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.

accordance with Article 151 (1) of the Law on the Monopoly in Spirits imported spirits are liable to the monopoly equalization duty [Monopolausgleich]. After the delivery of the judgments of the Court of Justice in the *REWE* case (judgment of 17 February 1976, *REWE Zentrale des Lebensmittelgroßhandels GmbH* v *Hauptzollamt Landau-Pfalz*, Case 45/75 [1976] ECR 181) and the *Miritz* case (judgment of 17 February 1976, *Hauptzollamt Göttingen* v *Wolfgang Miritz GmbH & Co*, Case 91/75 [1976] ECR 217), the Law amending the Law on the Monopoly in Spirits [Gesetz zur Änderung des Gesetzes über das Branntweinmonopol] was issued on 2 May 1976 (Bundesgesetzblatt I, p. 145) which *inter alia* laid down that the spirits surcharge and the monopoly equalization duty correspond to the tax on spirits.

Article 79 (2) of the Law on the Monopoly in Spirits, as amended by the Law amending the Law on the Monopoly in Spirits of 13 July 1978 (Bundesgesetzblatt I, p. 1002), provides, in the case of three groups of producers of spirits having a low annual production, for a reduction of 21% in the rate of tax, with, with a 30.5% reduction where the spirits are produced exclusively from stone-fruit, berries or gentian roots. Amongst the producers qualifying for the relief are, first, the so-called *Verschlußkleinbrennereien* [small bonded distilleries] with an annual production not exceeding 4 hectolitres of ethyl alcohol. Under Article 57 of the Law on the Monopoly in Spirits a second group is formed by the so-called *Abfindungsbrennereien* [distilleries for which production is estimated at a standard level for tax purposes on the basis of the amount of raw materials used], which are taxed in accordance with a special assessment procedure, without recourse to the official bonding procedure which would otherwise apply. According to the Order on Distilleries [Brennereiordnung] *Abfindungsbrennereien* may distil up to 50 litres or up to 3 hectolitres of alcohol per year, depending on the age of their distilling right. The third group which qualifies for the advantages under Article 79 (2) of the Law on the Monopoly in Spirits are the *Stoffbesitzer* [owners of the raw materials used to produce the spirits] within the meaning of Article 36 (1) of the Law on the Monopoly in Spirits who process in a distillery belonging to a second party raw materials which they alone have produced. *Stoffbesitzer* may produce up to 50 litres of alcohol annually in accordance with the assessment procedure laid down for *Abfindungsbrennereien.*

In accordance with Article 41 (1) of the Law on the Monopoly in Spirits both *Abfindungsbrennereien* and *Stoffbesitzer* may use up entirely in a single year of a 10-year period the total amount of ethyl alcohol for that period.

In accordance with the third sentence of Article 151 (1) of the Law on the Monopoly in Spirits, as amended by the Law of 13 July 1978, imported spirits obtain tax advantages corresponding to Article 79 (2) of the Law on the Monopoly in Spirits provided such spirits originate in a distillery with an annual production not exceeding 4 hectolitres of alcohol.

In August 1978 the plaintiff in the main action obtained customs clearance from the Hauptzollamt [Principal Customs Office] Mainz, to put into free circulation Rémy Martin VSOP cognac imported from France; the customs office levied upon the cognac a monopoly equalization duty in accordance with the rate of duty then applicable, DM 1 950 per hectolitre of ethyl alcohol.

When the plaintiff in the main action was unsuccessful in the complaint it lodged against that decision imposing the duty it instituted proceedings before the Finanzgericht Rheinland-Pfalz [Finance Court of Rhineland-Palatinate]. It complained principally that the customs authorities had infringed the prohibition against tax discrimination contained in the first paragraph of Article 95 of the EEC Treaty, because of the fact that imported cognac is taxed more heavily than domestic spirits made from fruit in *Abfindungsbrennereien.* It argued that there is no authority in the first paragraph of Article 95 of the EEC Treaty for the defendant Hauptzollamt's view that the same tax advantages as that enjoyed in

respect of domestic spirits from *Abfindungsbrennereien* may be claimed for imported cognac only if the latter originates from a small distillery in another Member State and has a correspondingly low production.

By an order of 20 December 1977 the Third Senate of the Finanzgericht Rheinland-Pfalz stayed the proceedings and, pursuant to Article 177 of the EEC Treaty, referred the following questions to the Court of Justice for a preliminary ruling:

"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?

