JUDGMENT OF THE COURT (Fourth Chamber)
15 January 1985 *

In Case 253/83

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

Sektkellerei C. A. Kupferberg & Cie KG a. A.

and

Hauptzollamt Mainz [Principal Customs Office, Mainz],

on the interpretation of Articles 37 and 95 of the EEC Treaty, Article 3 of the Agreement of 29 June 1970 between the EEC and Spain (Official Journal L 182, p. 4) and the first paragraph of Article 21 of the Agreement of 22 July 1972 between the EEC and the Portuguese Republic (Official Journal L 301, p. 165) with regard to the implementation of certain measures in the field of the Branntweinmonopolgesetz [Law on the Monopoly in Spirits] of 8 April 1922,

THE COURT (Fourth Chamber)

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

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

gives the following

* Language of the Case: German.

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the 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:

1. Facts and procedure

1.1. The German Law on the Monopoly in Spirits (Branntweingesetz) of 8 April 1922 was amended on a number of occasions. The version applicable at the material time applied to spirits a tax on consumption that was levied in three different ways.

1.1.1. Domestically-produced spirits had in principle to be sold to the Federal Monopoly Administration (Bundesmonopolverwaltung) at an acquisition price for spirits (Branntweinübernahmepreis) which was calculated by reference to the basic price (Branntweingrundpreis) fixed by the Federal Monopoly Administration. In March 1976 the basic price was DM 253 per hectolitre of spirit. In accordance with Paragraph 84 of the Law on the Monopoly in Spirits those spirits were liable to the tax on spirits (Branntweinsteuer) — at the material time DM 1 500 per hectolitre of spirit. They were marketed by the Federal Monopoly Administration at a price, known as the normal selling price (regelmässiger Verkaufspreis), which was made up of the sum of the acquisition price, the tax on spirits and the administrative and operating costs of the monopoly. The Federal Monopoly Administration set the normal selling price at DM 1 833 per hectolitre of spirit in a notice of 10 September 1975 (Bundesanzeiger [Official Gazette] No 174 of 19 September 1975).

However, as a result of the judgments of the Court of Justice of 3 February 1976 in Case 59/75, *Pubblico Ministero* v *Manghera*, [1976] ECR 91 and 17 February 1976 in Case 45/75, *Rewe-Zentrale* v *Hauptzollamt Landau/Pfalz*, [1976] ECR 181, and Case 91/75, *Hauptzollamt Göttingen* v *Miritz GmbH*, [1976] ECR 217, spirits imported from other Member States could be marketed at lower prices than spirits marketed by the monopoly. So, in order to remain competitive, the Federal Monopoly Administration was obliged to reduce its selling price for spirits, as from 23 February 1976, by DM 150 per hectolitre of spirit; yet it did not alter the normal selling price, which had been set at DM 1 833 per hectolitre of spirit in its notice of 10 September 1975. Consequently, the actual selling price during the material period for the purposes of the main proceedings (1 to 17 March 1976) came to DM 1 633 per hectolitre of spirit.

1.1.2. Spirits which are exempted from the requirement to be sold to the Federal Monopoly Administration or which, in breach of that requirement, were not so sold were liable, pursuant to Paragraph 78 of the aforesaid Law, to a spirits surcharge (Branntweinaufschlag). According to Paragraph 79 the surcharge corresponded to the difference between the 'normal selling price and the basic price' for spirits, less the average costs which the Federal Monopoly Administration saved by not taking delivery of the spirits. By virtue of Paragraph 79 (2) to (8) and Paragraph 79a, the spirits surcharge was, in certain circumstances, reduced or increased depending on such criteria as the type of distillery, the quantities produced and the type of raw material used.

However, in accordance with the circular (Schnellbrief) of 23 March 1976 of the

Federal Minister for Finance (III A2-V 7030-32/76), the surcharge was levied at a rate of only DM 1 500 per hectolitre of spirit, that is to say, at a rate corresponding to the tax on spirits, when the liability to tax arose between 23 February and 17 March 1976.

1.1.3. *Monopoly equalization duty (Monopolausgleich)*

Under Paragraphs 151 and 152 of the Law on the Monopoly in Spirits, imported spirits were subject to monopoly equalization duty (Monopolausgleich), which, under Paragraph 152 (1), corresponded to the difference between the monopoly's 'normal selling price' for spirits and the 'basic price' for spirits.

On the basis of the monopoly's actual selling price of DM 1 683 per hectolitre of spirit, between 23 February 1976 and 17 March 1976 the equalization duty would have been DM 1 430 per hectolitre of spirit, given the basic price of DM 253 per hectolitre of spirit at that time.

However, on the basis of the 'normal selling price' published in the Bundesanzeiger pursuant to Paragraph 82 (1) of the Verwertungsordnung (Marketing Rules) of DM 1 833 per hectolitre of spirit, the equalization duty would have amounted to DM 1 580 per hectolitre.

Nevertheless, between 23 February and 17 March 1976, neither the monopoly's actual selling price nor the normal selling price was used to calculate the equalization duty, since, in accordance with the Federal Minister's circular of 23 March 1976 (III A2-V 7030-32/76), where the liability to duty arose between 23 February and 17 March 1976 the amount of equalization duty to be levied on imported spirits was set at DM 1 500 per hectolitre of spirit, that is to say, at the same level as the tax on spirits.

1.2. The plaintiff in the main proceedings, Sektkellerei C. A. Kupferberg & Cie KG a.A. (hereinafter referred to as 'Kupferberg'), put into free circulation between 1 and 17 March 1976 various types of alcoholic beverages (whisky, geneva, liqueurs, armagnac, pruneaux, sherry and port) from Great Britain, the Netherlands, France, Spain and Portugal respectively.

