it possible to apply to imports of products from other Member States arrangements the practical effect of which may be considered as equivalent to the arrangements applied to domestic products so that imported products may in fact enjoy the same advantages as comparable national products.

As regards, in particular, the tax advantages reserved by national legislation to certain categories of small-scale producers of spirits, the fixing by the legislation of a Member State of an upper limit for production which is imposed upon producers of other Member States as a condition for qualifying for a reduction in the rate of tax conforms to the requirements of Article 95 where that limit corresponds in general to the upper limit to which national producers are subject in order to qualify for the same tax advantage. Article 95 does not require the Member State to extend the same advantage to imported products coming from undertakings whose production exceeds the production limit thus fixed.

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht Rheinland-Pfalz [Finance Court of Rhineland-Palatinate], for a preliminary ruling in the action pending before that court between

SCHNEIDER-IMPORT GMBH & CO. KG, Bingen,

and

HAUPTZOLLAMT [Principal Customs Office] MAINZ,

for a preliminary ruling on the interpretation of Article 95 of the EEC Treaty in relation to the application of the German Law of 8 April 1922 on the Monopoly in Spirits *[Gesetz über das Branntweinmonopol]* as amended by the Laws of 13 July 1978 and of 13 November 1979,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, A. Touffait and O. Due, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Between 3 and 28 August 1978 Schneider-Import GmbH & Co. KG, which has its registered place of business at Bingen, obtained from the Zollamt [Customs Office] Bingen customs clearance to place in free circulation 50 000 litres of various alcoholic beverages including 23 118 litres of cognac of the Rémy Martin VSOP brand imported from France.

The German Law on the Monopoly in Spirits of 8 April 1922, as variously amended, applies to spirits a tax on consumption levied in three different forms: spirits marketed by the Federal Monopoly Administration *[Bundesmonopolverwaltung]* are liable under Article 84 (1) to a tax on spirits *[Branntweinsteuer];* a spirits surcharge *[Branntweinaufschlag]* is imposed under Article 78 on spirits exempted from the duty to deliver them to the German Federal Monopoly Administration or which, in breach of that duty, are not delivered to it; in accordance with Article 151 (1) an equalization duty *[Monopolausgleich]* is charged on imported spirits.

Following the judgment of the Court of Justice of 17 February 1976 in Case 45/75 *(REWE,* [1976] ECR 181) and Case 91/75 *(Miritz;* [1976] ECR 217) the Law on the Monopoly in Spirits was amended by the Law of 2 May 1976 (Bundesgesetzblatt I, p. 1145). That law *inter alia* fixed the spirits surcharge and the monopoly equalization duty at the same level as the tax on spirits and amended various provisions of the Law of 1922. Thus Article 79 (2), as amended, made provision for a reduction in the rate of the spirits surcharge in the case of spirits manufactured either in a distillery for which production is estimated at a standard level for tax purposes on the basis of the amount of raw materials used *[Abfindungsbrennerei]* or by a peson owning the raw materials *[Stoffbesitzer]* within a favourable production limit as regards the monopoly, or in a small bonded distillery *[Verschlußkleinbrennerei]* with an annual production of not more than 4 hectolitres of ethyl alcohol or, again, in a fruit-cooperative distillery up to the limit of its distilling right. That reduction of 21% in the spirits surcharge was 30·5% in the case of spirits manufactured exclusively from stone-fruit, berries or gentian roots.

In accordance with the third sentence of Article 151 (1) the higher reduced rate was also applicable to imported spirits made from fruit originating in a distillery having an annual production not exceeding 4 hectolitres of ethyl alcohol.

By the Law of 5 July 1976 (Bundesgesetzblatt I, p. 1770) the tax on spirits and consequently the spirits surcharge and the monopoly equalization duty were increased from 1 January 1977 from DM 1 650 to DM 1 950 per hectolitre of ethyl alcohol.

Article 79 (2) of the Law on the Monopoly in Spirits was amended by the Law of 13 July 1978 (Bundesgesetzblatt

I, p. 1002) so that fruit-cooperative distilleries no longer qualify for the reduction in the rate of the spirits surcharge; acoording to the third sentence of Article 151 (1), as amended, the reduction in the spirits surcharge henceforth applies to all imported spirits, not only to those produced from fruit originating in a distillery with an annual production not exceeding 4 hectolitres of ethyl alcohol.

The Law on the Monopoly in Spirits was further amended by the Law of 13 November 1979 (Bundesgesetzblatt I, p. 1937); that amendment did not relate to Article 79 (2) and did not affect the substance of Article 151 (1) as amended by the Law of 13 July 1978.

In accordance with the legislation applicable the Zollamt [Customs Office] Bingen claimed from Schneider in respect of the quantities of cognac imported payment of the monopoly equalization duty, adopting as the basis for its calculations a quantity of 4 104 litres of ethyl alcohol and a rate of DM 1 950 per hectolitre of ethyl alcohol.

On 28 August 1978 Schneider lodged a complaint against the claim for payment which was dismissed by a decision of the Hauptzollamt [Principal Customs Office] Mainz of 22 June 1979.

