5. A measure carried out by means of discriminatory taxation, which may be considered at the same time as forming part of an aid within the meaning of Article 92 of the Treaty, should in any case be governed by Article 95.
6. The rules contained in Article 37 of the Treaty concern only activities intrinsically connected with the specific business of the monopoly in question. They are thus irrelevant to national provisions which have no connexion with such specific business, like those concerning relief for spirits on which tax was previously charged.
7. Article 53 (1) of the Agreement establishing an Association between the European Economic Community and Greece fulfils, within the framework of that Agreement, the same function as that of Article 95 of the Treaty. It forms part of a group of provisions the purpose of which was to prepare for the entry of Greece into the Community by the establishment of a customs union, by the harmonization of agricultural policies, by the introduction of freedom of movement for workers and by other measures for the gradual adjustment to the requirements of Community law.

   It accordingly follows from the wording of Article 53 (1), cited above, and from the objective and nature of the Association Agreement of which it forms part that that provision precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece. It contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. In those circumstances Article 53 (1) must be considered as directly applicable from the beginning of the third year after the entry into force of the Agreement, on which date all measures conflicting with that provision was, by virtue of its third subparagraph, to be abolished.

In Case 17/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Hamburg for a preliminary ruling in the action pending before that court between

PABST & RICHARZ KG, having its place of business at Elsfleth,

and

HAUPTZOLLAMT [Principal Customs Office] OLDENBURG,

OBERFINANZDIREKTION HANNOVER [Principal Revenue Office, Hanover], intervener,

on the interpretation of Articles 37 and 95 of the EEC Treaty, Article 53 (1) of the Agreement establishing an Association between the European Economic Community and Greece and of Articles 92 et seq. of the EEC Treaty in relation to the application of certain administrative measures concerning the implementation of the German Law of 8 April 1922 on the Monopoly in Spirits (Gesetz über das Branntweinmonopol),

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

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

1. The German Law of 8 April 1922 on the Monopoly in Spirits [hereinafter referred to as the "1922 Law"], as amended on a number of occasions, applies to spirits a tax on consumption which is levied in three different forms.

(a) According to the 1922 Law domestically-produced spirits must in principle be delivered to the Federal Monopoly Administration (Bundesmonopolverwaltung] at an "acquisition price for spirits" (Branntweinübernahmepreis) calculated by reference to the basic price for spirits (Branntweingrundpreis) fixed by the Federal Monopoly Administration. In accordance with Article 84 of the 1922 Law "monopoly" spirits are liable to the tax on spirits (Branntweinsteuer) and are marketed by the Federal Monopoly Administration at the normal selling price (regelmäßiger Verkaufspreis) which is made up of the acquisition price, the tax on spirits and the administrative and operating costs of the monopoly. That latter component represents the "marginal element of the price" (Preisspitze).

(b) Spirits which are exempted from the requirement of delivery to the Federal Monopoly Administration or which, in breach of that requirement, are not so delivered become liable, pursuant to Article 78 of the 1922 Law, to a spirits surcharge (Branntweinaufschlag). The amount by which the surcharge exceeds the tax on spirits constitutes the marginal element of the spirits surcharge (Branntweinaufschlagspitze).

(c) Under Articles 151 and 152 of the 1922 Law imported spirits are subject to a monopoly equalization duty (Monopolausgleich) corresponding to the difference between the normal selling price and the basic price of spirits covered by the monopoly. The amount by which the monopoly equalization duty exceeds the tax on spirits represents the marginal element of the monopoly equalization duty (Monopolausgleichspitze).

The order making the reference shows that during the period from 1 January

1972 to 17 March 1976 the tax on spirits (Branntweinsteuer) basically amounted to DM 1 500 per hectolitre of wine-spirit. The spirits surcharge (Branntweinaufschlag), charged on a graduated scale, was generally in excess of DM 1 500 per hectolitre of wine-spirit but in certain circumstances it was considerably less than that amount. The monopoly equalization duty (Monopolausgleich) was basically in excess of the tax on spirits of DM 1 500 per hectolitre of wine-spirit. Around 1 January 1976 the marginal element of the monopoly equalization duty (Monopolausgleichspitze) amounted to DM 80 per hectolitre of wine-spirit.

Pursuant to the 1922 Law the Federal Monopoly Administration enjoys a monopoly of the importation of spirits. Nevertheless, as a result of the judgments of the Court of Justice of 3 February 1976 *(Manghera,* Case 59/75 [1976] ECR 91) and of 17 February 1976 *(Rewe,* Case 45/75 [1976] ECR 181 and *Miritz,* Case 91/75 [1976] ECR 217) it ceased to enforce that monopoly right in relation to spirits from Member States of the EEC.

The Federal Monopoly Administration was obliged by the cheaper importations resulting from this alteration in practice to reduce its prices for the sale of neutral spirit, first by DM 150 per hectolitre of wine-spirit and subsequently by other amounts. Nevertheless it maintained the acquisition prices payable to producers delivering spirits to the Federal Monopoly Administration. The resultant deficit was covered, through the general budget of the State, by an increase in the general rate of the tax on spirits. In fact the Law of 2 May 1976 amending the 1922 Law resulted in an increase with effect from 18 March 1976 in the three forms of the tax on the consumption of spirits by a uniform rate of DM 150 per hectolitre which raised them to DM 1 650. At the same time the marginal element of the spirits surcharge and of the monopoly equalization duty (Monopolausgleichspitze) were abolished.

