JUDGMENT OF THE COURT
OF 13 MARCH 1979 [1]

S.A. des Grandes Distilleries Peureux v Directeur des Services Fiscaux de la Haute-Saône et du Territoire de Belfort (preliminary ruling requested by the Tribunal de Grande Instance, Lure)

"French alcohol monopoly"

Case 86/78

1. *References for a preliminary ruling — Interpretation of Community law — Relevance to the proceedings before the national court — Assessment — Jurisdiction of national court*
   (EEC Treaty, Art. 177)

2. *State monopolies of a commercial character — Internal taxation — Domestic products more heavily burdened than products imported from other Member States — Admissibility*
   (EEC Treaty, Arts. 37 and 95)

1. It is for the national court pursuant to the separation of jurisdiction on which Article 177 of the Treaty is based to decide how far the interpretation of Community law is necessary for it to give its judgment.

2. Whether or not a domestic product is subject to a commercial monopoly, neither Article 37 nor Article 95 of the EEC Treaty prohibits a Member State from imposing on that domestic product internal taxation in excess of that imposed on similar products imported from other Member States.

In Case 86/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Grande Instance, Lure, for a preliminary ruling in the proceedings pending before that court between

1 — Language of the Case: French.

S.A. DES GRANDES DISTILLERIES PEUREUX, Fougerolles (Haute-Saône),

and

DIRECTEUR DES SERVICES FISCAUX DE LA HAUTE-SAÔNE ET DU TERRITOIRE DE BELFORT, Vesoul,

on the interpretation of Articles 7, 12, 34, 37 and 95 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The judgment making the reference to the Court and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The case which has come before the national court and for the purposes of giving judgment in which the latter has referred a question for a preliminary ruling to the Court of Justice is concerned with whether the charge called "cash adjustment" [soulte] is compatible with Community law; this charge must be paid by French distillers of alcohol subject to the monopoly when under Article 269 of Annex II to the Code Général des Impôts [General Tax Code], which was inserted into the Code by Decree No 74/91 of 6 February 1974 (Journal Officiel de la République Française of 8 February 1974, p. 1476) and subsequently supplemented by Decree No 77/842 of 25 July 1977 (Journal Officiel de la République Française of 27 July 1977, p. 3928), the administration of the monopoly agrees to the producers' request to leave them to

dispose freely of the alcohol reserved for the State.

2. The French State has a monopoly in the national production and marketing of ethyl alcohol (Article 358 *et seq.* of the Code Général des Impôts). It does not however engage in production itself but leaves this to private undertakings whilst retaining the property in the production which it buys and markets itself (Article 358 in conjunction with Article 370 of the Code Général des Impôts). Until 1974 it further reserved to itself the import of alcohol from abroad including that from other Member States (Article 385 of the Code Général des Impôts in the pre-1974 version).

There are two exceptions to the monopoly in the property of ethyl alcohol so produced:

(a) Certain potable spirits listed in Article 358 of the Code Général des Impôts are not subject to the monoply;

(b) Article 269 of Annex II to the Code Général des Impôts (Decree No 74/91 of 6 February 1974), which entered into force on 1 April 1974, provides: "If so requested the Service des Alcools may allow producers freely to dispose of certain alcohol reserved to the State upon payment of a cash adjustment the rate of which may not exceed the difference between the highest sale price of State alcohol and the lowest purchase price of alcohol of agricultural origin produced within the quotas during the previous marketing year."

This cash adjustment is intended to compensate for the loss suffered by the State in foregoing its right to the monopoly.

Article 269 was amended with effect from 29 July 1977 by Article 1 of Decree No 77/842 of 25 July 1977 which on the one hand substituted "freely to dispose of alcohol" for "freely to dispose of certain alcohol" and moreover added to the former version the following sentence: "These rules shall also apply to importers of the same alcohol originating in and coming from Member States of the European Economic Community or originating in non-member countries and put into free circulation in one of those Member States."