Schneider appealed against that decision before the Finanzgericht Rheinland-Pfalz [Finance Court of the Land of Rhineland-Palatinate]. The principal point which it put forward in support of its appeal was that the tax burden imposed upon imported cognac was higher than that charged on domestic spirits made from fruit produced in an *Abfindungsbrennerei.*

By an order of 20 December 1979 the Third Senate of the Finanzgericht Rheinland-Pfalz stayed the proceedings and submitted to the Court of Justice a request under Article 177 of the EEC Treaty for a preliminary ruling on the following questions:

1. Must the first and second paragraphs of Article 95 of the EEC Treaty be interpreted as meaning that spirits imported from the Community which are comparable ("similar" within the meaning of the first paragraph of Article 95 of the EEC Treaty) with domestic spirits made from fruit (Law on the Monopoly in Spirits, Article 27 (1), may, with regard to the tax advantages granted to domestic fruit spirits by Article 79 (2) of the Law on the Monopoly in Spirits, qualify for a correspondingly reduced rate of monopoly equalization duty only if the imported spirits come from a distillery with a small annual production (small distillery) within the meaning of Article 79 (2) of the Law on the Monopoly in Spirits (see Article 151 (1), third sentence, of that Law)?

2. In the case of an affirmative answer to Question 1:

   In view of the additional tax advantages enjoyed by domestic fruit spirits (tax-free excess yield, overstepping of maximum production limits by way of average distillation figures over a period), is it compatible with the first and second paragraphs of Article 95 of the EEC Treaty.

   (a) that the reduction in the monopoly equalization duty should be limited to the rates of reduction laid down in Article 79 (2) of the Law on the Monopoly in Spirits (21% or 30.5%) or must the reduction exceed those rates, and

   (b) that the upper limit for the application of the reduced rate of monopoly equalization duty should be fixed at an annual production by a foreign distillery of 4 hectolitres of ethyl alcohol?

The order of the Finanzgericht Rheinland-Pfalz was entered on the Court Register on 17 January 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 1 April 1980 by the Commission of the European Communities, represented by its Legal Advisers, René-Christian Bêraud and Rolf Wägenbaur, on 2 April by Schneider-Import GmbH & Co. KG, the plaintiff in the main action, represented by Dietrich Ehle, of the Cologne Bar, and on 14 April 1980 by the Government of the Federal Republic of Germany, represented by Martin Seidel, Ministerial Adviser at the Federal Ministry of Economics, assisted by Jochim Sedemund, of the Cologne Bar.

The Court, having heard the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. It nevertheless requested the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission to reply to some questions in writing before the opening of the oral procedure. Those requests were complied with within the time-limits laid down.

By an order of 21 May 1980 the Court decided to assign the case to the Second Chamber under Article 95 (1) and (2) of the Rules of Procedure.

II — Written observations lodged with the Court

Schneider-Import GmbH & Co. KG, the plaintiff in the main action, first recalled the principal details of the German monopoly in spirits which are in dispute and then submitted observations, the basic points of which are as follows:

The first question

(a) The Court is asked to rule whether the restriction by the third sentence of Article 151 (1) of the German Law on the Monopoly in Spirits to imported spirits from a distillery with an annual production which does not exceed 4 hectolitres of ethyl alcohol of the tax advantages provided for in Article 79 (2) of that Law is compatible with Article 95 of the EEC Treaty.

This question must be considered in the light of the case-law of the Court of Justice, in particular of the judgments of 10 October 1978 (Case 148/77 *Hansen*, [1978] ECR 1787), 8 January 1980 (Case 21/79, *Commission* v *Italian Republic*) and 27 February 1980 (Case 171/78, *Commission* v *Kingdom of Denmark*). That case-law shows that tax advantages granted at national level must, within the framework of Article 95, be extended without discrimination to imported products without regard to the reasons for such advantages, social or other; from the point of view of comparability, that extension may only be limited if the reasons for the tax advantages are objectively justified; limited extension of the tax advantages is precluded if the abolition of the preferential system constitutes the sole means of avoiding direct or indirect discrimination against imported products.

(b) The rule is that within the framework of Article 95 of the EEC Treaty national tax relief must be applied without restrictions to products imported from other Member States. Cognac, a spirit for which fruit is the raw material,

is a product similar to German spirits produced from fruit. The nature of the raw materials, the size of the undertaking and the volume of production may indeed influence the price of a product but such economic factors may not be taken into consideration for the purposes of comparing the tax burden within the framework of Article 95.

(c) In any case, such factors must be objectively justified.

With regard to their legal justification it must first of all be stated that the tax relief granted by Article 79 (2) of the Law on the Monopoly in Spirits to *Abfindungsbrennereien, Stoffbesitzer* and *Verschlußkleinbrennereien* constitutes only a minor aspect of the general arrangements which are themselves conceivable only within the framework of the existence and operation of a monopoly which, contrary to the duty set out in Article 37 of the EEC Treaty, maintains or indeed promotes discrimination regarding the conditions under which goods are produced and marketed.