The Hauptzollamt Mainz, the defendant in the main proceedings, fixed the monopoly equalization duty payable on the products cleared through customs at DM 1 500 per hectolitre of spirit. Kupferberg considers that, under Paragraph 152 of the aforesaid Law and given the Federal Monopoly Administration's actual selling price of DM 1 683 per hectolitre of spirit, the rate of equalization duty should have been DM 1 430 per hectolitre of spirit. After making an unsuccessful objection to the defendant in the main proceedings, Kupferberg brought an action before the Finanzgericht Rheinland-Pfalz [Finance Court, Rhineland-Palatinate]. The latter upheld the plaintiff's case and, by a judgment of 13 February 1978, declared the notice fixing the duty null and void in so far as it fixed the monopoly equalization duty at a level higher than DM 1 430 per hectolitre of spirit.

On appeal on a point of law by the Hauptzollamt, the Bundesfinanzhof [Federal Finance Court], by a decision of 5 August 1980, quashed the judgment on the ground that the actual selling price of DM 1 683 per hectolitre of spirit which had been applied as from 23 February 1976 was not the 'normal selling price for spirits' within the meaning of Paragraph 152 of the Law. The normal selling price had remained the price that had been properly fixed and published in Bundesanzeiger No 174 of 19 September 1975, namely DM 1 833 per hectolitre of spirit. If the calculation method stipulated in the first sentence of Paragraph 152 (1) of the Law was used the monopoly equalization duty on imported products came to DM 1 580 per hectolitre of spirit. The Bundesfinanzhof stressed that the Hauptzollamt in its decision fixing the duty had applied the German rules to a limited degree only, since by fixing the amount of equalization duty at DM 1 500 per hectolitre of spirit it had not claimed payment of that part of the equalization duty known as the monopoly equalization margin (Monopolausgleichspitze). The

Bundesfinanzhof concluded therefore that, in view of the aim of the proceedings, the levying of equalization duty of DM 1 500 per hectolitre of spirit, as set out by the contested decisions, was at all events proper from the point of view of German law.

The Bundesfinanzhof found, however, that the judgment of the Finanzgericht had failed to examine the question of the possible incompatibility with, in particular, Articles 37 and 95 of the EEC Treaty of fixing the monopoly equalization duty higher than DM 1 430. In its view, the decision fixing the duty was liable to infringe the first paragraph of Article 95 of the EEC Treaty together with Article 3 of the Agreement between the EEC and Spain and the first paragraph of Article 21 of the Agreement between the EEC and the Portuguese Republic only in so far as the Finanzgericht on re-examining the facts should hold that domestic spirits, exempted from the requirement to be sold to the Federal Monopoly Administration and comparable with the imported products, had been accorded the advantages conferred by Paragraphs 79 (2) and 79a of the Law on the Monopoly in Spirits. The Bundesfinanzhof, as the appeal court, could not make those findings itself and so remitted the case to the Finanzgericht Rheinland-Pfalz for a fresh decision.

1.3. By order of 6 October 1983 the Finanzgericht decided, pursuant to Article 177 of the EEC Treaty, that since the resolution of the dispute hinged on the interpretation of the provisions of Community law set out in the question referred to the Court it should stay the proceedings until the Court gave a preliminaty ruling on the following question:

'Should Articles 37 and 95 of the EEC Treaty, together with Article 3 of the Agreement of 29 June 1970 between the European Economic Community and Spain and the first paragraph of Article 21 of the Agreement of 22 July 1972 between the European Economic Community and the Portuguese Republic, be interpreted to mean that an importer of spirits from other Member States and from Spain and Portugal may invoke the aforesaid provisions before a national court, on the ground that the Federal Monopoly Administration for Spirits (Bundesmonopolverwaltung für Branntwein) lowered its selling price for spirits between 23 February and 17 March 1976 by DM 150 per hectolitre of spirit, namely from DM 1 833 to DM 1 683 per hectolitre of spirit, whereas it retained the selling price of DM 1 833 per hectolitre of spirit during the same period for the purpose of calculating the monopoly equalization duty (Monopolausgleich) on imported spirits?'

1.4. The order making the reference was lodged at the Court Registry on 11 November 1983.

1.5. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Hauptzollamt Mainz, the defendant in the main proceedings, represented by Martin Papenfuss, its Director; by Kupferberg, the appellant in the main proceedings, represented by Dr Dietrich Ehle and Partners, Rechtsanwälte, Cologne; and by the Commission of the European Communities, represented by its Legal Advisers, Friedrich-Wilhelm Albrecht and Peter Gilsdorf.

1.6. Upon 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. However, the Court submitted a question to the German Government, which the latter answered in writing.

1.7. By order of 4 July 1984 the Court assigned the case to the Fourth Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

2. Summary of the written observations submitted to the Court

The defendant in the main proceedings, the *Hauptzollamt Mainz*, states that it is unable to understand the issue of discrimination against imported products which is raised in the question referred to the Court.

In its view, given that imported and domestic products alike were subjected to a rate of DM 1 500 per hectolitre of spirit (the amount of the tax on spirits) on the basis of the circular of 23 March 1976 of the Federal Minister for Finance (III A2-V 7030-32/76), the question as to whether the imported products were entitled to have applied to them a rate of DM 1 430 per hectolitre of spirit, that is to say, a lower rate than that applied to domestic products, doubtless raises a problem in connection with the interpretation of Paragraphs 151 and 152 of the Law on the Monopoly in Spirits. But in no case could it imply that the provisions prohibiting discrimination contained in the EEC Treaty or in the Agreements concluded with Spain and Portugal had been infringed. Moreover, according to the Court's judgment of 7 May 1981 (Case 153/80, *Rumhaus Hansen GmbH* v *Hauptzollamt Flensburg*, [1981] ECR 1165), while the abovementioned provisions establish the principle of equal treatment, they do not oblige the Member States to accord more favourable treatment to imported products than to their own domestic products.