Before I give my views on these points in detail I wish first of all to point out that the measure in question in the order for reference resembles the one which has already formed the subject-matter of the judgment of the Court of Justice in the first *Hansen* case. Having regard to what the Court of Justice stated in that judgment the court making the reference therefore rightly wishes the questions submitted to be considered not in relation to Article 37 and 92 *et seq.* of the EEC Treaty but exclusively in relation to Article 95 of the EEC Treaty. In its judgment in the first *Hansen* case the Court of Justice in fact ruled that it was possible for preferential tax arrangements concerning spirits to exist independently of any connexion with a commercial monopoly and that it accordingly appeared preferable to examine the problem raised primarily from the point of view of the rule on taxation, which is conceived in general terms, in Article 95 and not from the point of view of Article 37 which is specific to arrangements for State monopolies. This is all the more justified since, as the Court of Justice stated, Article 37, like Article 95, is based on the principle that all discrimination in trade between Member States must be abolished. In the said judgment the Court of Justice furthermore refrained from considering the matter from the point of view of the provisions on aid in Article 92 *et seq.* and found that Article 95, like Articles 92 to 94, is intended to ensure "the elimination of

State interventions — including tax abatements — which might have the effect of distorting the normal conditions of trade between Member States". These findings must also apply to this case.

I — The first question

By this question the court making the reference wishes to clarify the basic problem whether, in view of the prohibition on discrimination contained in the first and second paragraphs of Article 95 of the EEC Treaty, imported spirits made from fruit may qualify for the tax advantages available for similar domestic products under Article 79 (2) of the Law on the Monopoly in Spirits, and if so under what conditions; that is, whether reductions in taxation which on the national territory are accorded only to small businesses which produce a specified amount must in principle be extended to all imported products even though they do not originate from corresponding small businesses.

The Finanzgericht Rheinland-Pfalz does not disregard the fact that this question has already been dealt with in the judgment of the Court in the first *Hansen* case but expresses doubt as to whether that judgment establishes that the linking of tax concessions to annual production of a specified quantity for both domestic and imported products is in principle compatible with Article 95 of the EEC Treaty. In this connexion the Finanzgericht refers chiefly to the following statements of the Court of Justice at paragraph 20 of the decision and the second paragraph of the operative part of the judgment:

"Where national tax legislation favours certain classes of producers or the production of certain types of spirits by means of tax exemptions or the grant of reduced rates of taxation, even if such advantages benefit only a small proportion of domestic production or are granted for special social reasons, those advantages must be extended to imported Community spirits which fulfil the same conditions, taking into account the criteria which underlie the first and second paragraphs of Article 95 of the EEC Treaty".

The court making the reference considers that, if the words "which fulfil the same conditions" are merely intended to make it clear that the goods in question must be "similar" and that the domestic tax arrangements must be of such a nature as to afford indirect protection to "other products", cognac imported from the Community would always suffer discrimination through the national tax provisions because the imported product, regardless of the conditions under which it is produced abroad, is similar to the favourably-treated spirits made from fruit and the tax provisions are of such a nature as to protect domestic spirits made from fruit. Furthermore it appears impossible to the court making the reference, in view of the further typical characteristics mentioned in Article 79 (2) of the Law on the Monopoly in Spirits which are specific to the Federal Republic of Germany and which have no equivalent abroad, for spirits imported from other Member States ever to fufil the same conditions. If a single characteristic such as a given production limit, is selected from the list of conditions specific to the Federal Republic, as is the case in the third sentence of Article 151 (1) of the Law on the Monopoly in Spirits, and this characteristic is laid down as a condition for equivalent tax relief for imported spirits, it is difficult to refer to "fulfilment of the same conditions". The rule referring to specific production limits contained in the third sentence of Article 151 (1) of the Law on the Monopoly in Spirits would only be

compatible with Article 95 of the EEC Treaty if the Court of Justice had referred to "comparable conditions" instead of to the "same conditions".

The plaintiff in the main action and the Commission, in their observations, consider that the advantages provided for domestic spirits whereby additional tax reductions are available to those spirits must be extended to imported spirits in view of the requirements of Article 95 of the EEC Treaty.

The Commission emphasizes in particular that the principle laid down by the Court of Justice in its judgments of 27 February 1980 in Cases 168, 169 and 171/78 *(Commission* v *France, Commission* v *Italy* and *Commission* v *Denmark),* namely that the Member States should not apply different rates of tax to the same kinds of spirits, should also be applied to the criterion of production limits.