According to the case-law of the Court, at the end of the transitional period Article 37 (1) of the EEC Treaty no longer allows derogations from the prohibition contained in Article 95 which entirely applies to the taxation on imported products as compared with national products. Tax provisions which exist only as an alternative to a monopoly system and which are meaningful only within the framework of the functions and effects of the monopoly in spirits thus may no longer have the effect within the framework of Article 95 of applying such restrictions to imported products too.

The limitation contained in the third sentence of Article 151 (1) of the Law on the Monopoly in Spirits likewise cannot be justified in law through a comparison with Article 79 (2) of the Law and the conditions of law and of fact on which that provision is based. Article 151 applies to imported products limits which are much narrower than those which apply to the German "small distilleries".

The annual production of *Abfindungsbrennereien* and *Verschlußkleinbrennereien* may be considerably in excess of 4 hectolitres and a considerable part of their production may be marketed tax-free. This possibility is made available to *Verschlußkleinbrennereien* under Article 116 (7) and to *Abfindungsbrennereien* by Article 116 (4) of the *Brennereiverordnung* [Distilleries Order].

It is thus impossible to justify in law the restriction of the tax advantages provided for in Article 79 (2) of the Law on the Monopoly in Spirits to certain producers or to a specific volume of annual production.

With regard to the economic justification of the tax advantages granted to *Abfindungsbrennereien* and *Stoffbesitzer*, they no longer serve proper social and economic purposes within the meaning of the case-law of the Court of Justice, at least on their present scale.

Stoffbesitzer, certain of whom enjoy high incomes and belong to the leisured classes, may distil fruit which they themselves produce or may have it distilled for them by *Abfindungsbrennereien.*

Abfindungsbrennereien for their part have largely lost their connexions with agriculture. But for the high prices paid by the monopoly, tax-free production surpluses and different rates of tax, distilleries with optimum capacity from the point of view of business management would have been able to replace the *Abfindungsbrennereien*; the monopoly in spirits has hindered that development. What occurs is less the

maintenance of certain groups of undertakings or the use of certain raw materials by distilleries than the maintenance of excessive and unjustified tax advantages which have continually increased in recent years. Small distilleries producing spirits of a regional character and marketing them themselves within the framework of their own distilling right could also be maintained by other means.

Nor therefore do economic reasons justify the restriction of the tax advantages flowing from Article 79 (2) of the Law on the Monopoly in Spirits and from the tax-free production surplus for imports from distilleries having an annual production not exceeding 4 hectolitres of ethyl alcohol.

(d) In any case the different taxation on imported spirits fails in that exporting undertakings in other Member States cannot subsequently comply with the conditions laid down in Article 79 (2) of the Law on the Monopoly in Spirits and with the provision of the monopoly system on which they are based. The identical treatment of all imported products in respect of the level of taxation laid down in Article 79 (2), that is, the abolition of that provision in the future, is the sole means of avoiding discrimination, direct or indirect, against imported spirits.

The tax advantages are not only granted in respect of certain volumes of production; Article 79 (2) of the Law on the Monopoly in Spirits refers to specific raw materials, fixes different rates of tax and is based essentially on the special legal institutions of *Abfindungsbrennereien* and *Stoffbesitzer*. These are specifically national characteristics, related to the production of spirits qualifying for tax advantages. These conditions cannot be fulfilled in foreign countries and consequently they may not be employed as criteria of the "similarity" between domestic products and imported products.

With regard to the case-law of the Court, in particular to the judgment of 22 June 1976 (Case 127/75 *Bobie* [1976] ECR 1079), it must be stated that the tax advantages enjoyed by the *Abfindungsbrennerei*, *Verschlußbrennereien* and *Stoffbesitzer* are based on conditions which are neither objective nor capable of subsequent fulfilment; they are not even clear and the advantages which they confer cannot be precisely determined.

(e) The reply to the first question should be as follows:

The first and second paragraphs of Article 95 of the EEC Treaty must be interpreted to mean that the tax advantages granted in pursuance of Article 79 (2) of the Law on the Monopoly in Spirits in respect of domestic spirits produced from fruit must be granted in respect of spirits imported from the Community.

The second question

This question concerns the "additional" tax advantages which do not follow from the letter of Article 79 (2) of the Law on the Monopoly in Spirits but which follow from the special legal institutions of *Abfindungsbrennereien* and *Stoffbesitzer*.

(a) According to the settled case-law of the Court tax advantages, even if they benefit only a small proportion of domestic production, must be extended to imported Community spirits under Article 95 of the EEC Treaty. In no case may an imported product be made

subject to higher taxation than that imposed on similar domestic products. Within the framework of Article 95 social or other reasons cannot justify different taxation.

(b) It does not suffice that the rate of the monopoly equalization duty on imported cognac is reduced to 30.5% in accordance with Article 79 (2) of the Law on the Monopoly in Spirits; the tax-free production surplus must also be taken into account, at any rate as a proportion and a percentage.