From the wording of the reasons given in support of the reference for a preliminary ruling and in view of the citation of Articles 95 and 37 of the Treaty, the Hauptzollamt does not preclude the possibility that the Finanzgericht considers that the reduction in the monopoly's selling price may have given rise to discrimination in taxation (Article 95), or economic discrimination (Article 37), or both. In the Hauptzollamt's view, discrimination in taxation is out of the question, since all the spirits were subject, as indicated above, to one and the same rate of taxation. As for economic discrimination, the Hauptzollamt points out that, in its judgment of 13 March 1979 (Case 91/78, *Hansen GmbH* v *Hauptzollamt Flensburg*, [1979] ECR 935), the Court clearly laid down the principles applicable in the field: such discrimination would only have taken place had the monopoly's prices been abnormally low compared with those in other Member States. That was not the case in the present instance, since at the material time the prices in the other Member States were much lower than DM 1 683 per hectolitre of spirit.

The plaintiff in the main proceedings, *Kupferberg*, states by way of introduction that during the period from 23 February 1976 (date of the actual DM 150 reduction per hectolitre of spirit in the selling price of spirits applied by the Federal Monopoly Administration and the Deutsche Kornbranntwein-Verwertungsstelle [German office for the utilization of grain spirit], which is responsible for the marketing of such spirit) to 18 March 1976, the date of the entry into force of the Law of 2 May 1976 amending Paragraphs 79, 84, 151 and 152 of the Law on the Monopoly in Spirits, the taxes levied on spirits under the applicable legal rules were as follows:

2.1. Taxation of *imported* spirits under the first sentence of Paragraph 152 (1) of the Law on the Monopoly in Spirits

normal selling price for	DM 1 683.00 per hectolitre of spirit
basic price for spirits	DM 253.00 per hectolitre of spirit
monopoly equalization duty	DM 1 430.00 per hectolitre of spirit.

2.2. Taxation of spirits *exempted from the requirement* to be sold to the Federal Monopoly Administration under Paragraph 79 (1) of the aforesaid Law

normal selling price for spirits	DM 1 683.00 per hectolitre of spirit
basic price for spirits	DM 253.00 per hectolitre of spirit
average expenses saved	DM 23.00 per hectolitre of spirit
spirits surcharge	DM 1 407.00 per hectolitre of spirit

2.3. Taxation of spirits which *may* be sold to the Monopoly Administration under Paragraph 84 (1) and Paragraph 76 of the Law read together with the circular of 24 March 1976 of the Federal Minister for Finance (III A2-V 7143-4/76-11). With a view to restoring the competitiveness, *vis-à-vis* the Deutsche Kornbranntwein-Ver-

wertungsstelle, of distillers of grain spirit who market their own products (this having been affected by the cut made in the former's prices as from 23 February 1976), the above circular granted those distillers the right to the payment of an aid by the Federal Monopoly Administration. The amount of that aid corresponded to the difference between the acquisition price for spirits (Branntweinübernahmepreis) that the Deutsche Kornbranntwein-Verwertungsstelle would have had to pay had it purchased the spirits and the lowest selling price for products of the Deutsche Kornbranntwein-Verwertungsstelle, plus a flat-rate sum to cover the costs incurred by the distiller in purifying the spirits.

spirits surcharge	DM 1 500.00 per hectolitre of spirit
aid to distillers of grain spirit who market their own spirit products	DM 150.00 per hectolitre of spirit
purification aid (approx.)	DM 30.00 per hectolitre of spirit
net tax spirit	DM 1 320.00 per hectolitre of spirit

2.4. Taxation of spirits which *must* be sold to the Federal Monopoly Administration under paragraph 84 (1) of the Law on the Monopoly in Spirits read together with Paragraphs 62, 63 *et seq.* of that Law.

normal selling price for its	DM 1 623.00 per hectolitre of spirit
less the acquisition price (varies according to the amount by which it may be increased or reduced), average about	DM 370.00 per hectolitre of spirit
net tax	DM 1 253.00 per hectolitre of spirit

Before addressing the 'broad' issue of discrimination against spirits imported in the period from 23 February to 17 March 1976, which, in its view, is raised by the question referred to the Court, and examining that issue in the light of four different situations, each corresponding to a sub-question, Kupferberg makes a number of general points about the non-discrimination principles that are applicable in the present instance.

As regards the products of Community origin (whisky, geneva, liqueurs, armagnac and pruneaux) in respect of which the prohibitions of discrimination set out in Articles 37 and 95 of the EEC Treaty have to be taken into account, Kupferberg stresses that in its judgments of 13 March 1979 (Case 86/78, *Peureux* v *Directeur des Services Fiscaux*, [1979] ECR 897) and 29 April 1982 (Case 17/81, *Pabst & Richarz* v *Hauptzollamt Oldenburg*, [1982] ECR 1331) the Court defined the scope of each of those provisions when it decided that Article 37 concerns only activities intrinsically connected with the specific business of the monopoly in question. It points out, however, that the present case concerns the taxation of imported spirits on the basis of the selling price for spirits. Given that, in its view, the fixing of the selling price for spirits (Paragraphs 88, 89 and 90 of the Law on the Monopoly in Spirits) performs a characteristic function in connection with the administration of a monopoly, Article 37 is applicable. Yet since the same price also performed a function with regard to the calculation of the tax, in so far as it determined the amount of the import duties for the period in question, Article 95 of the Treaty applies concurrently.