In order to assist producers, manufacturers and importers in adapting themselves to the new commercial and legal position the Federal Minister of Finance adopted various administrative measures.

In particular he issued circulars dated 23 March, 15 April and 1 July 1976 providing tax relief in respect of spirits held in individually-owned spirits warehouses (Branntweineigenlager) and in bonded warehouses (Zollager) subject to deferment of duty at the reference date of 22 February 1976, except for goods removed from warehouses up to 17 March 1976.

In the order making the reference it is explained that the spirits held in individually-owned warehouses and bonded warehouses had already been charged on entry to the warehouse with tax of the marginal element of the spirits surcharge or the marginal element of the monopoly equalization duty in so far as they were payable. On the other hand the balance of the spirits surcharge and of the monopoly equalization duty, including the amount of DM 1 500 per hectolitre of wine-spirit corresponding to the tax on spirits, was collected only when the spirits were removed from the warehouse.

Thus at the time of the increase in the rates of tax the individually-owned spirits warehouses contained domestic spirits and imported spirits on which the marginal elements of duty had already been paid, together with spirits on which they had not yet been charged, namely spirits from the Federal Monopoly Administration.

On the basis of the above-mentioned system of relief all spirits stored in individually-owned spirits warehouses at the reference date, including spirits from the Federal Monopoly Administration on which tax had not yet been charged, were granted relief in accordance with two procedures.

First, spirits stored at the reference date were exempted from a fixed sum of DM 80 per hectolitre of wine-spirit in order to offset the marginal element of the spirits surcharge and the marginal

element of the monopoly equalization duty charged on entry to the warehouse. In fact the marginal elements of duty varied between DM 16.05 and DM 99.54 per hectolitre of wine-spirit during the period after October 1975.

Subsequently, proprietors of individually-owned spirits warehouses were granted relief amounting to DM 70 per hectolitre of wine-spirit on an estimated turnover of two months in order to exempt them partially from the increase in tax after 18 March 1976.

Proprietors of bonded warehouses also obtained that latter relief but under the system no compensation was provided for the marginal elements of duty paid in respect of stocks of spirits held in bonded warehouses.

The relief was granted as compensation in relation to amounts of tax payable for the months after April 1976.

According to the order making the reference the Federal German Government failed to inform the Commission, in accordance with Article 93 (3) of the EEC Treaty, of the system of relief.

According to the information supplied by the Monopoly Administration relief granted on the basis of the above-mentioned circulars represented a total figure of some DM 72 000 000 and affected some 800 proprietors of individually-owned spirits warehouses and an unknown number of proprietors of bonded warehouses.

2. The firm Pabst & Richarz, the plaintiff in the main action, runs an establishment distilling spirits from wine. It has an individually-owned spirits warehouse and a storage tank (Tanklager) which is under customs supervision.

At the reference date the storage tank contained 13 278 hectolitres of raw spirit, a substance produced in the course of the last stage before spirits are processed from wine. The raw spirit came from Member States of the EEC (France and Italy) and from Greece. When the product entered the warehouse Pabst & Richarz paid the marginal element of the monopoly equalization duty, which amounted to DM 80 per hectolitre of wine-spirit. That duty was refunded to them under the system of relief.

In its application to the Finanzgericht Hamburg, Pabst & Richarz claimed supplementary relief amounting to DM 80 per hectolitre of wine-spirit in respect of the raw spirit held in their storage tank. The undertaking bases its claim on the argument that it is contrary to the principle of equality that spirits, which have not yet been taxed, which were bought from the Federal Monopoly Administration and which were held in individually-owned spirits warehouses at the reference date should qualify for relief amounting to DM 80 per hectolitre of wine-spirit whilst it did not obtain comparable relief. In fact, unlike the refund granted in respect of "monopoly" spirits, the tax relief for such spirits does not compensate a corresponding prior charge imposed in the form of the marginal element of the spirits surcharge or the marginal element of the monopoly equalization duty and spirits bought from the Federal Monopoly Administration thus qualify for more favourable tax treatment, up to an amount of DM 80 per hectolitre of wine-spirit.

The Hauptzollamt on the other hand considers that Pabst & Richarz has obtained sufficient relief through the refund of the marginal element of the monopoly equalization duty. Further relief is not provided for by the circulars and furthermore is not justified.

3. By an order of 31 October 1980 the IVth Chamber of the Finanzgericht Hamburg decided to stay the proceedings until the Court of Justice gave a preliminary ruling under Article 177 of the EEC Treaty on the following questions:

1. Must Article 95 of the EEC Treaty and Article 53 (1) of the Agreement

establishing an Association between the European Economic Community and Greece and Article 37 of the EEC Treaty be construed as meaning that the criteria laid down in those provisions are applicable to a measure adopted by a State which in connection with an increase in the duty on spirits and the granting of aid to particular domestic producers of spirits provides for relief to be granted through the tax assessments in respect of spirits which were in stock at the time of the said measure, but on which duty had not yet been charged, or does relief of the said type fall to be judged in the light of the provisions on aids contained in Article 92 et seq. of the EEC Treaty?

2. If the provisions of Article 37 and/or Article 95 of the EEC Treaty and Article 53 (1) of the Association Agreement are applicable:

   Are those provisions to be construed as meaning that they confer upon importers a legal right to demand that imported spirits from other Member States be relieved of duty in the same way as domestic spirits on the basis of general administrative instructions, irrespectively of whether under national law the relief is classifiable as a subsidy or as a tax concession and regardless of whether under national law the relief is lawful or unlawful?