(c) The upper limit for the application of the reduced rate of the monopoly equalization duty must be considerably raised. The criterion is constituted on the one hand by the distillation right of a former *Abfindungsbrennerei* for the duration of the fixed period (30 hectolitres) increased by the average production surplus assessed at 50% (15 hectolitres). To this must be added, taking that period into account, the annual quantity which an *Abfindungsbrennerei* is authorized to distil and may distil for a number, to be determined, of *Stoffbesitzer*, in addition to the production surplus also deriving from such distillation.

The *Government of the Federal Republic of Germany* submits observations, the main points of which are as follows:

The first question

(a) The court making the reference raises the question whether imported spirits must qualify for a reduced rate of monopoly equalization duty even though they do not satisfy the conditions which are prescribed for a corresponding reduction in tax for domestic spirits. According to the case-law of the Court of Justice there is no breach of Article 95 of the EEC Treaty if a Member State applies to a specific product on the national territory graduated rates of tax and does not grant similar imported products a reduced rate of tax unless they fulfil the same conditions as those prescribed for domestic products in order to qualify for the correspondingly reduced rate of tax.

(b) None of the categories of producers qualifying for tax advantages under Article 79 (2) of the Law on the Monopoly in Spirits can exceed the authorized annual production quantity of 4 hectolitres of ethyl alcohol since that upper limit is even appreciably lower in the case of *Abfindungsbrennereien* and *Stoffbesitzer*. The third sentence of Article 151 (1) of the Law permits small distillers of other Member States with an annual production not exceeding 4 hectolitres of ethyl alcohol to qualify for the same tax advantage as the comparatively small group of domestic distilleries which comply with the conditions laid down by Article 79 (2).

(c) The extension to all imported spirits, even if they do not come from small distilleries, of the lowest rate of tax in the Federal Republic far exceeds the contents of the prohibition against discrimination in tax matters laid down in Article 95 of the EEC Treaty.

Such a measure would place 95% of the German production of spirits at a severe disadvantage from the point of view of taxation in relation to similar imported products and would entail for the Federal Republic an annual loss of tax-revenue of between DM 300 and 350 millions.

(d) The first question submitted in this case has already been covered by the detailed reply in the judgment of the Court of 10 October 1978 *(Hansen)*, in

conjunction with the judgment of 22 June 1976 *(Bobie)*. The Court ruled that at the stage of development at which Community law was at the time it did not prohibit Member States from granting tax advantages to certain types of spirits or to certain classes of producers since tax advantages of that kind might serve legitimate social or economic purposes; in stating that such preferential systems must be extended without discrimination to spirits coming from other Member States the Court referred, with regard to the treatment of imported spirits, not only to the amount entailed under such preferential systems but also to the conditions to which they were subject. Imported products cannot in principle qualify for the tax advantage prescribed by the national system unless they satisfy the same conditions as competing domestic products. According to the Court, Article 95 requires that tax advantages granted in respect of domestic products must be extended without discrimination to spirits coming from other Member States. In a situation where a Member State lawfully applies different rates of tax to similar products the application of the lowest rate of tax to all similar imported products alone necessarily results in discrimination at the expense of products which do not qualify for that advantage under national law and which are nevertheless in competition with the imported products in a similar fashion to the products qualifying for the advantage in question.

(e) According to the court making the reference there may be indirect discrimination if the importation at the reduced rate of tax is linked exclusively to an annual production limit whilst, with regard to domestic products, Article 79 (2) of the Law prescribes a number of other conditions which may be laid down for the grant of the fiscal advantage and which foreign producers cannot normally fulfil. That question falls within the exclusive jurisdiction of the court dealing with the main action.

In the alternative, it may be found that in this connexion it has been laid down very clearly in the case-law of the Court of Justice that the criteria to which the tax advantage is subject under national law must not be designed in such a way that they can be satisfied without difficulty by domestic producers but not by foreign producers.

In the present case the three categories which qualify for preferential treatment are subject to a maximum limit on their annual production of 4 hectolitres of ethyl alcohol. In the case of *Abfindungsbrennereien* the tax-free production surplus arising from certain inaccuracies in the assessment of the rates of yield are not in fact included in the calculation of the maximum quantity; with regard to the annual maximum limit of 4 hectolitres this fact is of little importance since, when there are differences of 20%, the Law requires the rate of yield to be corrected.

In fact the German rules are more favourable to imported spirits than to domestic spirits: imported spirits coming from a distillery which does not produce more than 4 hectolitres of ethyl alcohol per year may qualify for the tax exemption without having to fulfil any other additional condition. On the other hand, domestic distilleries must satisfy an additional requirement: an annual

production of less than 4 hectolitres of ethyl alcohol must be manufactured under bond.

The condition which the third sentence of Article 151 (1) of the Law on the Monopoly in Spirits lays down for extending the tax advantage provided for in Article 79 (2) to foreign distilleries is thus not more stringent than the conditions laid down in Article 79 (2) for domestic distilleries; likewise it does not constitute a specific national requirement which can only be satisfied by foreign distilleries on conditions which have been made more difficult.

