the fact that the national provisions are incompatible with Community law are, in principle, decided according to national rules. Danish legislation is special in this respect in that there is no express legal provision for the repayment of overpaid taxes. According to the consistent case-law of the Danish courts the criterion of unjust enrichment plays a decisive role in answering the question whether payments made in error or without good reason must be refunded. Apparently there can only be a claim for repayment if the enrichment has gone to the disadvantage of the party which has made the payment.

The plaintiff in the main action is of the opinion that the repayment of taxes paid but not owed is too obscurely drafted in Danish law. The legal uncertainty which this creates is, in particular, it claims, incompatible with the protection granted by Community law in this field to Danish members of the EEC. It must also be noted in this connexion that according to Danish law taxpayers cannot avoid the duty to pay taxes in the absence of a judgment from the courts. Moreover, it is extremely difficult to furnish evidence that damage has been suffered as a result of the difficult market conditions, which means that an application has small chances of success. However if Community law is to be effective it is necessary to grant the

undertakings affected an unrestricted claim to repayment. The repayment should be made from the date on which Danish law came into conflict with Community law, that is to say, the date of the accession of Denmark to the European Economic Community. At the very least, the excess taxes should be refunded as from the date on which the complaint or application was lodged.

The first observation made by the Danish Government is that the fourth question has no relevance because the Danish system is compatible with Community law. In the alternative, it observes that even Community law contains no express rules governing the repayment of taxes wrongfully levied. It follows however from the case-law of the Court of Justice on the direct effect of Community law that in principle a claim to repayment of taxes paid contrary to Community law exists. In accordance with the principle of the duty of co-operation enunciated in Article 5 of the EEC Treaty, the task of affording the protection of the law falls to the domestic courts. Thus it is equally the task of those courts to decide, taking into account the limits prescribed by Community law, whether and to what extent a repayment is to be made. According to the established case-law of the Danish courts, which does not by any means lead to uncertainty in the law, repayment depends decisively on whether the tax-payer has suffered damage. However, the plaintiff in the main action has no claim to repayment of the tax paid since this prerequisite for a claim to repayment is not satisfied. The truth is that in the end the taxes have been passed on to the consumer, with the consequence that the plaintiff in the main action would be unjustly enriched by the repayment.

Together with the Danish Government, the Commission is also of the opinion that Community law requires repayment of taxes paid but not owed but that in the absence of provisions of Community law the extent of the protection by the law in that respect depends on domestic law, taking into account merely the limits which have been set by Community law.

The view thus put forward by the Danish Government and the Commission must, so much can already be said from the outset, be accepted for the following reasons:

As the Court of Justice has consistently held in decided cases, most recently in its judgment of 22 March 1977 in Case 74/76 *(Iannelli & Volpi S.p.A.* v *Firma Paolo Meroni* [1977] ECR 557), Article 95 of the Treaty has direct effect and creates individual rights which the courts of the Member States must protect (see Case 57/65, *Firma Alfons Lütticke GmbH* v *Hauptzollamt Saarlouis,* judgment of 16 June 1966, [1966] ECR 205, and Case 45/75, *REWE).* The consequence of this direct effect is that from the moment of Denmark's accession, that is to say, from 1 January 1973, those subject to the law may rely before the national courts on the provision laid down in the first paragraph of Article 95, which in this connexion takes precedence over national rules to the contrary. If individuals rely upon this provision the levying of charges which are contrary to Article 95 must be declared inadmissible. If the charges contrary to the provision have already been paid, then, as I have already pointed out in my opinion in Case 77/76 *(Firma Gebr. Cucchi* v *Avez*

S.p.A., judgment of 25 May 1977 [1977] ECR 987), from the point of view of Community law the direct effect of that provision involves in addition that they should be repaid. The duty to afford this legal protection, which springs for citizens from the direct effect of Community law, devolves, as the Court of Justice declared in Case 33/76 *(REWE-Zentralfinanz eG and REWE-Zentral AG* v *Landwirtschaftskammer für das Saarland*, judgment of 16 December 1976 [1976] ECR 1989), in accordance with the principle of the duty of co-operation set out in Article 5 of the EEC Treaty, upon the courts of the Member States (see also the judgment of the Court of Justice in Case 177/78, *Pigs and Bacon Commission* v *McCarren and Company Limited*, judgment of 26 June 1979, opinion of Mr Advocate General Warner of 15 May 1979 on that case, his opinion in Case 33/76, *REWE*, of 30 November 1976 and his opinion in Case 74/76, *Iannelli & Volpi*, of 10 February 1977).