Turning to the products from non-member countries, sherry from Spain and port from Portugal, which come under Article 3 of the Agreement between the EEC and Spain and Article 21 of the Agreement between the EEC and the Portuguese Republic respectively, Kupferberg refers to the Court's judgment of 26 October 1982 (Case 104/81, *Hauptzollamt Mainz* v *Kupferberg & Cie*, [1982] ECR 3641), and points out that the said provisions are directly applicable and capable of conferring on individual traders rights which the courts must protect. As far as their interpretation and implementation are concerned, the provisions correspond to Article 95 of the EEC Treaty and should not be interpreted differently on the ground that the object of the free-trade agreements differs from that of the EEC Treaty. In its view, sherry and port are discriminated against by being

liable to a higher rate of taxation than similar domestic products.

Kupferberg goes on to argue that the issue of the 'similarity' of products is not crucial as regards Article 37 of the Treaty. As far as Article 95 of the Treaty and Articles 3 and 21 respectively of the free-trade agreements are concerned, the national court should be guided by the established case-law of the Court (judgments of 15 July 1982 in Case 216/81, *Cogis* v *Amministrazione delle Finanze*, [1982] ECR 2701 and of 26 October 1982, *loc. cit.*). In its view, whisky, geneva and liqueurs are similar to grain spirit (Kornbranntwein) and clear spirit, while armagnac, pruneaux, sherry and port largely correspond to spirits derived from fruit. It adds that the differentiation made in the Law on the Monopoly in Spirits between spirits exempted from the requirement to be sold to the Federal Monopoly Administration (Paragraph 78), spirits subject to that requirement (Paragraph 84) and spirits which may be so sold (Paragraph 76 (2)) (including spirits made from cereals, potatoes, maize, marcs, lees and musts of apples or pears) should be left out of account for the purpose of establishing similarity, since it is based solely on considerations connected with the economic management of the monopoly.

Kupferberg then addresses the 'broad' issue of 'discrimination against imported products' and the first sub-question raised in the question referred to the Court, namely whether imported spirits are discriminated against for the purposes of Articles 37 and 95 of the Treaty merely because a provision of national revenue law (the Law on the Monopoly in Spirits, Paragraph 152 (1)) is interpreted and applied contrary to its plain meaning and this results in higher taxation than the application of that provision requires. Referring to the Court's judgment of 29 April 1982 (Case 17/81, *Pabst & Richarz* v *Hauptzollamt Oldenburg*, [1982] ECR 1331), it contends, first, that the legal classification in Community law of a national measure (namely the calculation of monopoly equalization duty) does not depend upon how that measure is viewed or appraised in the national context and, secondly, that Articles 37 and 95 are intended to cover all national procedures, whatever their nature, which are likely to give rise to higher taxation on imported than on domestic products.

In its view, the application of a fictitious 'normal selling price' (DM 1 833), which did not correspond to the actual selling price (DM 1 683), for the purpose of calculating the monopoly equalization duty pursuant to the first sentence of Paragraph 152 (1) of the Law on the Monopoly in Spirits conflicted with Article 37 of the Treaty, without there being any need to establish whether discrimination took place against imported spirits and in favour of domestically-produced spirits. It contends that Article 37 (1) and (2), read together, require the Member States to refrain from taking any new measure restricting the scope of the articles dealing with the abolition of customs duties and quantitative restrictions. In its opinion, in view of the situation of Article 37 in the scheme of the Treaty and the reference made in Article 37 (3) to Articles 30 and 34, the prohibition extends to measures having an effect equivalent to quantitative restrictions. The interpretation and application of a national provision contrary to its clear wording amounts to a measure having equivalent effect in so far as it results in imported products being taxed at a higher rate.

Apart from that, it considers that the practical implementation by the German Monopoly Administration and finance administration of Paragraph 152 of the Law on the Monopoly in Spirits also infringes the principles of non-discrimination set forth in Articles 37 (1) and 95 of the Treaty, with the result that there is no need to have recourse to the issue of the taxation levied on similar domestic products — even though for the purposes of those articles the term 'discrimination' fundamentally signifies imported products being treated less favourably than domestic ones — since the provision concerning imported products (namely Paragraph 152) was interpreted and

applied in a manner which was in contradiction with its wording. In its opinion, this raises a presumption that imported spirits were treated less favourably than the legislature expressly stipulated.

The above also applies to Articles 3 and 21 respectively of the free-trade agreements.

Lastly, according to calculations provided by Kupferberg on a preliminary basis, domestically-produced spirits are at all events subjected to lower taxation.

As regards the second sub-question, namely whether imported spirits suffer discrimination compared with similar spirits which are not subject to the requirement to be sold to the Federal Monopoly Administration when the amount of monopoly equalization duty (Paragraph 152) and the amount of the spirits surcharge (Paragraph 79) are based on the normal selling price for spirits and the Administration does not calculate the tax on the basis of the actual selling price but on that of the normal selling price previously published and retained by way of fiction, Kupferberg points out that the term 'impose' in Article 95 (1) of the EEC Treaty does not signify merely the actual taxation levied on domestic products but also that taxation which is 'legally permissible'. Failing this, the Member States could evade Article 95 without amending their laws in any way, simply by interpreting or applying *contra legem* tax provisions governing the taxation of similar domestic products. On the basis of the provisions on the amount of equalization duty (Paragraph 152) and the amount of spirits surcharge (Paragraph 79) and in view of the actual selling price of DM 1 683, the amount of equalization duty should have been DM 1 430 per hectolitre of spirit as against a spirits surcharge of DM 1 407. Because of this, the actual discrimination worked out not at merely DM 70 per hectolitre of spirit but at DM 93. These considerations apply *mutatis mutandis* to liqueur wines on the basis of Articles 3 and 21 respectively of the agreements concluded with Spain and Portugal.