3. If the provisions on aids are applicable:

   Does the principle of equality, generally applicable in Community law, confer upon importers of goods a legal right to demand that importers of spirits from other Member States receive subsidies in the same way as other importers or domestic producers of spirits or dealers in spirits?

4. In the statement of the reasons on which the order making the reference is based the Finanzgericht explains that in formulating the preliminary questions it proceeded on the basis of the following legal considerations:

The national court considers that the system of relief constitutes an equitable tax measure within the meaning of Article 131 of the German Revenue Code (Reichsabgabenordnung). The Finanzgericht, in a judgment of 31 October 1980 (IV 51/77 N), decided that the system of relief was not in accordance with that provision because it did not constitute intervention by the administration in individual cases but a general provision exceeding the lawful powers of the administration. Nevertheless, in a decision of 1 April 1980 (VIII R 17/78) the Bundesfinanzhof [Federal Finance Court] classified the system of relief in accordance with German law as a subsidy.

The Finanzgericht furthermore considers that the question how the system of relief must be classified in German law is irrelevant to the application of the provisions of Community law which have been invoked. Even if the measures in question are purely administrative the system of relief is in breach of Article 95 of the EEC Treaty or Article 53 of the Association Agreement with Greece in so far as the tax on proprietors of individually-owned spirits warehouses who held in such warehouses spirits coming from the Federal Monopoly Administrations was reduced by an amount of DM 80 per hectolitre of wine-spirit whilst Pabst & Richarz did

not obtain a corresponding reduction in tax in respect of the spirits which it imported.

With regard to the raw spirit coming from Greece the national court considers that the principles set out in the judgment of the Court of 13 March 1979 *(Hansen* v *Hauptzollamt Flensburg,* Case 91/78 [1979] ECR 935) in relation to Article 2 (1) of the Council Decision of 29 September 1970 on the Association of the Overseas Countries and Territories with the European Economic Community also applies to Article 53 (1) of the Association Agreement between the EEC and Greece.

It then observes that the reply to the preliminary questions is also a matter of importance for the proprietors of bonded warehouses who are in a similar position to that of the plaintiff in the main action.

Finally the Finanzgericht explains that the third question concerns the case, which in its view is improbable, where the prohibition of tax discrimination is not affected by the system of relief. The court furthermore inclines to the view that in so far as the system of relief constitutes an aid it is contrary to Community law because the Commission was not informed of it.

5. The order of the Finanzgericht of 31 October 1980, making the reference to the Court, was received at the Court Registry on 3 February 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by Pabst & Richarz KG, the plaintiff in the main action, represented by P. Müller-Kemler, Rechtsanwalt, Hanover, by the Oberfinanzdirektion Hannover, the intervener in the main action, represented by Mr Schäfer, acting as Agent, and by the Commission of the European Communities, represented by its Legal Adviser, Erich Zimmermann, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt, Düsseldorf.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. Nevertheless it requested the parties to reply in writing before the sitting to certain questions; the request was complied with within the time-limit laid down.

By an order of 17 June 1981, the Court decided, pursuant to Article 95 (1) and (2) of the Rules of Procedure, to assign the case to the First Chamber.

II — Summary of the written observations lodged with the Court

With regard to the facts *Pabst & Richarz,* the plaintiff in the main action, remarks that the order making the reference contains an error in the description of the sequence of the system of relief. It explains that with regard to stocks held in individually-owned spirits warehouses on 17 March 1976 the circular of 15 April 1976, which is the relevant document in the main action, provides for:

(a) Compensation of DM 150 per hectolitre of wine-spirit for the reference quantity, which corresponds to the average sales for two months and

(b) Compensation of DM 80 per hectolitre of wine-spirit for the part of the stock exceeding the reference quantity.

With regard to stocks in bonded warehouses, only compensation of DM 70 per hectolitre of wine-spirit was provided for the reference quantity.

The objective of these measures was to cancel out the increase in the tax on stocks already sold at prices in which the increase had not yet been taken into account.

Nevertheless, with regard to purchasers and processors of monopoly spirits the tax increase was cancelled out entirely from the point of view of costs. In fact their stock corresponding to the reference quantity qualified for relief up to the tax increase of DM 150 whilst, in respect of future transactions, the tax increase was entirely compensated by the reduction of DM 150 in the price of the monopoly spirits. Thus they were only affected by an increase in taxation of some DM 70 for the quantities held in stock on 17 March 1976 which exceeded the reference quantities.

Apart from these quantities the sum of the accounting heads "purchases of monopoly spirits" and "tax on spirits" thus remain identical for purchasers of monopoly spirits and accordingly their selling prices may also remain unaltered.

The plaintiff in the main action accordingly considers that the system of relief constitutes a classic case of an equitable tax measure taken to compensate for an unjust economic consequence of a tax measure which itself is lawful. This is also indicated by the recitals in the preamble to the circulars in which reference is made to the "hardships which may result from the altered state of the market . . . when selling takes place".

In this connection it states that the aids or subsidies are not intended to compensate for the inequitable consequences of legal measures or to alleviate particular cases of hardship caused by the law but to remedy disadvantages arising from economic circumstances.

It considers furthermore that the question of the lawfulness of the system of relief in German law may remain open. The relevant point in this case is the fact that the plaintiff's competitors have in fact been able to obtain economic advantages as the result of the relief.