The plaintiff in the main action considers that it is furthermore clear from the previous case-law of the Court of Justice on Article 95 of the EEC Treaty that tax advantages for domestic products are only permissible in so far as they are clear and may in fact be fulfilled in the exporting Member State. In addition, even where the tax reduction is extended to imported goods it must be objectively justified under national law and Community law, that is, it must be necessary, appropriate and suitable for the attainment of a lawful objective. In this case however neither of the conditions has been met.

It appears to me that this submission is based on a mistaken interpretation of the said judgments. I share the view of the Federal Government that — this much may be said at the outset — Article 95 also authorizes tax advantages which are granted within a State exclusively to undertakings with specific production quantities to be applied to imported products only where they come from small undertakings with corresponding production quantities. It is already clear from the above-mentioned judgments, which are plain and unequivocal on this point, that the first question submitted by the Court making the reference should receive an affimative answer in accordance with the foregoing.

Thus the Court of Justice made the following statement in the first *Hansen* case which, as I have already said, concerned a similar question: "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.* Indeed, 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".

The power to make such arrangements, which relates not only to the extent of the advantage but also to the conditions therefor, is a consequence, as I have already stated in my opinion in Cases 168, 169 and 171/78, of the retention by

the Member States of sovereignty in matters of taxation. It is a further consequence of this that at the present stage of Community law the Member States may decide independently the social or economic purposes for which they wish to grant exemptions from or reductions in duties in respect of domestic goods.

Article 95 of the EEC Treaty, which supplements the provisions on the abolition of customs duties and charges having equivalent effect, is intended, as the Court of Justice stated in its judgments in Cases 168, 169 and 171/78, merely to ensure free movement of goods between the Member States in normal conditions of competition "by the elimination of all forms of protection which may result from the application of internal taxation which discriminates against products from other Member States". Article 95 must therefore guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products.

In the first *Hansen* case the Court of Justice also found for that reason that the tax advantages granted must be extended without discrimination to spirits coming from other Member States. The Court also goes on to state in this case, making the position clear, that the provision "does not allow any distinction to be drawn either according to the reasons, whether social or otherwise, for those special systems, or according to the relative importance of such systems as compared with the ordinary taxation system". This sentence merely means that the drawing of a distinction for tax purposes, for social or other reasons, in the relationship between imported and domestic goods would constitute discrimination which is prohibited under Article 95. Therefore in so far as the Court of Justice referred once more expressly to the "same conditions" it did so merely to state this finding with greater clarity.

In addition, paragraph 18 of the decision in that judgment, in which the Court of Justice expressly referred to the practical difficulties regarding similar treatment which might arise in view of the different elements to which the legislation of the different Member States has linked the granting of tax advantages, that it is not only the similarity of the products which must be considered.

Finally, the judgment of the Court of Justice in the *Bobie* case (judgment of 22 June 1976, *Bobie Getränkevertrieb GmbH* v *Hauptzollamt Aachen Nord*, Case 127/75 [1976] ECR 1079) may be taken into account in answering the first question. This judgment, which concerned a graduated beer tax calculated on the annual production, shows clearly that a distinction on the basis of the production of the undertaking may be taken as a criterion in conferring tax advantages. The condition of the permissibility of such a distinction is simply, according to that judgment, that the imported products must also be taxed in accordance with the same criteria. The third paragraph of the operative part of the judgment shows clearly that Article 95 of the EEC Treaty is ultimately intended to preclude discrimination only in respect of the amount of the tax; the Court of Justice stated as follows:

"If therefore a Member State has elected to apply to home-produced beer a graduated tax calculated on the basis of the quantity which each brewery produces in one year, the first paragraph of Article 95 is only fully complied with if the foreign beer *is also taxed at a rate,*

the same or lower, applied to the quantities of beer produced by each brewery during the period of one year."