(f) Furthermore the arrangements regarding imports in question cannot be contrary to Article 95 of the EEC Treaty merely because the tax advantage provided for in Article 79 (2) of the Law on the Monopoly in Spirits constitutes an aid within the meaning of Article 92 et seq. of the Treaty. The Commission was duly informed of it and found no grounds for complaint. It must also be emphasized that an extension going beyond Article 95 of the tax advantage in question to all imported spirits would in fact result in the abolition of that lawful system of aids. The abolition of that system would jeopardize the existence of small distillers and is inconceivable on a number of grounds of both social and agricultural policy.

(g) The reply which should be given to the first question is as follows:

The granting in a Member State of an advantage in the form of a tax exemption or a tax reduction in respect of certain types of spirits or of certain categories of producers when, having regard to the criteria set out in Article 95 of the Treaty, they satisfy the same conditions, is compatible with Article 95 of the EEC Treaty.

The second question

(a) This question concerns two sets of detailed rules on methods of collecting tax and the procedures for taxing given categories of domestic distilleries. Since these rules are in the nature of technical procedures they do not come within the scope of Article 95. The reply to the two parts of this question can thus only be in the affirmative.

(b) *Abfindungsbrennereien* make the methods of collection of tax easier; social considerations and considerations of agricultural policy are also involved.

The system of *Abfindungsbrennereien* makes it possible to tax small distilleries without unreasonable administrative costs; at the same time, the fact that the assessment procedure permits a tax-free production surplus promotes honesty in taxation matters and curbs the temptation of clandestine distilling. Any reduction in tax for *Abfindungsbrennereien* is essentially a side-effect of the only practicable arrangements for the collection of taxes on a national scale from very small distilleries. As a technical rule for the collection of taxes the system of *Abfindungsbrennereien* does not fall within the prohibition on tax discrimination contained in Article 95 of the Treaty; from the point of view of tax procedures it forms the most suitable means of collecting taxes and any subsidiary advantages which it may bring have positive effects on social and agricultural policy.

(c) The arrangements whereby distilleries are assessed over a fixed period do not come within the scope of Article 95: they do not constitute a tax advantage. The mere procedure whereby it is possible to distil on favourable tax conditions a larger quantity of spirits in certain years, that quantity being reduced by as much in other years, does

not constitute an advantage in view of the balance which is achieved within the period; the fact that this advantage is not extended to foreign products does not fall within the prohibition on tax discrimination laid down in Article 95. In any case the arrangements in question are compatible with the principles laid down by Article 95: an extension of the right to distil a certain quantity over a fixed period to foreign producers of spirits would not entail equality of treatment in tax matters but rather the granting of a considerable advantage in favour of imported spirits.

(d) Both parts of the second question submitted to the Court of Justice should be answered in the affirmative.

The *Commission* observes with reference to the case-law of the Court of Justice that the questions submitted by the Finanzgericht Rheinland-Pfalz must be appraised not in the light of Article 37 but exclusively in the light of the requirements laid down by Article 95 of the EEC Treaty.

The case-law on Article 95 has recently been confirmed with particular clarity in the judgments of 27 February 1980 (Case 168/78 *Commission* v *French Republic*; Case 169/78 *Commission* v *Italian Republic;* Case 171/78 *Commission* v *Kingdom of Denmark*) in which the Court held in particular that the considerations set out in the judgment of 10 October 1978 in the *Hansen* case cannot be understood as legitimating tax differences which are discriminatory or protective.

The first question

(a) Under the arrangements in dispute the Federal Republic of Germany is granting in respect of spirits produced from fruit tax advantages on the basis of a criterion which disregards the similar or competing nature of those products in relation to the same spirits produced by undertakings having a production level in excess of the annual limit fixed by the national legislation and also in relation to other types of similar or competing spirits.

(b) These arrangements were referred to in the *Hansen* case in which the Finanzgericht Hamburg gave a ruling on 23 May 1979 requiring equality of treatment in matters of taxation by extending to rum from Martinique the most favourable rate laid down in Article 79 (2) of the Law on the Monopoly in Spirits solely to spirits produced from fruit.

(c) The Court, in ruling in its judgments of 27 February 1980 that the Member States concerned had failed to fulfil their obligations under Article 95, declared that the Italian, French and Danish tax arrangements must be adjusted so that all imported spirits were subject to the same rate of tax. The reasons for which the Court disregarded the criterion based on the various "types of spirit" in order to maintain certain "productions" also applies to the criterion based on the production levels of undertakings as laid down in the German legislation in question.

(d) With regard to the economic and social objectives which might be invoked in defence of the tax reductions in question it must be recalled that

intervention measures for the benefit of certain fruit used as raw materials for the spirits in question are laid down by the common organization of the market in fruit and vegetables.

(e) The following reply should be given to the first question:

Article 95 of the EEC Treaty requires that the tax advantages reserved by national legislation exclusively to undertakings whose annual production is limited to a certain quantity of spirits must be extended to cover all similar or competing imported spirits.