With regard to the applicability of Articles 37 and 95 of the EEC Treaty, the plaintiff in the main action considers that the preliminary question put by the Finanzgericht is principally intended to establish whether the reduction in national taxation granted in respect of a domestic product must also be extended to a similar product coming from a Member State. The question accordingly concerns the interpretation of the first paragraph of Article 95 ot the EEC Treaty and Article 37 of the Treaty is not applicable. In fact this case does not concern "an activity specifically connected with the exercise by a State monopoly of its exclusive right . . . within the meaning of the said judgment of the Court of 13 March 1979 *(Hansen* v *Hauptzollamt Flensburg)* but an equitable tax measure intended partially and temporarily to cancel out the consequences of the increase in a consumption tax.

For the purposes of the application of Article 95 of the Treaty the form of the tax is irrelevant.

In fact even if the partial exemption from tax for domestic products is limited both as to its duration and amount it must be extended on the same conditions to similar imported products. There can be no doubt that in this case the products in question are similar. The exemption is not justified by reasons concerning the individual position of a party liable to

the tax but by the incidence of the tax on all persons liable to it.

Article 95 indicates that, with regard to liability to tax, the importer of an imported product may not be treated less favourably than the person liable to the tax on the similar domestic product.

The plaintiff in the main action emphasizes that, with regard to its stock of spirits, it has already paid tax prior to 17 March 1976 and thereafter it became liable to the full increase in the tax on spirits whilst relief of at least DM 80 per hectolitre of wine-spirit was granted in respect of stocks of similar domestic products held in warehouses.

With regard to the stock of raw spirit coming from Greece Article 53 (1) of the Association Agreement with Greece should be applied.

Finally the application of that provision, together with Article 95 of the Treaty, renders Article 92 et seq. of the EEC Treaty inapplicable.

The *Oberfinanzdirektion Hannover,* the intervener in the main action, remarks first of all that in the adoption or application of the system of relief in respect of old stocks no distinction was drawn between the categories of spirits or on the basis of their origin.

With regard to the facts of the case it explains that all spirits held in individually-owned spirits warehouses at the reference date were granted relief, at a flat rate of DM 80 per hectolitre of wine-spirit, in respect of the marginal elements of duty paid on entry into the warehouse.

On the other hand stocks held in bonded warehouses did not obtain that relief because they had not been liable to the prior charges. In this respect the appraisal of the facts put forward by the Finanzgericht is mistaken. In fact, in accordance with Article 154 of the Law on the Spirits Monopoly in conjunction with Article 46 of the Customs Code the amount owed in respect of monopoly equalization duty, including the marginal element thereof, is payable only on removal from the warehouse. The marginal element of the monopoly equalization duty was no longer payable on products removed from the warehouse after 23 February 1976.

Furthermore, in order to counter the temporary difficulties arising from the increase in the tax and from the alteration of the conditions of competition an indemnity of DM 70 per hectolitre of wine-spirit was granted both on stocks held in individually-owned spirits warehouses and on these held in bonded warehouses, in both cases up to a reference quantity. In the case of individually-owned spirits warehouses the total compensation per hectolitre of wine-spirit for the reference quantity thus amounted to DM 150.

The Oberfinanzdirektion endeavours to show by giving figures that the effects of the relief measures were identical for imported products and monopoly spirits.

With regard to the relevant Community provisions the Oberfinanzdirektion considers that the real purpose of the preliminary questions which have been put is to ascertain whether it is possible to regard as discrimination the fact that contrary to the case with imported raw spirits, relief for monopoly spirits was contained "in the price of the product". Furthermore it will be unnecessary to answer the questions put in this case if an affirmative reply is given to the question put in Case 4/81 *(Hauptzollamt Flensburg* v *Andresen,* which is at present pending before the Court of Justice) with regard to the nature of the charge arising for monopoly spirits from the selling price fixed by the Federal Monopoly Administration.

In this connection the Oberfinanz-direktion observes that the Finanz-

gericht, by presenting the case as one concerning a tax credit, and thus placing it within the field of tax law, risks avoiding the problem rather as happened in the said Case 91/78 *(Hansen* v *Hauptzollamt Flensburg).* It emphasizes that the tax credit provided for is merely a matter of administrative convenience and not an essential requirement of the system. This is supported by the fact that, in accordance with the order of 15 April 1976, compensation must be paid if a credit cannot be provided.

Accordingly the Finanzgericht is really considering the problem of the monopoly price during a phase in the transformation of the commercial monopoly. The system in question must accordingly be appraised in accordance with the criterion contained in Article 37 (1) and (2) and, in so far as imports from Greece are concerned, in accordance with Article 31 of the Agreement between the EEC and Greece.

According to the judgment of the Court of 13 March 1979 in the above-mentioned Case 91/78 the price-policy of a commercial monopoly protected by the State only has a discriminatory effect where the selling prices are abnormally low in relation to the prices before of spirits of comparable quality imported from other Member States. In this connection the Oberfinanzdirektion remarks that the raw spirit obtained from the wine and the Monopoly's neutral spirit are not of comparable quality. Furthermore the price of the monopoly spirits is appreciably higher than the price of the neutral spirits coming from the Member States.

In addition, with regard to the raw spirits coming from Greece, the prohibition of discrimination contained in Article 31 of the Agreement between the EEC and Greece is of no effect, having regard to paragraphs (1) and (6) thereof, at the time of the events in question.