Contrary to the Commission's view, it is impossible to draw a different conclusion from the judgments of the Court of 27 February 1980 in the said actions for declarations that certain Member States had failed to fulfil obligations under the Treaty brought against France, Italy and Germany. In these judgments it was, instead, expressly confirmed, referring to the first *Hansen* judgment, that a distinction for domestic tax purposes according to the size of an undertaking may in principle be applied to imported products if it is established that certain domestic products will not benefit therefrom. The Court expressly emphasized that such distinctions for tax purposes were to be considered lawful where they serve "to enable productions or undertakings to continue which would no longer be profitable without these special tax benefits because of the rise in production costs", in so far as they are not understood as "legitimating tax differences which are discriminatory or protective". However, in the said applications for declarations that certain Member States had failed to fulfil obligations under the Treaty precisely the charge levied against the Member States in question was that they gave favourable treatment for tax purposes to categories of domestic spirits as against spirits which were practically not produced at all on the national territory and thereby discriminated against the foreign products which were to be considered similar to or in competition with the domestic products. On the other hand taxation which is graduated exclusively in accordance with production and which is also applied to imported products is not discriminatory and is not of a protective nature if comparable imported products are subject to a similar or lower rate of tax. Furthermore, it should be noted in conclusion in this connexion that the view advanced by the Commission and the plaintiff in the main action that, having regard to Article 95 of the EEC Treaty, all imported spirits made from fruit must benefit from the tax relief provided for in Article 79 (2) of the Law on the Monopoly in Spirits even though they do not come from a small distillery with limited production, would lead to all imported spirits, even if they come from large-scale distilleries, being subject to the reduced rate of tax whilst, as we have heard, only 5% of domestic production qualifies for that rate. This would however further mean that domestic large-scale producers, in addition to the general uniform rate, could also claim the advantage with the result that Article 95 of the EEC Treaty would ultimately lead to an infringement of national sovereignty in tax matters which, as we have seen, was not intended.

Finally, it is also necessary to reject the argument of the plaintiff in the main action that the abolition of the tax advantage in question constitutes the sole proper application of Article 95 of the EEC Treaty. The principles developed by the Court of Justice on indirect discrimination indeed make it clear that the criteria to which the tax advantage is linked under national law may not take such a form that they may readily be met by domestic producers but not by foreign manufacturers. Such indirect discrimination might occur if foreign producers, regardless of the criterion of the production limit could only qualify for

the tax advantage if the spirits in question originated from *Verschluß-kleinbrennereien, Abfindungsbrennereien* or from the stock of a *Stoffbesitzer.* These circumstances, brought about by historical and regional factors, are certainly not set up as a condition for imported spirits' also qualifying for that advantage.

The fact that this particular feature of the domestic tax arrangements ultimately does not require to be abolished provided it does not lead to discrimination against imported products is made clear by the judgment of the Court of Justice of 8 January 1980 in the action for a declaration that the Italian Republic had failed to fulfil its obligations under the Treaty *(Commission* v *Italian Republic,* Case 21/79 [1980] ECR 1) in which the Court stated the following:

"Although the first paragraph of Article 95 therefore places Member States under an obligation to extend the tax advantages accruing to domestic products to similar products imported from the other Member States as well provided that the latter products satisfy the conditions to which a reduced rate or an exemption have been made subject, it does not however impose upon the Member States the duty to abolish as regards internal taxes on domestic products differences which are objectively justified and which may be introduced by domestic legislation unless such abolition is the only way of avoiding direct or indirect discrimination against the imported products".

II — The second question

Since the first question is accordingly to be answered in the affirmative the further questions which were submitted in the alternative need to be considered only briefly in the remaining part of my opinion. The court making the reference wishes to establish whether, apart from the fixing of a production limit as a condition of tax relief, other circumstances may not give rise to advantages which must be taken into account in order to satisfy the requirements of Article 95 of the EEC Treaty, either by increasing the rate of relief of the monopoly equalization duty in the case of imported products or by altering the maximum limit for an udertaking's annual production for distilleries in the other Member States.

To understand this question it must be explained that spirits produced in what are known as *Abfindungsbrennereien* are taxed at a fixed rate on the basis of the quantity of raw materials used. The estimate of the quantity of raw materials used corresponds, as we have heard, to an amount which the administration considers standard following comparative tests. In this connexion the legislature of necessity takes as its basis the most unprofitable undertakings in order to prevent them suffering a disadvantage. It follows in turn from this that undertakings which are more profitable are able to attain a yield in excess of the "standard" yield which, as all the parties have conceded, averages 20% and in certain cases may indeed amount to 50% or 60% net. Thus, according to the submission of the plaintiff in the main action and the Commission, domestic small distilleries, which in principle only quality for the tax advantage up to an annual production limit of 50 litres or 3 hectolitres in fact produce up to 5 hectolitres without loosing their privileged status whilst foreign producers do not qualify for the tax reduction once their production exceeds 4 hectolitres.

The plaintiff in the main action and the Commission consider that in this matter foreign producers, who, except for those in Luxembourg, are not subject to any equivalent tax arrangements, suffer discrimination in relation to domestic producers.