3. The Peureux distillery, the plaintiff in the main action, contends that the "cash adjustment" payable by the distiller on being allowed freely to dispose of the alcohol which it produced in the period prior to the amendment of the aforesaid Article 269 by Decree No 77/842 of 25 July 1977 is incompatible with Community law; the ground alleged is that the requirement of such "cash adjustment" constitutes discrimination against "freed" French alcohol in relation to alcohol originating from other Member States which did not pay the cash adjustment before 1977.

4. The system for potable alcohol imported from other Member States in relation to that for national alcohol "freed" and chargeable on this account with the cash adjustment has varied during the course of time and it seems possible to distinguish three periods:

I. Before 1 April 1974 (the date of entry into force of Decree No 74/91)

Products with an alcoholic base both from other Member States and third countries were subject, when in derogation from the monopoly their import was authorized, to a surcharge on the alcohol which they contained (Article 386 of the Code Général des Impôts).

II. After the entry into force of Decree No 74/91 (1 April 1974) and before the amendment by Decree No 77/842 (29 July 1977)

— Alcohol "freed" under Article 269 of Annex II to the Code Général des Impôts paid the *cash adjustment* provided for thereunder.

— The system for imported ethyl alcohol is governed by Articles 273 and 275 of the same Annex II.

(a) The import monopoly is maintained in respect of ethyl alcohol not usable or consumable without further processing (first paragraph of Article 273).

(b) Ethyl alcohol usable or consumable without further processing may be imported freely but its import whether from third countries or other Member States is subject to the payment of a *"compensatory surcharge"* on the pure alcohol contained in the product equal "to the difference between the lowest purchase price paid by the Service des Alcools at the end of the previous marketing year and the sale price of alcohol intended for the corresponding use" (second and third paragraphs of Article 273). This wording is similar to that of Article 269 of Annex II in respect of the calculation of the cash adjustment.

(c) Products "intended for drinking containing ethyl alcohol" coming from other Member States are exempt from the compensatory surcharge "until the entry into force of a Community organization of the market in alcohol" but subject "when the minimum sale price of neutral potable alcohol in the country of origin is less than the sale price in France for the same use" to a *compensatory charge* equal to the difference between the two prices (second paragraph of Article 275).

(d) Potable wine-spirits of other Member States made by the distillation of wine originating in the Community is not liable to the compensatory charge but to the *cash adjustment* provided for in Article 269 (third paragraph of Article 275).

III. After the amendment of Annex II by Decree No 77/842 (29 July 1977)

The position of national alcohol which the monopoly allows to be freely disposed of by the producer remains unchanged; it is subject to the *cash adjustment* provided for in Article 269 of Annex II.

The position of imports from third countries remains unchanged. The State retains the monopoly of import of ethyl alcohol not usable or consumable without further processing. The import of usable or consumable products is free but subject to the *compensatory surcharge.*

It seems that the monopoly is also abolished in respect of crude alcohol (products not usable or consumable without further processing) from other Member States so that the import both of crude alcohol and products usable and consumable without further processing and products containing potable ethyl alcohol is free and exempt from the

compensatory surcharge whilst the compensatory charge is abolished. On the other hand imported alcohol from other Member States pays the same *cash adjustment* as the equivalent French product when it is "free".

5. Having regard to the above rules which it considers incompatible with Article 37 (adjustment of monopolies) and alternatively with Articles 5 and 7 of the Treaty the plaintiff in the main action has brought proceedings against the French administrative authority concerned before the Tribunal de Grande Instance, Lure, with a view to obtaining an order for the repayment of the "cash adjustments" which it has paid amounting to FF 399 435 between 6 February 1970 and 6 October 1976 on potable spirits made by it from Williams pears and in respect of which it had sought and obtained the right of free disposal.

The national court before which the matter was brought found that under the French law the claim was barred in respect of payments made before 31 December 1974; before deciding on the remainder of the claim it stayed the proceedings and referred to the Court of Justice for a preliminary ruling the question whether the existence of the French State monopoly for the production of certain potable spirits involving the levy by the State of a resale adjustment [soulte de rétrocession] where the sale of such spirits is entrusted to the producer is compatible since 1 January 1975 or subsequently with the provisions of Article 37 of the Treaty of Rome prohibiting any discrimination between nationals of Member States of the European Economic Community in respect of imports and exports.