Finally the Oberfinanzdirektion considers that examination of the problem from the point of view of Article 92 of the EEC Treaty brings about the same result since that article is based on the same basic notions as Articles 37 and 95 of the Treaty (cf. the judgment of the Court of 10 October 1978, *Hansen* v *Hauptzollamt Flensburg,* Case 148/77 [1978] ECR 1787).

The *Commission of the European Communities* observes first of all that the report of the Finance Committee of the Bundestag concerning the amendment of the Law on the Monopoly in Spirits shows that the Committee intended to permit, in respect of spirits obtained from wine and from fruit which did not need to be delivered to the Monopoly, an adaptation to the new situation by making provision for

(a) relief amounting to DM 80 per hectolitre of wine-spirit in order to cancel out, for old stock, the marginal element of the monopoly equalization duty or the marginal element of the spirits surcharge;

(b) relief on old stock up to a reference quantity in order to compensate for the total amount of the increase in the tax on spirits, that is DM 150 per hectolitre of wine-spirit.

The Commission indicates that the stock held by Pabst & Richarz in its storage tank was apparently treated as a stock held in an individually-owned warehouse. Furthermore only the relief of DM 80 referred to in subparagraph (a) above is relevant for the appraisal of this case.

It considers that the reimbursement of the charge previously imposed in the form of the marginal element of the spirits surcharge or the marginal element of the monopoly equalization duty constitutes a tax measure covered by Article 95 of the EEC Treaty. In fact in both cases the marginal elements were a part of two forms of underlying taxation.

The general grant of the relief of DM 80 thus brought about a greater reduction in the consumption tax on monopoly spirits, in respect of which there were no prior charges, than that affecting spirits which did not require to be delivered to the Monopoly Administration or imported spirits.

The Commission states that, even if the national measure in question might at the same time be considered as an aid within the meaning of Articles 92 et seq. of the EEC Treaty it could not fall outside the scope of Article 95 of the Treaty (cf. the judgment of the Court of 21 May 1980, *Commission* v *Italy*, Case 73/79 [1980] ECR 1533).

It then refers to the judgment of the Court of 10 October 1978 in Case 148/77 *(Hansen* v *Hauptzollamt Flensburg)*, as a basis for its argument that, with regard to national provisions favouring certain types of spirits or certain categories of producers with regard to the charging of the consumption duty on spirits, the application of Article 95 of the Treaty takes precedence over that of Article 37 of the Treaty.

In considering the question whether in this case there has been discrimination within the meaning of Article 95 the Commission accepts that monopoly spirits were in fact liable to a lower rate of tax, DM 80 per hectolitre of wine-spirit, than the tax due by the plaintiff in the main action in respect of its stock of raw spirit. Nevertheless it admits that that argument may be contested, in particular if it is considered that the relief for which monopoly spirits qualified constitutes a refund corresponding to the marginal element of the selling price of monopoly spirits and that the marginal element of the selling price represents a charge comparable to the marginal element of monopoly equalization duty.

Furthermore it refers to the wealth of case-law of the Court on Article 95 in order to argue that that provision requires the abolition of discrimination by the repeal of the unlawful measure and recovery of the relief granted or by granting to imported products the same advantage as that enjoyed by domestic products, the choice between these methods being at the discretion of the national courts.

The Commission shares the view of the Finanzgericht that Article 53 (1) of the Agreement between the EEC and Greece must be considered as directly applicable.

Finally the Commission considers that, in the light of its foregoing observations, it is unnecessary to reply to the third question on the interpretation of Articles 92 et seq. on aids. Nevertheless it remarks as a subsidiary point that it was not informed in accordance with Article 93 (3) of the Treaty of the relief measures in dispute. Accordingly the plaintiff in the main action may not rely before the national court on rights conferred by Community legislation which concern the granting of an aid.

III — Oral procedure

At the sitting on 15 October 1981 oral argument was presented by the following: by P. Müller-Kemler, Rechtsanwalt, Hanover, for the plaintiff in the main action; Mr Jarsombeck, Director at the Federal Ministry of Finance, Bonn, representing the Oberfinanzdirektion Hannover, the intervener in the main action, and Erich Zimmermann, Legal Adviser to the Commission, assisted by Wolf-Dietrich Krause-Ablass, Rechtsanwalt, Düssel-

dorf, for the Commission of the European Communities.

In the course of the hearing the parties clarified certain aspects of the case.

The *Oberfinanzdirektion Hannover*, the intervener in the main action, pointed out that the question whether or not the marginal element of the price, payable before spirits coming from the Federal Monopoly Administration entered a warehouse, as a component of the monopoly price, constituted a tax, formed the subject-matter of Case 4/81, *Andresen*, which was pending before the Court of Justice. The finding in the order making the reference that monopoly spirits held in individually-owned spirits warehouses have not yet been taxed was thus open to doubt.

The system of relief also provided for compensation for this marginal element paid on monopoly spirits. Since October 1975 the marginal element has varied between DM 16.05 and DM 104.60 per hectolitre of wine-spirit.

Comparable relief was not provided for stocks held in bonded warehouses since the latter were not liable to a marginal element on entry to the warehouse.