It has been further submitted that *Stoffbesitzer* are granted the same benefits as *Abfindungsbrennereien.* Since *Stoffbesitzer* may also have entirely at their disposal the whole quantity of spirits to which the estimation procedure applies including the tax-free excess yield the *Abfindungsbrennereien* and the majority of the *Stoffbesitzer* create large-scale economic units which may no longer be described as "small distilleries".

The purpose of assessing certain distilleries for taxation over a given period is to take account of differing crop yields so as to ensure that bad harvests in certain years may be set off against surpluses in good years. This also constitutes an advantage which is not conferred upon imported products which are manufactured by corresponding distilleries in the other Member States since the production limit of 4 hectolitres of ethyl alcohol, which is fixed annually, applies to them unchanged.

The Federal Government considers that the prohibition on tax discrimination contained in Article 95 of the EEC Treaty on the other hand does not apply to the technical tax rules relating to the levying of the tax on *Abfindungsbrennereien* if only because they form the most practical technical means of levying taxation whose side-effect of conferring advantages in social and agricultural matters, whilst only on a limited scale, is desirable. The same applies to *Abschnittsbrennereien,* in the case of which purely procedural arrangements for overcoming surpluses of fruit are involved which do not affect the amount of tax to be paid during the period as a whole.

In appraising these arguments it is first of all necessary to point out, as does the plaintiff in the main action, that the Court of Justice, in its settled case-law (see the judgment of 27 February 1980 in Case 55/79, *Commission* v *Ireland* [1980] ECR 481, with documents), has decided that it is necessary for the purposes of the application of the prohibition on discrimination laid down in Article 95 to take into consideration the provisions relating to the basis of assessment and the *detailed rules for levying* the various duties in addition to the rate of tax in which connexion the decisive criterion of comparison is the actual effects of each tax on domestic production on the one hand and on imported products on the other. As the Court of Justice emphasized in its judgment of 27 February 1980 in the proceedings instituted against France, Italy and Denmark for declarations that they had failed to fulfil their obligations under the Treaty it is sufficient therefore "to examine whether the application of a given national tax system is discriminatory or, as the case may be, protective, in other words whether there is a difference in the rate or the detailed rules for levying the tax and whether that difference is likely to favour a given domestic production". This point must ultimately be settled by the court making a decision on the substance of the case.

In considering the question whether there exists a distinction which is not objectively justified, that is, discrimination for the purposes of Article 95 of the EEC Treaty, it is necessary to take into consideration the fact that, in view of the large number of small distillers and of the small quantities which may be produced in *Abfindungsbrennereien,* it is technically impossible from the point of view of the levying of the tax, having regard to the disproportionate expenditure of funds and staff, "to bond" all these undertakings and to exercise individual supervision over them. Accord-

ingly, taxation at a fixed rate is the only practicable solution concerning such undertakings, of which, as we have heard, there are approximately 30 000. Since on the other hand the producer's markets in other Member States differ structurally it is, as has already been stated, objectively justified to link imports from such States to production limits.

When we turn to the question whether the estimation procedure applied to domestic spirits is protective in the sense that it is capable of imposing on domestic products a lower tax burden than that on corresponding products imported from other Member States it is naturally impossible to disregard the fact that every system embodying a fixed rate of tax of necessity proceeds on the basis of average values. It is in fact an inescapable feature of the system that these values may in fact in individual cases be exceeded whilst in others they are not reached. Accordingly it only remains to consider whether taxation at a fixed rate as such is capable of conferring upon domestic spirits additional advantages over corresponding imported products in the form of the so-called tax-free excess yield and of average distillation figures over a certain period.

The answer to the foregoing must however be in the negative for the following reasons: the factor common to all three groups which qualify for advantages under Article 79 (2) of the Law on the Monopoly in Spirits is that the annual production limit prescribed for them in connexion with the tax advantage does not exceed 4 hectolitres of ethyl alcohol per year. In the case of the great majority within these groups, that is, most of the *Abfindungsbrennereien* and the *Stoffbesitzer,* the annual production limit amounts to 50 litres, whilst a minority of the *Abfindungsbrennereien* may produce not more than 3 hectolitres of alcohol in order to qualify for the tax advantage. Even if an average excess yield of 20% is assumed — this figure seems to be the rule since the legislature, in fixing the estimated values, must of necessity take the unprofitable undertakings into account so that they are not placed at a disadvantage — the annual production limit usually does not exceed the so-called "production limit for qualifying for monopoly benefits" of 4 hectolitres per year which also applies to foreign products. As an additional point — and this appears to me an important aspect — the rate of yield which applies in certain cases is required by the law to be adjusted at the latest whenever cases of deviations of 20% or more occur. However, as we have heard, such adjusted or special rates of yield are in practice the rule whilst the regular rate of yield constitutes the exception. Since in practice a fluctuation from the officially fixed rates of yield may be either above or below that rate in certain cases the result may be that there is a complete absence of any tax-free excess yield. In addition regard must be had for the point that domestic *Verschlußkleinbrennereien* may only distil and qualify for tax advantages up to a maximum production limit of 4 hectolitres up to a rate of 21% or 30.5% and do not obtain any tax-free excess yield.