The second question

In view of the fact that the reply to the first question must be in the negative it is superfluous to consider this question. Nevertheless in order to take care of all eventualities the following considerations should be borne in mind:

(a) Taxation based on an estimate of the quantity of raw materials used necessarily entails a difference in the actual taxation depending on how good the yield of the distillery is. Surplus production as compared with the "normal" yield is frequent; it amounts on average to 20 % and in certain cases to between 50 and 60 %. Accordingly domestic small distilleries may well record an actual production of up to 5 hectolitres without losing their privileged status, whilst the tax reduction is withdrawn from foreign undertakings as soon as their production exceeds 4 hectolitres.

Despite the correctives and restrictions applied by German legislation to the arrangements for taxation at a standard level an "excess yield" resulting in total exemption from taxation on the portion of production in excess of the "normal" yield nevertheless necessarily favours at least some domestic distilleries in relation to the distilleries of other Member States. Accordingly such arrangements applied to domestic distilleries alone discriminate against imported spirits and accordingly prove to be incompatible with the requirements of Article 95.

This finding also applies to *Stoffbesitzer.*

(b) The right of domestic *Abfindungsbrennereien* to carry forward and aggregate production rights limited annually to 4 hectolitres of ethyl alcohol over a period of ten years constitutes an advantage which is not enjoyed by imported spirits manufactured by their counterparts in other Member States: for the latter the limit of 4 hectolitres of ethyl alcohol is assessed annually, which means that they lose the benefit of the tax relief for the proportion below that limit if the harvest is poor.

(c) The measures in dispute, which were designed in terms of the position of domestic undertakings alone, cannot be transferred to the distilleries of other Member States.

(d) The reply to the second question should be as follows:

The advantages provided for in favour of domestic spirits enabling them to qualify for additional tax relief, such as

exemption from taxation of the production surplus following from the application of a system of standard taxation or the overstepping of maximum production limits in distilling over a certain period, must be extended to imported spirits in order to meet the requirements of Article 95 of the EEC Treaty.

If such advantages, though formally extended to imported spirits, cannot be applied to them in practice they must be granted in respect of all imported spirits in order to meet the requirements of Article 95.

III — Oral procedure

At the hearing on 10 July 1980 Schneider-Import GmbH & Co., the plaintiff in the main action, represented by Dietrich Ehle, Advocate, the Government of the Federal Republic of Germany, represented by Jochim Sedemund, Advocate, assisted by Jörn-Arne Jarsombeck, Chief Executive Officer at the Federal Ministry of Finance, and the Commission, represented by Rolf Wägenbaur, delivered oral argument and answered questions asked by the Court.

The Advocate General delivered his opinion at the sitting on 2 October 1980.

Decision

1 By order of 20 December 1979 which was received at the Court on 17 January 1980 the Finanzgericht Rheinland-Pfalz [Finance Court of Rhineland-Palatinate] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions as to the interpretation of Article 95 of the EEC Treaty in order to enable it to appraise the compatibility with the EEC Treaty of certain provisions of national legislation on the taxation of spirits concerning the application of reduced rates of tax to various categories of producers.

2 The order for reference shows that the plaintiff in the main action imported and released to the market in 1978 a consignment of cognac bought from a major French producer and on which it paid on so doing the *Monopolausgleich* [equalization duty] at the regular rate of tax then in force amounting to DM 1 950 per hectolitre of ethyl alcohol. The plaintiff instituted proceedings against the decision of the customs authorities, claiming that there was discrimination against the imported spirits contrary, in particular, to Article 95 of the Treaty because certain categories of domestic spirits qualified for a more advantageous rate of tax.

3 It is clear from the file and from the explanations provided by the plaintiff in the course of the procedure that it is not in dispute that the rate of tax applied in this matter by the customs authorities in fact corresponds to the general rate of tax applicable to domestic spirits. The plaintiff's objection is based on the fact that national legislation makes provision for certain exceptions from that general rate for various categories of small producers who benefit from a reduced rate of tax. It claims the application of that rate of tax to the product which it imported.

4 The provisions for which the plaintiff wishes to qualify are contained in Article 79 (2) of the Law on the Monopoly in Spirits *[Gesetz über das Branntweinmonopol].* These provisions provide for a reduction in the rate of tax for three categories of producer:

— *Abfindungsbrennereien* [distilleries for which production is estimated at a standard level for tax purposes on the basis of the amount of raw materials used];

— *Stoffbesitzer* ["owners of the raw materials", that is the producers of fruit used for distilling] and

— *Verschlußkleinbrennereien* [small bonded distilleries].

The reduced rate of tax is reserved to those producers up to the limits of an annual production quota of between 50 litres and 3 hectolitres of ethyl alcohol per annum for the undertakings in the first category, a maximum of 50 litres of ethyl alcohol for those in the second category and a maximum of 4 hectolitres of ethyl alcohol for those in the third.

5 The German tax authorities dismissed the complaint of discrimination, maintaining that pursuant to Article 151 (1) of the Law on the Monopoly in Spirits as last amended by the Law of 13 July 1978 (Bundesgesetzblatt I, p. 1002), the benefit of the reduced rates of tax in Article 79 was extended to all spirits imported from other Member States of the Community if it is established that they come from a distillery whose annual production does not exceed 4 hectolitres of ethyl alcohol. In the opinion of the authorities these arrangements are in accordance with the requirements of Article 95 since the tax advantages given to certain categories of domestic spirits and certain groups of domestic producers are thereby extended to all imported spirits which fulfil the same conditions. This, on the other hand, does not apply to the cognac which forms the subject-matter of the dispute, which comes from a manufacturer whose production considerably exceeds that limit.