The Oberfinanzdirektion then explained that the storage tank under customs supervision, owned by the plaintiff in the main action, was in a special position with regard to the legislation on the monopoly in spirits. That position was explained by traditional German distilling and warehousing practices. In the case of storage tanks the data used to fix the amount of the charge to tax were established before the raw spirit, which has already undergone initial processing, enters the warehouses but the taxation, and accordingly the collection of the marginal element of the monopoly equalization duty, was effected later on the basis of the final distillation.

In this connection the representative of *Papst & Richarz KG*, the plaintiff in the main action, explained that, pursuant to an order of 26 February 1976 the marginal element of the monopoly equalization duty amounting to DM 16.05 per hectolitre of wine-spirit, and not the amount of DM 80 stated in the order making the reference, was charged on the spirits held in the storage tank. The undertaking paid the corresponding amount which was subsequently refunded to it as a result of a special claim outside the framework of the system of relief.

The Advocate General delivered her opinion at the sitting on 28 January 1982.

Decision

1 By order of 31 October 1980, which was received at the Court on 3 February 1981, the Finanzgericht [Finance Court] Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions as to the interpretation of Articles 37, 92, 93 and 95 of the EEC Treaty and of Article 53 (1) of the Agreement establishing an Association between the European Economic Community and Greece, signed at Athens on 9 July 1961, and concluded and approved on behalf of the Community by

the Council Decision of 25 September 1981 (Official Journal, English Special Edition, Second Series, I External Relations (1), p. 3).

2 The dispute in the main action concerns the application of a system of relief, which was established by three circulars issued by the Federal Minister of Finance in order to take into account an adjustment of the German spirits monopoly to the requirements of Community law to a quantity of raw spirit coming from France, Italy and Greece which was held in a storage tank (Tanklager) on the reference date fixed by the circulars.

3 Before the adjustment of a monopoly a consumption tax called the monopoly equalization duty (Monopolausgleich) was imposed on all spritis imported into the Federal Republic of Germany irrespective of whether they came from a Member State or from a non-member country. That duty was composed of a fixed component corresponding to the tax on spirits (Branntweinsteuer) levied on domestic spirits marketed by the Federal Monopoly Administration [Bundesmonopolverwaltung] and a variable component called the marginal element of the monopoly equalization duty (Monopolausgleichspitze) which was the equivalent of the marginal element of the price (Preisspitze) calculated in the selling price of monopoly spirits. The amount of the marginal element of the price was obtained by subtracting from the monopoly's selling price the sum of the tax on spirits and the basic price of the spirits fixed by the Monopoly Administration. According to the order making the reference the tax on spirits has amounted to DM 1 500 per hectolitre of wine-spirit since 1972 whilst the marginal element of the monopoly equalization duty amounted to DM 80 per hectolitre of wine-spirit on or about 1 January 1976.

4 In order to render the monopoly in spirits compatible with Community law the Federal Monopoly Administration no longer exercised, in compliance with the judgments of the Court of 17 February 1976 (Case 45/75, *Rewe* [1976] ECR 181 and Case 91/75 *Miritz* [1976] ECR 217), with regard to spirits coming from other Member States the monopoly in the importation of spirits which it held under German law. The reduction in the selling prices of monopoly spirits which the Monopoly Administration consequently effected led to a deficit for the Monopoly since the purchase prices payable to producers delivering their products to the Monopoly were maintained. That deficit was met from the State budget, and this led to an increase of 10% in the general rate of the tax on spirits. The rates of the tax on spirits and that of the monopoly equalization duty were increased by DM 150 per 1 hectolitre of wine-spirit, resulting in a total of DM 1 650 per hectolitre. At the same time, and as a result of that adjustment of the monopoly, the marginal element of the monopoly equalization duty was abolished with effect from 18 March 1976.

5. On the basis of an undertaking given to the Finance Committee of the Bundestag the Federal Minister of Finance adopted various administrative measures in order to make it easier for producers, manufacturers and importers of spiritis to adapt to the new commercial and tax situation. Accordingly by three circulars dated 23 March, 15 April and 1 July 1976, the Minister laid down administrative instructions which contained measures of relief.

6 These measures applied to spirits which were held on 22 February 1976 in an individually-owned spirits warehouse (Branntweineigenlager) or in a bonded warehouse (Zollager). The relief provided was granted in principle by way of a credit against the amounts of tax payable each month as from the month of April 1976.

7 According to the instructions of the Minister the relief could amount to a maximum of DM 150 per hectolitre. It was made up of two components. First, a relief of DM 70 per hectolitre for a certain reference quantity of spirits was provided for in order to compensate for unjust hardship which might have arisen from the increase in the rates of the taxes on spirits, particularly in the case of longterm contracts. That relief applied to the part of net stocks corresponding to the reference quantity held in individually-owned spirits warehouses and bonded warehouses. Secondly, a reimbursement of DM 80 per hectolitre was provided for total stocks held in an individually-owned spirits warehouse. That reimbursement represented in particular the refund of the marginal element of the monopoly equalization duty and the marginal element included in the selling price of monopoly spirits. These marginal elements had been charged on the entry of the spirits to the warehouse whilst the monopoly equalization duty and the tax on spirits were not charged until withdrawal from the warehouse. This case concerns only the refund of DM 80 per hectolitre.

8 The Oberfinanzdirektion Hannover [Principal Revenue Office, Hanover], the intervener in the main action, has explained that the amount of the marginal element of the monopoly equalization duty was essentially variable by reason of the calculation of the marginal element of the price effected at the time by the Federal Monopoly Administration. The refund of DM 80 must consequently be considered as a fixed-rate refund of the marginal element which was charged on entry to the warehouse.