Furthermore the plaintiff's endeavour to call in question the status of *Abfindungsbrennereien* as small undertakings because the majority of *Stoffbesitzer* have their products distilled by contract work in the latter is not convincing. In fact the quantities of spirits produced in an *Abfindungsbrennerei* by *Stoffbesitzer* actually do not constitute in law or in

fact a total production from a *single* distillery unit but a corresponding number of independent, individual production figures. Under German tax law *Stoffbesitzer* are in fact producers of spirits and accordingly are also treated as persons liable to tax. For example Article 174 (3) of the Brennereiordnung [Distilleries Order] requires that the raw materials of the various *Stoffbesitzer* be stored and distilled separately from one another. The contract work carried out by the *Abfindungsbrennereien* for *Stoffbesitzer* accordingly cannot be ascribed to the former. Furthermore Article 116 of the Brennereiordnung prescribes legal limits for plant for *Abfindungsbrennereien*, thereby ensuring that the production capacity of the latter as such does not attain the scale of large distilleries.

A distinction must be drawn between the question of the amount of production and the question of distribution. In relation to the tax benefit the German arrangements, both as regards domestic and as regards corresponding imported products, are linked only to a limit on production and not however to the marketing process. It is therefore possible for domestic small distilleries, as indeed for their counterparts in the other Member States, to distribute in common or through large-scale distilleries.

Finally, contrary to the view of the plaintiff in the main action, the right laid down for German small distillers to have their distillation operations assessed by way of average distillation figures over a period does not constitute discriminatory tax arrangements for purposes of Article 95 of the EEC Treaty since these are purely procedural arrangements for dealing with fruit surpluses which do not affect the amount of tax to be paid during the period taken as a whole. As the Federal Government rightly states, compliance with the annual production limit applicable to each distillery can be checked in the Federal Republic of Germany if a distillery exercises its right to have its operations assessed by way of average distillation figutes over a specified period. If that right were extended to foreign distilleries it would however be possible for any imported product coming from an undertaking which in the course of the current production year produces less than ten times the annual production limit to qualify for the reduced rate of tax since in the other Member States there is no check extending to the future regarding quantities distilled.

In concluding my remarks reference should also be made to the fact that the Government of the Federal Republic of Germany, through a note verbale of 23 April 1976, gave formal notice in accordance with Article 93 (3) of the EEC Treaty to the Commission of the amendments, made to its legislation, *inter alia* to Articles 79 and 151 of the Law on the Monopoly in Spirits, on the basis of the judgments of the Court of Justice in Cases 45/75, 59/75 and 91/75. Since the Commission examined the provisions which were notified to it and did not raise any objections it is clear that the Commission, contrary to its present submissions, did not then consider that the legislation constituted aids granted by States for the purposes of Article 92 of the EEC Treaty and incompatible with the common market which, by favouring the production of certain goods, distorted or threatened to distort competition.

III — I accordingly propose that the questions submitted by the Finanzgericht should be answered as follows:

1. The first and second paragraphs of Article 95 of the EEC Treaty must be interpreted as meaning that if in a Member State specified kinds of spirits or specified groups of producers benefit from a reduction in or exemption from tax corresponding benefits must also be extended without discrimination and without having a protective effect to similar or competing products imported from Community countries. Accordingly imported spirits only qualify for these advantages if they fulfil the criteria laid in national legislation.

2. The imposition of taxation at a fixed rate, which provides for certain reductions in the rate of taxation in relation to a production limit, as is the case for example with *Abfindungsbrennereien* and distillation by way of average distillation figures over a specified period, is not discriminatory and does not have any protective effect for the purposes of the third and second paragraphs of Article 95 of the EEC Treaty if that taxation as such does not generally confer an advantage upon domestic products over similar or competing imported products.