6 In this connexion the plaintiff objects that the production limit of 4 hectolitres applicable to imported spirits under Article 151 of the Law on the Monopoly in Spirits does not really constitute an equivalent of the tax measures applicable to national production. Since these measures are neither objective nor clear they cannot be transferred as such to the imported products. In this connexion the plaintiff relies more particularly on the following circumstances: with regard to the *Abfindungsbrennereien,* the fact that the production limits fixed on the basis of a tax on the must may be exceeded by means of a "production surplus", which is exempt from all tax and varies between 20 % and 50 % depending on the year; the procedure known as "Brennen im Abschnitt" whereby the distiller may freely use his distillation right within ten-year periods makes it possible to improve even more on that result; finally, the aggregation of the distilling rights of *Stoffbesitzer* in the hands of certain distilleries which enables the latter considerably to exceed the limit of 4 hectolitres.

7 In order to settle this dispute the Finanzgericht submitted two questions which are worded as follows:

1. Must the first and second paragraphs of Article 95 of the EEC Treaty be interpreted as meaning that spirits imported from the Community which are comparable ("similar" within the meaning of the first paragraph of Article 95 of the EEC Treaty) with domestic spirits made from fruit (Law on the Monopoly in Spirits, Article 27 (1)), may, with regard to the tax advantages granted to domestic fruit spirits by Article 79 (2) of the Law on the Monopoly in Spirits, qualify for a correspondingly reduced rate of monopoly equalization duty only if the imported spirits come from a distillery with a small annual production (small distillery) within the meaning of Article 79 (2) of the Law on the Monopoly in Spirits (see Article 151 (1), third sentence, of that Law)?

2. In the case of an affirmative answer to Question 1:

   In view of the additional tax advantages enjoyed by domestic fruit spirits (tax-free excess yield, overstepping of maximum production limits by way of average distillation figures over a period), is it compatible with the first and second paragraphs of Article 95 of the EEC Treaty

   (a) that the reduction in the monopoly equalization duty should be limited to the rates of reduction laid down in Article 79 (2) of the Law on the Monopoly in Spirits (21 % or 30.5 %) or must the reduction exceed those rates, and

(b) that the upper limit for the application of the reduced rate of monopoly equalization duty should be fixed at an annual production by a foreign distillery of 4 hectolitres of ethyl alcohol?

8 In substance these questions raise the problem whether a provision such as Article 151 (1) of the Law on the Monopoly in Spirits, read in conjunction with Article 79 (2), constitutes a provision in accordance with the requirements of Article 95 of the Treaty. It is necessary to provide the Finanzgericht with the criteria of interpretation based on Community law enabling it to decide that problem.

9 In this connexion it must be recalled first of all that the Court, in its judgment of 10 October 1978 in Case 148/77 *Hansen and Balle* [1978] ECR 1787, stated that "at the present stage of its development and in the absence of any unification or harmonization of the relevant provisions, Community law does not prohibit Member States from granting tax advantages, in the form of exemption from or reduction of duties, to certain types of spirits or to certain classes of producers". It added 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" to which it added that, "according to the requirements of Article 95, such preferential systems must be extended without discrimination to spirits coming from other Member States". That opinion was confirmed in a series of judgments of 27 February 1980 in which the Court remarked that "although it acknowledged in the judgment in the *Hansen and Balle* case, taking into account the state of development of Community law, that certain tax exemptions or tax concessions are lawful, this is on condition that the Member States using those powers extend the benefit thereof without discrimination to imported products in the same conditions" (see in particular the judgment in Case 168/78 *Commission* v *French Republic*, paragraph 16 of the decision).

10 The difficulties of interpretation expressed in the question from the national court are caused by the close link existing between the tax advantages provided for by Article 79 of the Law on the Monopoly in Spirits and the

methods of taxation and of supervision under German law. For that reason it is particularly difficult to transfer those provisions to the tax treatment of spirits produced under the arrangements of the legislation of another Member State. In view of that situation it must be stated that the requirements of Article 95 of the Treaty are fulfilled where the legislation of a Member State makes it possible to apply to imports of spirits from other Member States arrangements the practical effect of which may be considered as equivalent to the arrangements applied to domestic spirits.

11 It is not for the Court, within the framework of an application for a preliminary ruling on interpretation under Article 177, to give a judgment in this matter on the German legislation since that appraisal is reserved to the national court. It is sufficient to find in this connexion that, from the point of view of Community law, none of the arguments put forward by the plaintiff has been of such a nature as to cast doubts on the compatibility with the requirements of Article 95 of arrangements such as those which are laid down in Articles 151 and 79, read together, of the German Law.