9 The quantity of spirits concerned in this case was held on the reference date in a storage tank (Tanklager) owned by the undertaking Pabst & Richarz, the plaintiff in the main action. It is common ground that that storage tank is

not included among the warehouses in respect of which the ministerial circulars prescribe measures on relief.

10 According to the order making the reference the plaintiff in the main action paid the marginal element contained in the monopoly equalization duty amounting to DM 80 per hectolitre when the spirits entered the warehouse. The amount of that marginal element was refunded to it. It nevertheless claimed a supplementary relief of DM 80 per hectolitre on the ground that it was contrary to the principle of equality of treatment that spirits purchased from the Federal Monopoly Administration which were held at the reference date in individually-owned spirits warehouses should have been granted relief from duty at the rate of DM 80 per hectolitre without previously having been liable to any tax whatever, whilst spirits held in the storage tank did not qualify for comparable relief.

11 In the course of the procedure before the Court the plaintiff in the main action gave a different description of the facts of the case and of the basis of its claim for a refund. It alleged, without being contradicted by the Oberfinanzdirektion, that it had paid the marginal element of the monopoly equalization duty amounting to DM 16.05 per hectolitre on the spirits placed in its storage tank and that the same amount per hectolitre was refunded to it. It considered on those facts that the system of relief established by the ministerial circulars had not been applied to it and that was the basis of its claim for the relief of DM 80 per hectolitre.

12 It is, however, not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver.

13 The Finanzgericht took as its starting point the premise that the problem to be resolved concerns discrimination between, on the one hand, monopoly spirits which qualify for the fixed reimbursement without having previously been subject to tax and, on the other, imported spirits in respect of which the fixed reimbursement was intended to compensate for the previous payment of the marginal element of the monopoly equalization duty. The Finanzgericht inclines to the view that this aspect of the system of relief infringes Article 95 of the EEC Treaty and, so far as spirits imported from Greece are concerned, Article 53(1) of the Association Agreement with Greece.

14 The Finanzgericht nevertheless took into account the fact that according to certain decisions of German courts the system of relief must be classified as a subsidy measure in view of its close link with the marketing of monopoly spirits, the deficit of which is made good out of the State budget. Furthermore the Oberfinanzdirektion claimed that Article 37 of the Treaty, which governs national monopolies such as the German monopoly in spirits, excluded the application of the provisions of Article 95.

15 In order to be enabled to resolve these problems, the Finanzgericht has referred to the Court the following three questions:

"1. Must Article 95 of the EEC Treaty and Article 53(1) of the Agreement establishing an Association between the European Economic Community and Greece and Article 37 of the EEC Treaty be construed as meaning that the criteria laid down in those provisions are applicable to a measure adopted by a State which in connection with an increase in the duty on spirits and the granting of aid to particular domestic producers of spirits provides for relief to be granted through the tax assessments in respect of spirits which were in stock at the time of the said measure, but on which duty has not yet been charged, or does the relief of the said type fall to be judged in the light of the provisions on aids contained in Article 92 et seq. of the EEC Treaty?

2. If the provisions of Article 37 and/or Article 95 of the EEC Treaty and Article 53(1) of the Association Agreement are applicable:

Are those provisions to be construed as meaning that they confer upon importers a legal right to demand that spirits imported from other Member States be relieved of duty in the same way as domestic spirits on the basis of general administrative instructions, irrespective of whether under national law the relief is classifiable as a subsidy or as a tax concession and regardless of whether under national law the relief is lawful or unlawful?

3. If the provisions on aids are applicable:

Does the principle of equality, generally applicable in Community law, confer upon importers of goods a legal right to demand that importers

of spirits from other Member States receive subsidies in the same way as other importers or domestic producers of spirits or dealers in spirits?"

16 The first two questions, which concern the classification for the purposes of Community law of a system of relief of the kind forming the subject-matter of the dispute in the main action, should be considered together.

17 These questions are essentially designed to ascertain whether a system of relief, which was introduced on the basis of administrative instructions in connection with an alteration in the tax on spirits following an adjustment of the national monopoly in spirits, must be judged on the basis of Article 95 of the Association Agreement with Greece or whether that is precluded by an application of Article 37 of of Articles 92 and 93 of the Treaty, and, in the former case, whether the importer may rely upon the provisions in question before a national court.

18 As the Commission has rightly submitted, the legal classification in Community law of a national measure does not depend upon how that measure is viewed or appraised in the national context. The need to ensure that the provisions of the Treaty are applied in a uniform manner throughout the Community requires that they should be interpreted independently.

19 According to a consistent line of decisions of the Court Article 95 is intended to cover all taxation procedures which conflict with the principle of equality of treatment of domestic products and imported products. Accordingly that provision applies to measures of relief which, within the framework of an increase in taxes on spirits, accord more favourable treatment to similar domestic products than to imported products even though such measures were adopted on the basis of administrative instructions.

20 It should further be recalled that the Court, in its judgment of 25 November 1981 (Case 4/81 *Andresen* [1981] ECR 2835) decided that the term "taxation" contained in Article 95 of the Treaty must be regarded as covering, in so far as the selling price for spirits fixed by a national monopoly is concerned, only that part of the price which the monopoly is

required by law to remit to the State Treasury as a tax on spirits, determined as to amount, to the exclusion of all other elements or charges, economic or other, included in the calculation of the monopoly selling price.