As for the third sub-question, namely whether imported spirits suffer discrimination compared with domestic spirits which may be sold to the Federal Monopoly Administration when the calculation of the tax on imported spirits does not take account of the actual reduction of DM 150 in the normal selling price for spirits, whereas domestic spirits eligible for sale to the Federal Monopoly Administration and, in particular, grain spirits produced by distillers who market their products themselves qualify for a subsidy in the form of an aid of DM 150, on top of which they receive supplementary aid intended to cover purification expenses (about DM 30) to offset the reduction in the selling price, Kupferberg points out that the said aid, which was introduced by a circular of 24 March 1976 of the Minister for Finance, has to its knowledge not been notified to the Commission pursuant to Article 93 of the Treaty and has the effect, from a purely economic point of view, of decreasing the amount of tax on domestic grain spirit to DM 1 320 per hectolitre of spirit or even less. In its view, payment of the said aid infringes Article 95 of the EEC Treaty, as the Court found in its judgments of 21 May 1980 (Case 73/79, *Commission of the European Communities* v *Italian Republic*, [1980] ECR 1533) and 29 April 1982 (Case 17/81, *Pabst & Richarz* v *Hauptzollamt Oldenburg*, [1982] ECR 1331).

In its view, the above argument cannot be undermined by the Court's judgment of 13 March 1979 in Case 91/78 (*Hansen GmbH* v *Hauptzollamt Flensburg*, [1979] ECR 935), in which the Court considered that there was a causal link between the amount of aid granted to producers in the form of a guaranteed acquisition price and the selling price, owing to the intervention of the monopoly. This could not be in point in the present instance given that the distillers of grain spirits marketing their own products and receiving the aid have direct access to the market and the aid granted to them

plays a crucial role in determining the market price. Moreover, in its opinion, the Deutsche Kornbranntwein-Verwertungsstelle is a marketing company subject to private law, which cannot be assimilated to the administration of the spirits monopoly.

Finally, as regards the fourth sub-question, namely whether imported spirits suffer discrimination compared with domestic spirits which are subject to the requirement to be sold to the Federal Monopoly Administration, when the calculation of the tax on imported products (Paragraph 152) does not take account of the *de facto* DM 150 reduction in the normal selling price whereas domestic spirits sold to the Federal Monopoly Administration and the Deutsche Kornbranntwein-Verwertungsstelle are purchased at a price markedly higher (between DM 250 and DM 550) than their subsequent selling price (DM 1 683), Kupferberg points out that, in view of the reduction in the normal selling price from DM 1 833 to DM 1 683 and the concurrent retention of the acquisition price, the Federal Monopoly Administration in reality forwent the tax on domestic spirits to the extent of DM 150 during the material time while it adopted, *vis-à-vis* the outside world, a structure whereby the reduction did not appear to affect the rate of taxation but rather the price of the goods, which is included in the normal price.

In its view, in order to assess these circumstances in the light of Articles 37 and 95 of the EEC Treaty, it should be borne in mind that the normal selling price is a composite entity made up of the tax on spirits and the price of the goods. The acquisition price is constant and so, when the price as a whole is reduced, the reduction can only be in tax. The Federal Monopoly Administration goes into deficit to the extent of the reduction of DM 150, which has to be offset by aid. The upshot is higher indirect taxation on imported spirits.

In Kupferberg's view, even if it were to be considered that the diminution in the selling price did not affect the tax component in the price but the component representing the price of the goods, the argument developed in paragraph 13 of the grounds of the judgment of 13 March 1979 (Case 91/78, *Hansen GmbH* v *Hauptzollamt Flensburg*, [1979] ECR 935) is not applicable in this case. It contends in this connection that during the period at issue the final selling price of the monopoly was not determined autonomously on the basis of considerations of commercial policy, since the Federal Monopoly Administration had no means available to it for this purpose.

In conclusion, Kupferberg considers that these factors show that, leaving aside questions concerning the similarity or comparability of the products, levying an equalization duty on spirits of more than DM 1 430 per hectolitre of spirit infringes Articles 37 and 95 of the EEC Treaty and Articles 3 and 21 respectively of the free-trade agreements.

Accordingly, in its view the question put by the Finanzgericht should be answered as follows:

Articles 37 and 95 of the EEC Treaty, Article 3 of the Agreement between the EEC and Spain and the first paragraph of Article 21 of the Agreement between the EEC and the Portuguese Republic must be understood as meaning that imported spirits suffer discrimination when the competent national authorities interpret and apply tax provisions applicable to imported products in a manner which is in contradiction with their literal meaning and with actual practice (in this case, reduction of the normal selling price) so that imported products are treated less favourably.

Even when the tax on imported products is comparable with the taxes levied on similar domestic products, Community law requires the tax provisions applicable to domestic products to be interpreted and applied

literally and in accordance with actual circumstances (in this case, reduction of DM 150 in the normal selling price per hectolitre of spirit).

Finally, Kupferberg states that it will not put forward a possible answer to the question put by the Finanzgericht in order to cover the eventuality of the Court's basing itself definitively on a comparison between the taxes on imported products and those on domestic spirits produced by distillers of grain spirits marketing their own products and/or with spirits subject to the requirement to be sold to the Federal Monopoly Administration.