The courts in the Member States may, in so far as Community law does not itself provide rules for these matters, uphold these claims only in accordance with their own procedural law, including the rules concerning admissibility, the prerequisites for bringing an action and the periods within which such actions must be brought. This is shown by a number of decisions given by the Court of Justice, of which only the following need be mentioned: Case 6/60, *Jean-E. Humblet* v *Belgian State*, judgment of 16 December 1960, [1960] ECR 559, Case 28/67 *Firma Molkerei-Zentrale Westfalen/Lippe GmbH* v *Hauptzollamt Paderborn*, judgment of 3 April 1968, [1968] ECR 143, Case 34/67, *Firma Gebrüder Lück* v *Hauptzollamt Köln-Rheinau*, judgment of 4 April 1968, [1968] ECR 245, Case 13/68 *S.p.A., Salgoil* v *Italian Ministry for Foreign Trade*, judgment of 19 December 1968, [1968] ECR 453), Case 120/73, *Gebr. Lorenz GmbH* v *Federal Republic of Germany and the Land Rheinland/Pfalz*, judgment of 11 December 1973 [1973] ECR 1471, Case 121/73, *Markmann KG* v *Federal Republic of Germany and the Land Schleswig-Holstein*, judgment of 11 December 1973, [1973] ECR 1495), Case 141/73, *Fritz Lohrey* v *Federal Republic of Germany and the Land Hessen*, judgment of 11 December 1973, [1973] ECR 1527, Case 33/76, *REWE-Zentralfinanz eG and REWE-Zentral AG* v *Landwirtschaftskammer für das Saarland* and Case 45/76 *Comet B.V.* v *Produktschap voor Siergewassen*, judgment of 16 December 1976, [1976] ECR 2043.

It may also be inferred from these judgments that the fact that its application will differ in accordance with the varying national procedural rules is deliberately taken into account by Community law, which is not complete in this respect. This was pointed out by the Court of Justice particularly in Case 33/76 *(REWE)*, when it stated that in the absence of measures of harmonization the rights conferred by Community law must be exercised before the national courts in accordance with the *conditions* laid down by national rules; the Court however placed the two reservations on this: the conditions imposed by domestic law must not, on the one hand, be less favourable than those relating to similar actions of a domestic nature and, on the other, the procedural conditions and time-limits must not make it impossible in practice to exercise the rights which the national courts are obliged to protect.

In my opinion these references to domestic law apply not only to procedural rules, but also to the conditions for entitlement to the rights afforded by Community law and to the repayment of interest, in so far as Community law contains no rules applicable in the matter. The Court of Justice also evidently assumes this reference to national substantive law when it ruled in Case 74/76 *(Iannelli & Volpi)* that "it is . . . for the national court within the framework of its own legal system to decide whether the whole of any internal taxation which is discriminatory within the meaning of Article 95 or only that part of it which exceeds the tax assessed on the domestic product is to be regarded as not payable". The Court was even more precise in Case 177/78 *(Pigs and Bacon)* when it pointed out that it is for the national court to determine whether and to what extent a given levy must be reimbursed.

The domestic law applicable in this context also remains, however, subject to the limits imposed by Community law on procedural law mentioned already in Case 33/76 *(REWE)* and referred to above. As the Danish Government rightly points out these conditions are satisfied where the courts have developed their own legal concept of the claim to repayment, since that is also applicable first of all in respect of similar claims made under domestic law. Proof of damage or impoverishment as a precondition for bringing proceedings is known in the legal systems of all the Member States and in the Community legal system itself as an expression of the general principle of natural justice (see Case 90/78, *Granaria B.V.* v *Council and Commission of the European Communities*, judgment of 28 March 1979 and Joined Cases 83 and 94/76, 4, 15 and 40/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and Others* v *Council and Commission of the European Communities*, judgment of 25 May 1978 [1978] ECR 1209).

In my opinion it follows that in the present case the question of the repayment of taxes paid contrary to Article 95 should be settled according to Danish law. Concluding my examination, I may say that from the point of view of Community law claims by individuals for reimbursement of unlawfully levied taxes cannot be made to depend on whether a formal complaint has been lodged or whether legal proceedings have been instituted. The situation of bringing proceedings against Member States in the sphere of tax law cannot be compared with that in Case 43/75 *(Gabrielle Defrenne* v *Société Anonyme Belge de Navigation Aérienne Sabena*, judgment of 8 April 1976, [1976] ECR 455), in which the Court limited the retroactive effect of its judgment because a large number of persons, especially private employers, had gained a false impression of their duties owing to the conduct of the Community institutions and the governments of the Member States. In that case there was serious ground for fearing that many undertakings would incur financial difficulties if it were necessary to raise again the question of their conduct in matters which were already concluded.

On those grounds I conclude that the questions should be answered as follows:

1. Alcoholic beverages which come under tariff heading 22.09 C of the Common Customs Tariff are to be considered as similar goods within the meaning of the first paragraph of Article 95 of the EEC Treaty.

2. The first paragraph of Article 95 of the EEC Treaty prohibits Member States from imposing on goods imported from other Member States taxation in excess of that imposed on similar domestic products.

3. In the context of Article 95 of the EEC Treaty the production costs of alcoholic beverages should not be taken into consideration in so far as the tax burden arises from a specific tax which is determined according to the pure alcohol content.

4. The above-mentioned provision does not prohibit Member States from imposing on domestic products taxation in excess of that imposed on imported products.

5. The consequence of the direct effect of the first paragraph of Article 95 of the EEC Treaty is that duties which have been paid contrary to that provision must be repaid. It is for the courts of the Member States to decide whether and to what extent the taxes are to be repaid but in doing so they must ensure that the conditions for bringing an action to enforce these rights are not less favourable than those relating to the enforcement of similar claims under the law of the Member State, and it must not be made impossible in practice to bring such actions.