21 It follows that a tax component included in the taxation of imported spirits and corresponding to a non-tax component in the selling price of spirits marketed by the Federal Monopoly Administration is discriminatory. Consequently if the same amount of relief is available in respect of different taxes imposed on imported spirits on the one hand and on the domestic spirits of a monopoly on the other the less favourable tax treatment of the imported spirits continues and the said discrimination subsists.

22 In those circumstances it is irrelevant to establish whether such measures of relief may also be considered as aid within the meaning of Articles 92 and 93 of the Treaty. it is clear from the case-law of the Court and in particular from the judgment of 21 May 1980 (Case 73/79 *Commission* v *Italy* [1980] ECR 1547) that a measure carried out by means of discriminatory taxation, which may be considered at the same time as forming part of an aid within the meaning of Article 92, should in any case be governed by Article 95.

23 Likewise the fact that the measures of relief are linked to the adjustment of the national monopoly in spirits does not lead to a different conclusion. As the Court has stated in its judgment of 13 March 1979 (Case 86/78 *Peureux* [1979] ECR 897) the rules contained in Article 37 of the Treaty concern only activities intrinsically connected with the specific business of the monopoly in question. They are thus irrelevant to national provisions which have no connection with such specific business, like those concerning relief for spirits on which tax was previously charged.

24 It follows from the foregoing that Article 95 of the EEC Treaty applies to a national system of relief which accords, on the basis of administrative instructions, less favourable treatment to spirits coming from other Member States than to similar domestic products. Since Article 95 is directly applicable the importer of spirits coming from other Member States may rely upon it before the national courts.

25 Article 53 (1) of the Association Agreement with Greece is worded as follows:

"Neither Contracting Party shall impose, directly or indirectly, on the products of the other Contracting Party any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Neither Contracting Party shall impose on the products of the other Contracting Party any internal taxation of such a nature as to afford indirect protection to other products.

The Contracting Parties shall, not later than the beginning of the third year after the entry into force of this Agreement, repeal any provision existing at the date of its entry into force which conflicts with the above rules."

26 That provision, the wording of which is similar to that of Article 95 of the Treaty, fulfils, within the framework of the Association between the Community and Greece, the same function as that of Article 95. It forms part of a group of provisions the purpose of which was to prepare for the entry of Greece into the Community by the establishment of a customs union, by the harmonization of agricultural policies, by the introduction of freedom of movement for workers and by other measures for the gradual adjustment to the requirements of Community law.

27 It accordingly follows from the wording of Article 53 (1), cited above, and from the objective and nature of the Association Agreement of which it forms part that that provision precludes a national system of relief from providing more favourable tax treatment for domestic spirits than for those imported from Greece. It contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. In those circumstances Article 53 (1) must be considered as directly applicable from the beginning of the third year after the entry into force of the Agreement, on which date all measures conflicting with that provision was, by virtue of its third subparagraph, to be abolished.

28 Accordingly the reply to the first and second questions must be that an importer of spirits from other Member States may rely before a national

court on the first subparagraph of Article 53 (1) of the Association Agreement with Greece against the application of national measures of tax relief for spirits, intruduced on the basis of administrative instructions in connection with an alteration in the taxes on spirits following the adjustment of the national monopoly in spirits if such measures have the effect of according less favourable treatment to such spirits than to similar domestic products.

29 In view of that reply it is unnecessary to consider the third question which concerns the detailed rules for the application of Articles 92 and 93 of the Treaty.

Costs

30 The costs incurred by the Commission of the European Communities, which has 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 proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in answer to the questions submitted to it by the Finanzgericht Hamburg by order of 31 October 1981, hereby rules:

An importer of spirits coming from other Member States or from Greece may rely before a national court on the provisions of Article 95 of the Treaty or of the first subparagraph of Article 53 (1) of the Association Agreement with Greece against the application of national measures of tax relief for spirits, introduced on the basis of

administrative instructions in connection with an alteration in the taxes on spirits following the adjustment of the national monopoly in spirits if such measures have the effect of according less favourable treatment to such spirits than to similar domestic products.

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 29 April 1982.

For the Registrar

A. W. H. Meig

Legal Secretary

G. Bosco

President of the First Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 28 JANUARY 1982 [1]

Mr President,
Members of the Court,

The Finanzgericht [Finance Court] Hamburg, has made a reference to the Court for a preliminary ruling on the interpretation of Articles 37, 92 et seq. and 95 of the EEC Treaty and of the provision, corresponding to the last-mentioned article, contained in the Agreement of 1961 establishing an association between the EEC and Greece.

The facts are as follows:

I — The dispute is between Pabst & Richarz KG, an importer of spirits produced from wine (Branntwein aus Wein) and the Federal Finance Administration.

1. The dispute arises from the transitional measures adopted by the competent authorities of the Federal Republic of Germany following the judgments of the Court of February 1976 in which the Court ruled in substance that prohibitions on imports [1] and taxes on imports [2] in favour of national monopolies and the component, known as the Monopolausgleichspitze [marginal element of the monopoly equalization duty], of the tax applied to imported spirits (judgment of 17 February 1976, in Case 45/75 *Rewe* [1976] ECR 181) were contrary to the Treaty.

1 — Translated from the French.

1 — 3 February 1976, *Manghera*, Case 59/75 [1976] ECR 91.

2 — 17 February 1976, *Miritz*, Case 91/75 [1976] ECR 217