6. It seems possible to infer from these findings of the national court regarding the application of the limitation period to the part of the claim relating to payments prior to 1 January 1975, the wording of the question referred to the Court and the date of the last payment at issue that the legal position to be taken into account in order to reply to the question raised is solely that resulting from the national law at issue as amended by Decree No 74/91 of 6 February 1974 and before its amendment by Decree No 77/842 of 25 July 1977. In spite of this it is apparent from certain recitals in the judgment making the reference that the national court is seeking elucidation on the position after the entry into force of the decree of 25 July 1977.

7. The judgment making the reference to the Court was registered at the Court on 28 March 1978. The French Government and the Commission of the European Communities submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

II — Observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the French Government

The French Government observes in the first place that in questioning the so-called resale adjustment the court making the reference is questioning the very existence of the monopoly for alcohol in France. The adjustment is the consideration for renunciation by the State of its right to the alcohol. If it were possible for a French producer to dispose freely of his alcohol without paying the

adjustment, the very principle of reservation of the alcohol to the State would become devoid of substance. In providing that State monopolies of a commercial character shall be adjusted Article 37 of the Treaty does not require their abolition but simply that they shall be adjusted in such a way so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

In the present case the question amounts to whether the actual system of the cash adjustments as a result of the adjustments which have been made to the monopoly in alcohol by France in performance of its Community obligations has a discriminatory character or not.

Turning to consideration of this question the French Government distinguishes the system for crude alcohol from that from products containing ethyl alcohol.

(a) Crude alcohol

The French Government considers that the levy provided for involves no discrimination either on export to other Member States or on the home market. In the event of export of freed alcohol the adjustment is not in fact levied.

On the home market the French producer of crude alcohol reserved to the State pays an adjustment in order to dispose of his product. Since the reform of 1977 the importer of alcohol from other Member States pays the same adjustment so that there is no discrimination between the nationals of Member States.

(b) Alcoholic products usable and consumable without further processing

In the view of the French Government it is necessary to distinguish between the position prior to Decree No 77/842 of 25 July 1977 and that resulting from the adjustments made by that decree.

Before 1977

On the home market manufacturers of products containing freed alcohol paid the adjustment but from the point of view of competition it was compensated for by the compensatory charge (Article 275 of Annex II to the Code Général des Impôts inserted by Decree No 74/91) to which alcoholic products imported from other Member States were liable. Further in the event of export of alcoholic products the adjustment payable on the freed home-produced alcohol which the products contained was also refunded. There was therefore no discrimination.

After 1977

To honour its Community obligations the French Government proceeded in July 1977 to adjust the French economic system for alcohol. The compensatory charge on the alcohol contained in spirituous beverages from the Common Market was abolished, while the possibility enjoyed by home producers of alcohol reserved to the State of obtaining the right freely to dispose of their products on payment of the adjustment was extended to everybody. All Community crude alcohol may henceforth enter France freely subject only to payment of the said adjustment. The system which has been implemented henceforth concerns only pure alcohol with the result that exemption from the adjustment is no longer possible save in the event of export of crude alcohol.

It follows however from this reform that home manufacturers of products containing ethyl alcohol are ostensibly henceforth treated differently from their competitors in other Member States since only crude alcohol and not alcohol usable or consumable without further processing is subject to the adjustment on import into France under Article 269 (1) of Annex II as amended in 1977. This advantage however is more apparent than real since in the absence of a Community organization of the market in alcohol the national system (of which the adjustment is an essential part) of reserving ethyl alcohol to the State provides guarantees not only to the producers but also to the users of alcohol in so far as the latter enjoy security of supply and the charge imposed on the manufacturers is the consideration for this guarantee.

The French Government concludes that this system and in particular the cash adjustment should not be regarded as having a discriminatory character.

B — Observations of the plaintiff in the main action

After referring in the first place to the facts of the case the plaintiff in the main action stresses that the discrimination of which it complains is that which penalizes the home product in relation to the products of other Member States. Article 37 (monopolies) and Articles 5 and 7 of the Treaty are aimed as much against this discrimination in reverse as against that which is to the disadvantage of the products of other Member States.