In the *Commission's* view, although the question submitted by the Finanzgericht for a preliminary ruling is formulated with a view to obtaining a concrete decision concerning the amount of the duty to be levied on products put into free circulation by Kupferberg, it is admissible, since it enables the Court to give an answer solely on the interpretation of Community law.

The Commission first points out that the object of the proceedings pending before the Finanzgericht is to establish whether Kupferberg may, according to Community law, require that spirits originating in another Member State or in a non-member country be subjected to an equalization duty of DM 1 430 instead of DM 1 500 per hectolitre of spirit. It then states that, in its view, it is appropriate to answer the question first of all from the point of view of products originating in other Member States (subheading 22.09 C of the Common Customs Tariff) in the light of Articles 95 and 37 of the EEC Treaty and subsequently from that of products from Spain and Portugal (subheading 22.05 C III of the Common Customs Tariff) in the light of Article 3 and Article 21 respectively of the Agreements between the EEC and Spain and Portugal.

Before embarking on an examination of the substantive issues, the Commission considers it necessary to point out that the main proceedings concern a specific period of short duration prior to the reform of the German spirits monopoly. That period commenced on 23 February 1976, the date as from which the Federal Monopoly Administration reduced the selling price for spirits and the Minister for Finance fixed the effective rate of equalization duty without employing the calculation methods laid down by the Law on the Monopoly in Spirits. The period ended on 18 March 1976, the date of the entry into force of the Law of 2 May 1976 amending the aforementioned Law and of the increase in the burden of taxation on spirits.

Consideration in the light of Articles 37 and 95 of the EEC Treaty

1 — *Article 95 of the Treaty*

(a) The Commission emphasizes that during the period in question imported products were subject to an equalization duty of DM 1 500 per hectolitre of spirit, which was equivalent to the tax levied on similar or competing domestic products whether they were spirits sold by the monopoly and subject to the tax on spirits or spirits not sold to the monopoly and subject to the spirits surcharge.

Given that, subject to the observations set out below, the tax on spirits was identical in all three cases, namely DM 1 500 per hectolitre of spirit, the tax levied on the products from other Member States did not exceed, directly or indirectly, the tax on similar domestic products. The conditions laid down in Article 95 were therefore met and so, in the Commission's view, Kupferberg is not entitled to have the rate reduced to DM 1 430 per hectolitre of spirit.

(b) As for Kupferberg's assertion that, in view of the provisions of the Law on the Monopoly in Spirits and having regard to the reduction in the selling price from DM 1 833 to DM 1 683 per hectolitre of spirit, the rate of equalization duty should have been DM 1 430 instead of DM 1 500 per hectolitre of spirit, the Commission points out that from the point of view of Community law it is irrelevant whether the lower selling price ought to be viewed under German law as the normal selling price for the purposes of the calculation method laid down in Paragraph 152 (1) of the said Law. All that it is necessary to determine is whether the real tax burden, that is to say, the rate of tax actually applied, is compatible with Community law.

Referring to the judgments of the Court of 13 March 1979 (Case 86/78, *Peureux* v *Directeur des Services Fiscaux*, [1979] ECR 897) and 7 May 1981 (Case 152/80, *Rumhaus Hansen GmbH* v *Hauptzollamt Flensburg*, [1981] ECR 1165), it points out that although Article 95 of the Treaty does not preclude goods imported from another Member State from enjoying more favourable tax treatment than domestic goods it does not require this, since it simply prohibits imported products from being taxed more heavily than domestic products.

Finally, the Commission stresses that, as regards the rate of tax actually applied in this case, the rate of DM 1 500 per hectolitre of spirit was fixed by the Minister for Finance in his circular of 23 March 1976 without reference in any way to the calculation method set out in Paragraph 152 of the Law on the Monopoly in Spirits.

(c) As for Kupferberg's doubts about the amount of tax actually levied on domestic spirits by the monopoly, the Commission points out that the fact that a calculation carried out on the basis of the reduced selling price actually applied by the monopoly (DM 1 683 per hectolitre of spirit) and an unchanged basic price (DM 253 per hectolitre of spirit) produces an amount (DM 1 430 per hectolitre of spirit) less than the tax (DM 1 500) by no means signifies that the Federal Monopoly Administration was partially relieved of its obligation to levy and pay to the Treasury the whole amount of the tax. In its view, it is necessary to start from the principle that the Federal Monopoly Administration always duly levied the tax under Paragraph 84 of the Law on the Monopoly in Spirits and that it always paid the proceeds over to the Treasury in accordance with Paragraph 86.

(d) However, the Commission considers that should it turn out, contrary to its belief, that the spirits sold by the monopoly were in fact less heavily taxed owing to the monopoly's being partly released from levying and paying the tax, the issue would take on a different complexion. In that regard, it points out that from an economic point of view exemption from tax to the extent of DM 70, as would be the case, would constitute no more than a partial offsetting in advance of losses incurred by the monopoly. That would be aid, and, as such, would have to be assessed in the light, not of Article 95 of the Treaty, but of Article 37. It adds that it would be wholly specious to seek to make a distinction depending on whether the tax to be paid is reduced immediately or whether it is first paid in full to the Treasury and later partly offset from general tax revenue, in so far as losses are always offset from tax revenue.