12 The plaintiff in the main action has not succeeded in establishing that the possibilities of a "production surplus" available to *Abfindungsbrennereien* permit them to attain, or appreciably to exceed, the annual production limit of 4 hectolitres or to achieve a considerable reduction in the level of taxation. This also applies to its observations concerning the exercise of distilling rights over ten-year periods *(Brennen im Abschnitt)* since it has been shown that that right merely permits the transfer of distilling rights within the ten-year period but not their increase. With regard to the distilling rights of the *Stoffbesitzer,* the German Government has stated that the distilling merely constitutes work carried out under contract and does not thus extinguish the identity of the rights granted to individual holders.

13 The plaintiff is again unsuccessful in the criticisms which it makes to the Court when it claims that the provisions of Article 151 do not constitute an exact transposition to the imported products of the conditions applicable to the various methods of production which qualify for preferential tax treatment under the German Law. In this connexion it must be observed that the German legislature, by retaining as the sole criterion for the granting of the tax advantages in question the volume of the annual production of

distilleries in other Member States, has avoided transferring to imported spirits a series of technical procedures peculiar to German legislation which in fact cannot be fulfilled by producers of Member States whose legal systems do not contain the equivalent of the provisions the essential points of which have been recalled above.

14 Finally, it is also necessary to dismiss the argument put forward by the plaintiff to the effect that, having regard to the large number of persons who benefit from the provisions laid down in Article 79 of the Law on the Monopoly in Spirits, the proportion of production obtaining preferential tax treatment appreciably affects competition on the market in alcoholic products. In fact the information supplied in the course of the procedure by the German Government, which the plaintiff did not seriously challenge, shows that the quantities obtaining preferential tax treatment in reality constitute only an insignificant proportion (5 %) of total domestic production.

15 In view of those considerations the reply to the questions submitted must be that Article 95 of the EEC Treaty, in its application to the tax advantages reserved by national legislation to certain categories of small-scale producers of spirits, must be interpreted as meaning that the requirement of non-discrimination laid down in the provision of the Treaty is fulfilled where the arrangements applicable to spirits imported from other Member States may be considered as equivalent to the arrangements applicable to national production, so that imported products may in fact enjoy the same advantages as comparable national products.

16 In this connexion, the fixing by the legislation of a Member State of an upper limit for production which is imposed upon producers of other Member States as a condition for qualifying for a reduction in the rate of tax conforms to the requirements of Article 95 of the EEC Treaty where that limit corresponds in general to the upper limit to which national producers are subject in order to qualify for the same tax advantage. Article 95 does not require the Member States to extend the same advantage to imported products coming from undertakings whose production exceeds the production limit thus fixed.

Costs

17 The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the questions referred to it by the Finanzgericht Rheinland-Pfalz by order of 20 December 1979, hereby rules:

1. **Article 95 of the EEC Treaty, in its application to the tax advantages reserved by national legislation to certain categories of small-scale producers of spirits, must be interpreted as meaning that the requirement of non-discrimination laid down in that provision of the Treaty is fulfilled where the arrangements applicable to spirits imported from other Member States may be considered as equivalent to the arrangements applicable to national production so that imported products may in fact enjoy the same advantages as comparable national products.**

2. **The fixing by the legislation of a Member State of an upper limit for production which is imposed upon producers of other Member States as a condition for qualifying for a reduction in the rate of tax conforms to the requirements of Article 95 of the EEC Treaty where that limit corresponds in general to the upper limit to which national producers are subject in order to qualify for the same tax advantage.**

Article 95 does not require the Member States to extend the same advantage to imported products coming from undertakings whose production exceeds the production limit thus fixed.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 30 October 1980.

The Registrar
by order

H. A. Rühl
Principal Administrator

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 2 OCTOBER 1980 [1]

Mr. President,
Members of the Court,

The reference for a preliminary ruling which I shall consider today relates to the interpretation of Article 95 of the EEC Treaty in relation to Article 79 (2) and the third sentence of Article 151 (1) of the German Law on the Monopoly in Spirits [Gesetz über das Branntweinmonopol] of 8 April 1922 (Reichsgesetzblatt I, p. 335, 405, as last amended by the Law of 13 November 1979, Bundesgesetzblatt I, p. 1937). Since the provisions governing the taxation of spirits in the Federal Republic of Germany have already been set out in detail in the preliminary rulings delivered in the first *Hansen* case (judgment of 10 October 1978, Case 148/77 [1978] ECR 1787) and the second *Hansen* case (judgment of 13 March 1979, *Hansen GmbH & Co* v *Hauptzollamt Flensburg*, Case 91/78, [1979] ECR 935) it is sufficient merely to recall briefly certain points in so far as they are necessary for an understanding of the facts of this case.

In the Federal Republic of Germany there is in principle a single duty imposed on spirits the name of which differs only in accordance with the origin and application of the spirits: in accordance with Article 84 (1) of the Law on the Monopoly in Spirits, spirits which are delivered to the Federal Monopoly Administration [Bundesmonopolverwaltung] are liable to the tax on spirits [Branntweinsteuer]. According to Article 78 of the Law on the Monopoly in Spirits, spirits which are not delivered to the Federal Monopoly Administration are liable to a spirits surcharge [Branntweinaufschlag]. In

1 — Translated from the German.