The plaintiff in the main action is at one with the French Government in thinking that a distinction must be made between the system before and after Decree No 77/842 of 25 July 1977.

Although in its view there is no longer discrimination since the decree in supplementing Article 269 of Annex II to the Code Général des Impôts has subjected the import of (crude) alcohol from other Member States to the payment of the same cash adjustment as freed national alcohol, the position is different regarding the previous period from the entry into force of Decree No 74/91 of 6 February 1974 to that of Decree No 77/842 of 25 July 1977.

During this period from 1 April 1974 to 29 July 1977 the system of "freed alcohol subject to payment of a cash adjustment" is a State monopoly within the meaning of Article 37 of the Treaty. By reason of the obligation on national producers to deliver their alcohol, the monopoly in alcohol influenced or was liable to influence trade between Member States even in the absence of exclusive rights to import and to export.

The monopoly however in providing for the adjustment in question did not ensure, as required by Article 37, that no discrimination regarding the conditions under which goods are procured and marketed shall exist between nationals of Member States. Further if the cash adjustment is compatible with Article 37 it is incompatible with Articles 5 and 7 of the Treaty.

The French market

The discrimination arises from the fact that "freed" national alcohol pays the cash adjustment and national spiritous beverages containing freed alcohol pay their due proportion thereof whereas alcohol usable or consumable without further processing (including potable alcohol) coming from other Member States enters freely into France without

paying the "cash adjustment". It is not possible to counter this argument by saying that during the same period and under Decree No 74/91 alcohol usable or consumable without further processing and coming from other Member States was subject to the compensatory surcharge (Article 273) or the compensatory charge (Article 275), as the case may be, because it is apparent from the case-law of the Court of Justice and in particular the judgments in Cases 44/75 *Rewe* (German monopoly in alcohol) [1976]1 ECR 181 (judgment of 19 February 1976); 59/75 *Manghera* (Italian monopoly in tobacco) [1976]1 ECR 91 (judgment of 3 February 1976); 91/75 *Miritz* (German monopoly in alcohol) [1976]1 ECR 217 (judgment of 17 February 1976) that the compensatory surcharges and charges are incompatible with the prohibition on discrimination contained in Articles 37, 5, 7 and with Article 95 of the Treaty. Since the prohibitions contained in these provisions have direct effect, the charges on alcohol imported from other Member States were unlawful and not payable. It follows that since the import of alcohol from other Member States is not liable to such compensatory surcharge or charge, there would be discrimination if home-produced alcohol "freed" from the monopoly had nevertheless to pay the cash adjustment. Accordingly the adjustment is incompatible with the prohibition of discrimination contained in Article 37 or that arising from Article 7.

The market of other Member States

In this case discrimination arises from the fact that "freed" French alcohol or French spirituous beverages containing freed alcohol intended for export becomes non-competitive by the imposition of this adjustment which can only increase the cost price and necessarily make the product concerned less competitive on foreign markets.

C — Observations of the Commission

The Commission sets out what it has done regarding adjustment, within the meaning of Article 37 of the Treaty, of the French monopoly in alcohol and states that, applying *inter alia* the principles laid down in the judgment of the Court of 17 February 1976 in Case 91/75 which has already been cited, it prevailed upon the French Government to abolish, as the French Government has done by Decree No 77/842 of 25 July 1977, the compensatory surcharge imposed by Article 273 and the compensatory charge imposed by Article 275 of Annex II to the Code Général des Impôts, as amended by Decree No 74/91 of 6 February 1974, on alcohol coming from other Member States. In the view of the Commission the case in the main action has its origin in the fact (resulting from Decree No 77/842 of 25 July 1977) that "pure alcohol (raw material) contained in imported spirituous beverages" is not subject to the cash adjustment " whereas alcohol contained in spirituous beverages made in France is so subject."

Turning then to consideration of the question raised, the Commission considers that it should be so re-worded as to ask whether it is compatible with the Treaty for a charge such as the resale adjustment referred to above to be imposed on certain traders carrying on their business in the Member State concerned whereas it is not imposed on import on traders carrying on their business in other Member States and making similar products.