The Commission considers that even if that view were not accepted, the existence of an infringement of Article 95 would still have to be established in the actual case of the spirits put into free circulation by Kupferberg. In this connection it would, in its view, be necessary to take the following factors into account:

— Whisky, geneva, armagnac and pruneaux are distilled spirits which are not comparable with the spirit sold by the Federal Monopoly Administration. The only similar products on the German market, within the meaning of the first paragraph of Article 95, are those products which are not subject to the requirement to be sold to the monopoly, such as the various grain spirits (Steinhäger, for instance) and spirits derived from fruit. Those spirits are subject to the spirits surcharge, which (ignoring the specific decreases and increases mentioned under (e) below) amounted to DM 1 500 per hectolitre of spirit, that is to say, it was identical in amount to the tax levied on similar imported products. Any reduction of the monopoly equalization duty by DM 70 therefore did not apply to those products.

From the pricing policy practised by the monopoly, as described, neither does it appear that protection, not even indirect protection, of spirit sold by the monopoly has been practised as against the four spirits mentioned above, and hence neither does it appear that the second paragraph of Article 95 has been infringed.

— At the most only the liqueur imported from the Netherlands might warrant a different line of argument in so far as spirit is used in its manufacture, as is the case in Germany. If spirit from the monopoly is used to manufacture liqueur, the German liqueur would enjoy preferential tax treatment to the extent of DM 70 per hectolitre of spirit, contrary to the first paragraph of Article 95.

(e) Lastly, although this issue is not the subject of the question referred to the Court for a preliminary ruling, the Commission points out that, in order to satisfy the requirements of Article 95 of the Treaty, imported products must be eligible without discrimination for the tax concessions provided for in the Law on the Monopoly in Spirits and, in particular, in Paragraphs 79 and 79a thereof, provided that they satisfy the requisite conditions. It refers in this connection to the Court's case-law, which provides the necessary guidance to enable the Finanzgericht to decide on the matter once it has made the necessary findings of fact.

2 — *Article 37 of the EEC Treaty*

(a) The Commission, while leaving aside its specific observations on the reduced rates resulting from Paragraphs 79 and 79a of the Law, stresses that since the taxes actually levied in the case at issue affected imported products based on distilled spirit and domestic products in the same way, there was no discrimination regarding the conditions under which goods are procured and marketed, within the meaning of Article 37.

(b) Although the Finanzgericht did not ask to what extent the actual reduction in the selling price from DM 1 833 to DM 1 683 per hectolitre of spirit and the loss apparently incurred by the monopoly as a result come as such within the scope of Article 37, the Commission nevertheless considers that it should tackle that question in view of the fact that it is linked to some extent with the taxation aspects of the case and was raised by Kupferberg.

— It points out that the said reduction does not constitute a measure peculiar to the State monopoly but a commercial measure dictated by competition.

— Since the question nevertheless arises as to what extent the German spirits monopoly, by reducing the actual selling price but keeping the basic price unchanged, practised a system of aids for national producers which should be dealt with in the context of Article 92 and Article 37 of the Treaty, the Commission stresses that that question has already been resolved by the

judgment of 13 March 1979 (Case 91/78, *Hansen GmbH* v *Hauptzollamt Flensburg*, [1979] ECR 935) in which the Court ruled as follows:

'Article 37 of the EEC Treaty constitutes in relation to Articles 92 and 93 of that Treaty a *lex specialis* in the sense that State measures, inherent in the exercise by a State monopoly of a commercial character of its exclusive right must, even where they are linked to the grant of an aid to producers subject to the monopoly, be considered in the light of the requirements of Article 37.'

'Any practice by a State monopoly which consists in marketing a product such as spirits with the aid of public funds, at an abnormally low resale price compared to the price, before tax, of spirits of comparable quality imported from another Member State is incompatible with Article 37 (1) of the EEC Treaty.'

The Commission observes that the normal selling price of DM 1 683 per hectolitre of spirit which was actually applied by the monopoly as from 23 February 1976 was consonant with the requirements of the market, as determined by the prices offered for alcohol originating in other Member States. The Commission finds therefore that it cannot be said that the monopoly charged 'abnormally low' prices. It followed that an importer may not avail itself of Article 37 and the change in the monopoly's selling price to claim a reduction of DM 70 per hectolitre of spirit in the import duty.

— The Commission refers to the arguments, submitted by Kupferberg with a view to arriving at a different solution from that resulting from the judgment in the second *Hansen* case, to the effect that, since during the period between 23 February and 18 March 1976 the higher prices of the Federal Monopoly Administration were not covered by aid, the latter was obliged, in order to avoid insolvency, to reduce the tax on spirits which it had to levy and pay to the Treasury by the difference between the purchase price and the selling price (DM 70), and that there is therefore a close, direct link between the acquisition of the products by the Administration and their sale. In reply, the Commission contends that if the assumption underlying the latter statement were incorrect it would be impossible to establish a causal link between the purchase price and the selling price. Even if it were correct that would not alter the legal assessment of the case at all. On the economic level, the tax reduction could amount to nothing more than the offsetting of losses in advance, that is to say, to a sales practice of the monopoly to which the Court's observations cited above apply. The reduction in the selling price to DM 1 683 per hectolitre of spirit in no way constitutes an obstacle to equal opportunities for imported spirits. On the contrary, equal opportunities for domestic spirits would be jeopardized were the tax on imported spirits reduced, as Kupferberg is asking, by a further DM 70 per hectolitre of spirit.

— Finally, the Commission notes that no more is it possible to argue that the tax on imported spirit helps to finance the losses incurred by the monopoly as a result of its guaranteed purchase prices and hence is contrary to Article 95, in so far as no causal relationship and no link as regards the destination of the tax can be found between the tax which was levied and the funding of the purchase price that was guaranteed to the producer. The interposition of the monopoly in any event breaks that causal nexus and, in the final analysis, the funding of the acquisition price is invariably charged to the Federal budget.