In the opinion of the Commission the answer necessitates consideration of the charge in question from the point of view of Articles 37, 34, 95 and 7 of the Treaty in turn.

(a) Article 37 of the Treaty (commercial monopolies)

In the Commission's view this provision is no longer relevant to the present case because, if the French system for alcohol does still constitute a production monopoly, it is no longer a commercial monopoly within the meaning of Article 37 of the Treaty.

— By virtue of Article 222 of the Treaty the exclusive right to the alcohol produced on French territory and which the State claims for itself is compatible with Article 37, whilst the State's exclusive right to market "its own property", that is to say, products whose ownership it reserves to itself, does not depend on Article 37. No doubt by means of its sale policy for alcohol, the property in which it reserves to itself, the State is able to influence trade between Member States, but if so, this would be a matter falling within Article 86 of the Treaty.

— On the other hand the Service des Alcools no longer has exclusive rights to import, export and market alcohol reserved to the State and since such exclusive rights are the very essence of the monopoly their disappearance will necessarily involve the disappearance of the latter. It follows in the view of the Commission that after the end of the transitional period it is no longer possible to have recourse to Article 37 (1) to prohibit discrimination introduced or maintained by a Member State to the detriment of certain of its nationals.

(b) Articles 12 and 34 of the Treaty (charges and measures having an effect equivalent to customs duties or quantitative restrictions on imports)

Since the cash adjustment is imposed on the national production, then whether the latter is for the home market or for export, the adjustment cannot constitute a charge having an effect equivalent to a customs duty on exports nor a measure having an effect equivalent to a quantitative restriction on exports.

(c) The first paragraph of Article 95 of the Treaty (internal taxation)

Article 95 does not prevent the imposition on national products of taxation in excess of that on similar imported products so that the "cash adjustment" in question is not incompatible with Article 95.

(d) Article 7 of the Treaty (discrimination on grounds of nationality)

Although Article 7 is aimed at discrimination on grounds of nationality, it is open to question whether interpreted broadly it ought not to apply to discrimination on grounds of the geographical situation of the production whatever the nationality of the producer.

The following arguments could be advanced in favour of the applicability of Article 7 in such case:

— The principle of non-discrimination is one of the fundamental principles of the Treaty the various provisions of which are only an expression of that principle; therefore its wording may be read as meaning that the prohibition of discrimination covers the nationals of a Member State, or

certain of them, as well as the nationals of other Member States.

— The wording of Article 37, the second paragraph of Article 40 (3) and Article 48 of the Treaty is evidence that the Treaty did not intend to limit the concept of discrimination to the nationals of other Member States.

— The direct effect which Article 7 is recognized as having requires that the provisions of this article are not limited.

— In certain Member States such as the Federal Republic of Germany the fundamental rights could be cited against a charge of this kind in so far as the difference in treatment between national traders and the traders of other Member States is not justified on objective grounds.

The Commission however inclines in favour of regarding Article 7 as applying to the case in question. It puts forward the following considerations in this respect:

— The general structure of the Treaty is based on the implementation of provisions intended to require Member States not to discriminate against the nationals of other Member States leaving to each of them the responsibility for protecting its own nationals. Measures causing discrimination in reverse usually have an aim which is of indirect benefit to the nationals of the Member State concerned as a whole.

— The interpretation which the Commission gives to Article 37 would prevent this provision from prohibiting "discrimination in reserve". Otherwise in the case of products falling within the ambit of that article the Treaty would make it possible to go beyond what is prescribed in Articles 30 and 34.

— The wide nature of the prohibition contained in Article 48 regarding workers is an exception which is not found in Article 52 relating to freedom of establishment

— Although the national provisions referred to in Article 100 of the Treaty may amount to discrimination in reverse they are not prohibited but have to be abolished by harmonization.

— Although Article 92 authorizes certain classes of aid it does not require Member States to grant them. It follows that in neglecting to do so the Member States may discriminate against their nationals.

— The prohibition of discrimination imposed on the Community legislature applies at the Community level whereas the obligations on Member States on the other hand are at the national level.

In conclusion the Commission suggests that the Court should rule that a charge such as that referred to in Article 269 of Annex II to the Code Général des Impôts of the French Republic applying to national products and not affecting similar products originating in or coming from other Member States is not incompatible with the EEC Treaty.

The plaintiff in the main action, represented by J. Imbach of the Strasbourg Bar and P. Didier of the Brussels Bar, the Government of the French Republic, represented by its

adviser, Mr Bessou, the Commission of the European Communities, represented by its Agent, Mr Béraud, made oral observation.

The Advocate General delivered his opinion at the hearing on 14 December 1978.

Decision

1 By judgment dated 6 January 1978, received at the Court on 28 March 1978, the Tribunal de Grande Instance, Lure, referred a question for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Article 37 of the Treaty.

2 This question has arisen in proceedings between the plaintiff in the main action and the French revenue administration and relates to the compatibility with Community law of the charge called "cash adjustment" levied by the administration on ethyl alcohol which, on the producer's application, is left at the producer's disposal and thus freed from the obligation of delivery to the State.

3 The national court, before which came the plaintiff's claim for recovery of the "cash adjustments" which it considered had been unlawfully exacted of it, referred the following question to the Court for a preliminary ruling:

"Is the existence of the French State monopoly for the production of certain potable spirits such as that distilled from Williams pears, involving the levy by the State of a resale adjustment where the sale of such spirits is entrusted to the producer, compatible since 1 January 1975 or subsequently with the provisions of Article 37 of the Treaty of Rome prohibiting any discrimination between nationals of Member States of the European Economic Community in respect of imports and exports?"

4 It appears both from the recitals to the judgment of the national court and the wording of the question that the interpretation of Community law and in particular Article 37 of the Treaty is required to enable the Court to decide whether certain special features of the French monopoly in ethyl alcohol are compatible with Article 37.

5 In this respect the national court distinguishes two successive periods, the first concerning the system for alcohol in force after its amendment by Decree No 74/91 of 6 February 1974 (Journal Officiel de la République Française of 8 February 1974, p. 1476) until its amendment by Decree No 77/842 of 25 July 1977 (Journal Officiel de la République Française of 27 July 1977, p. 3928), the second concerning the same system in force after amendment by the second of these decrees.

6 Although it appears that the only question concerning the national court is the "cash adjustments" paid prior to the entry into force of the Decree of 25 July 1977, it is for the national court pursuant to the separation of jurisdiction on which Article 177 of the Treaty is based to decide how far the interpretation of Community law is necessary for it to give its judgment so that the question will be answered having regard to the situations arising during the two above-mentioned periods.

(a) The period between the entry into force of Decree No 74/91 of 6 February 1974 and of Decree No 77/842 of 25 July 1977

7 During the period in question the State monopoly in ethyl alcohol was basically governed by the provisions of Book 1, Part 1, Title III (Indirect Taxation and Fiscal Monopolies) Chapter I, Section 1, Letter B (Economic System) of the Code Général des Impôts and Annex II to the said code.

8 According to Article 358 *et seq.* of the Code Général des Impôts the effect of the monopoly is that producers of ethyl alcohol established in France or at least in metropolitan France must reserve to the State their production of ethyl alcohol save certain alcohol expressly mentioned in the article.

9 The volume produced is determined by fixed annual quotas allocated, by the Minister responsible to the manufacturers according to their technical capacities.

10 In return for the obligation on the producer to supply it, the monopoly has an obligation to buy the said alcohol at prices periodically fixed by order of the Minister for Finance.

11 The alcohol bought by the State is resold by it for all uses at fixed official prices.

12 Under Article 269 of Annex II to the Code Général des Impôts (introduced by the Decree of 6 February 1974) the Service des Alcools can allow producers, on their application, to dispose freely of certain alcohol, otherwise reserved for the State, subject to the payment of a charge called a "cash adjustment".

13 Thus at the time in question it was necessary to distinguish three categories of ethyl alcohol of the national production, namely *free* alcohol, that is to say, not subject to the monopoly, alcohol *reserved* to the monopoly and bought by it and *freed* alcohol, that is to say, in principle reserved to the monopoly but left at the disposal of producers and subject in that event to the payment of the "cash adjustment".

14 Under Article 385 of the Code Général des Impôts the import of alcohol from abroad is reserved to the State.

15 Nevertheless as regards ethyl alcohol usable or consumable without further processing and spirits and spirituous beverages coming from other Member States Decree No 74/91 of 6 February 1974 in particular, adopted in the context of adjusting the monopoly in implementation of Article 37 of the Treaty, terminated the import monopoly so that since entry into force of the decree such alcohol, spirits and spirituous beverages may be imported from other Member States and marketed in France.

16 Imported alcohol usable or consumable without further processing was under Article 273 of Annex II subject to a "compensatory surcharge" the method of calculation for which resembled the method for calculating the "cash adjustment" levied on freed national alcohol.

17 Article 275 of the same annex however provides that "products intended for drinking containing ethyl alcohol" coming from other Member States are exempt from the compensatory surcharge but subject to a "compensatory charge" when the minimum sale price of neutral potable alcohol in the country of origin is less than the sale price obtaining in France for the same use.

18 The same Article 275 nevertheless provides that ethyl alcohol imported from other Member States is exempt from this "compensatory charge" when such alcohol is identical to the alcohol of the national production which is not subject to the monopoly (free alcohol).

19 It appears from these different provisions, and it is moreover not disputed, that the object, and in any event result, of the "compensatory charge" on potable alcohol imported from other Member States is to prevent such alcohol, when it is the same kind as the national alcohol coming under monopoly, from being marketed in France at a price less than the minimum sale price fixed by the monopoly for the alcohol which it markets.

(b) The period subsequent to the entry into force of Decree No 77/842 of 25 July 1977

20 Following the judgments of the Court of Justice of 17 February 1976 in Case 45/75 *Rewe* [1976] 1 ECR 181 and 91/75 *Miritz* [1976] ECR 217 relating to certain details of the German monopoly in alcohol the Commission considered that the above-mentioned "compensatory charge" was incompatible with the obligation in Article 37 of the Treaty to adjust State monopolies of a commercial character so as to ensure that at the end of the transitional period no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

21 The operative part of the judgment in Case 91/75 *Miritz* is to the effect that after the end of the transitional period, Article 37 prevents a Member State from levying a charge imposed only on products imported from another Member State for the purpose of compensating for the difference between

the selling price of the product in the country from which it comes and the higher price paid by the State monopoly to national producers of the same product.

22 After an exchange of views between the Commission and the French Government the latter adopted Decree No 77/842 of 25 July 1977 which took effect on 29 July 1977.

23 Article 3 of this decree repeals Article 275 of Annex II to the Code Général des Impôts on the levying of the "compensatory charge" on certain alcohol coming from other Member States.

24 Article 2 of the decree provides that products usable or consumable without further processing and containing ethyl alcohol imported from other Member States are also exempt from the "compensatory surcharge" provided for by Article 273 of Annex II.

25 On the other hand under Article 1 of the decree ethyl alcohol imported from other Member States and identical to the ethyl alcohol of the national production which has to be delivered to the monopoly is subject on import to the same "cash adjustment" to which national ethyl alcohol freed from the obligation to be delivered to the monopoly is subject.

26 It is against the background of these details of the national law that the national court must be answered.

27 The plaintiff in the main action complains before the national court:

(a) As regards the period between the entry into force of Decree No 74/91 of 6 February 1974 and that of Decree No 77/842 of 25 July 1977

of having been subjected, as regards the alcohol which it produces, to the obligation to pay a "cash adjustment" on the alcohol freed, on application by the plaintiff, from the obligation of being reserved to the monopoly whereas similar products imported from other Member States are not subject to a similar charge or in any event are subject to a charge, in the present case the "compensatory charge" which is

incompatible with the Treaty and accordingly not payable, a position which the plaintiff regards as contrary to the prohibition of discrimination contained in Article 37 of the Treaty.

(b) As regards the period subsequent to the entry into force of the Decree of 25 July 1977

of being subject to an obligation to pay a "cash adjustment" on the "freed" alcohol which it produces whereas similar alcohol produced in another Member State is not subject to this charge with the result that the plaintiff's products suffer discrimination on the markets of the other Member States to which they are exported.

28 In view of the above considerations the question is basically:

(a) Whether Article 37 (1) so far as it requires Member States to adjust their commercial monopolies so as to ensure that when the transitional period has ended there is no discrimination between the nationals of Member States prevents national products coming under the monopoly from being subject to charges to which similar products imported from other Member States are not so subject or are subject to a lesser extent;

(b) Whether Article 37 (1) prevents the imposition on national products coming under the monopoly of charges greater than those on the similar product in the other Member State when the national product is intended for export to such other Member State.

The first part of the question

29 The relationship between internal taxation on national products and that on products imported from other Member States is governed by Article 95 of the Treaty which provides that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

30 Article 37 (1) in prohibiting when the transitional period has ended all discrimination between nationals of Member States regarding the conditions

under which goods are procured and marketed is aimed not only at quantitative restrictions and measures having equivalent effect but also, as has been found by the Court of Justice in its judgment, which has already been cited, of 17 February 1976 in Case 45/75 *Rewe*, charges "which would result in discrimination against imported products as compared with national products coming under the monopoly".

31 Thus at the end of the transitional period Article 37 (1) no longer allows derogations from the prohibition contained in Article 95 which applies solely to the imposition of internal taxation on imported products as compared with national products, whether or not the latter come under the commercial monopoly.

32 Although Article 95 prohibits any Member State from imposing internal taxation on products imported from other Member States in excess of that on national products, it does not prohibit the imposition on national products of internal taxation in excess of that on imported products.

33 Disparities of this kind do not come within the scope of Article 95, but result from special features of national laws which have not been harmonized in spheres for which the Member States are responsible.

34 Even if it had to be accepted that Article 37 prohibits not only discrimination against imported products as compared with national products subject to the monopoly but also discrimination against the latter in relation to imported products, this would not mean that the Member States are prevented from imposing internal taxation on national products, whether or not coming under the monopoly, in excess of that on similar imported products.

35 The rules contained in Article 37 concern only activities intrinsically connected with the specific business of the monopoly and are irrelevant to national provisions which have no connexion with such specific business.

36 The fact that products are or are not subject to internal taxation according to whether they are subject or not to the monopoly or whether or not they

can be freed from the obligation of delivery is not a factor which determines how the specific business of the monopoly is conducted.

37 The connexion between such taxation and that on similar imported products also not subject to the monopoly is accordingly governed by Article 95 and not by Article 37 (1) of the Treaty whatever the scope of the latter.

38 The appropriate answer to the first part of the question is therefore that whether or not a domestic product — in particular certain potable spirits — is subject to a commercial monopoly, neither Article 95 nor Article 37 of the EEC Treaty prohibits a Member State from imposing on that domestic product internal taxation in excess of that imposed on similar products imported from other Member States.

The second part of the question

39 Since, as appears from the answer given to the first part of the question, it is open to a Member State to impose on a national product internal taxation in excess of that imposed on a similar imported product, whether or not it is a national product coming under a commercial monopoly in that Member State, it is *a fortiori* open to it to impose on a national product internal taxation in excess of that imposed on a similar product in another Member State.

40 These disparities arise from the powers of the Member States in the matter of taxation and are not affected either by Article 95 or Article 37 of the EEC Treaty.

Costs

41, 42 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Tribunal de Grande Instance, Lure, by a judgment of 6 January 1978, hereby rules:

Whether or not a domestic product — in particular certain potable spirits — is subject to a commercial monopoly, neither Article 37 nor Article 95 of the EEC Treaty prohibits a Member State from imposing on that domestic product internal taxation in excess of that imposed on similar products imported from other Member States.

Kutscher Mertens de Wilmars Mackenzie Stuart

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 13 March 1979.

A. Van Houte
Registrar

H. Kutscher
President