The Commission concludes from the foregoing observations that the application during the material period of a tax on imported spirits equivalent in amount (DM 1 500 per hectolitre of spirit) to the tax on spirits is contrary neither to Article 95 nor to Article 37 of the EEC Treaty.

Consideration in the light of the Agreements

The Commission first sets out the wording of Article 21 of the Agreement with the Portuguese Republic (hereinafter referred to as 'the Agreement with Portugal') and Article 3 of the Agreement with Spain. It then refers to the judgment of the Court of 26 October 1982 (Case 104/81, *Hauptzollamt Mainz* v *Kupferberg & Cie*, [1982] ECR 3641) and points out that the products in question, namely port and sherry, fall within the scope of those provisions. In view of the fact that in the judgment cited the Court found that Article 21 of the Agreement with Portugal was directly applicable, the same conclusion must be reached as regards Article 3 of the Agreement with Spain, given the wording of that provision and the structure and aim of the agreement in which it is incorporated. The reservation expressed by the Court about Article 21 of the Agreement with Portugal — namely that its interpretation must not be based automatically on that of Article 95 of the EEC Treaty but must be effected in the context of the 'system of free trade' established by the Agreement — also applies to Article 3 of the Agreement with Spain, especially since the system instituted by that agreement is in general less strongly structured than that of the Agreement with Portugal.

Whilst stressing that the Agreements do not contain any provision comparable to Article 37 of the EEC Treaty, the Commission observes that Article 3 of the Agreement with Spain and Article 21 of the Agreement with Portugal have the same aim as Article 95 of the Treaty but a narrower scope (prohibiting effect). The reason for this is that the Agreements have more limited objectives than the EEC Treaty, and hence if no infringement of Article 95 of the Treaty has taken place there can *a fortiori* have been no infringement of Article 3 or Article 21 of the Agreements. The Commission refers to its observations concerning Article 95, which apply *mutatis mutandis* to the provisions of the Agreements.

Apart from that consideration, the Commission considers that, in view of the actual facts of the case, there can have been no infringement whatsoever of those provisions. On this point it makes the following observations:

1 — Sherry and port are 'liqueur wines' as defined in Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine (Official Journal 1979 L 54, p. 1). One of the essential quality requirements for such products is the fact that they must be obtained only by the addition of products of the distillation of wine or of concentrated grape must, the aim being to prevent other blends containing alcohol from being produced under the description 'liqueur wine'. Moreover, that requirement of Community law matches the legal requirements of Spain and Portugal.

2 — In view of the fact that the spirit sold by the Federal Monopoly Administration at the price reduced by DM 150 per hectolitre was not derived from wine, inasmuch as it appears from Paragraph 76 of the Law on the Monopoly in Spirits that spirit obtained by the distillation of wine is not included among the products subject to the 'requirement to be sold to the Monopoly Administration', the products in question can in no case be eligible for the 'alleged' tax preference at issue in this case since, to adopt the terminology of the judgment in Case 104/81, no similar product (within the meaning of the provisions of the Agreements) existed in the Federal Republic of Germany which could have benefited from the reduction.

3 — Apart from that, any similarity with any domestic spirit-based product, vermouth for example, should be rejected — even if the product is deemed to be a liqueur wine according to the definition of liqueur wine under German law — if that product is derived from spirit of non-vinous origin, since such a product cannot be deemed to be a similar product in view of the specific quality requirements that port and sherry have to satisfy. The condition of 'similarity' for the purposes of the Agreements should be interpreted strictly and not 'flexibly', as in the case of the interpretation given to that concept in the context of the first paragraph of Article 95 of the Treaty owing to the need to achieve 'total equality with regard to competition' in the intra-Community sphere, in so far as the Agreements have a much narrower scope than the EEC Treaty. Sherry and port, although they are not similar to spirit-based products made in Germany without the addition of vinous spirit, are at the most 'partially in competition' with those products. But that does not imply that the Agreements have been infringed, since neither of them contain a provision comparable to the second paragraph of Article 95.

3. Oral procedure

At the sitting on 23 October 1984 Kupferberg, represented by Dr Ehle, and the Commission of the European Communities, represented by F. W. Albrecht, presented oral argument.

The Advocate General delivered his opinion at the sitting on 27 November 1984.

Decision

1 By order of 6 October 1983, received at the Court Registry on 11 November 1983, the Finanzgericht Rheinland-Pfalz [Finance Court, Rhineland-Palatinate] referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 37 and 95 of the EEC Treaty, Article 3 of the Agreement of 29 June 1970 between the EEC and Spain (Official Journal L 182, p. 1) and the first paragraph of Article 21 of the Agreement of 22 July 1972 between the EEC and the Portuguese Republic (Official Journal L 301, p. 164).

2 The question was raised in proceedings calling in question the compatibility with the aforementioned provisions of the amount of monopoly equalization duty (Monopolausgleich) imposed by the Hauptzollamt [Principal Customs Office], Mainz, on spirits imported by the Kupferberg company, the plaintiff in the main proceedings, from Great Britain (whisky), the Netherlands (geneva and liqueurs), France (armagnac and pruneaux), Spain (sherry) and Portugal (port) and put into free circulation in the Federal Republic of Germany between 1 and 17 March 1976.

3 As the Court has already noted in several judgments, the German Law on the Monopoly in Spirits (Branntweingesetz) of 8 April 1922, before it was recast by the Law of 2 May 1976, applied to spirits a tax on consumption which was levied in three different ways depending whether the spirits were:

(a) spirits marketed by the Federal Monopoly Administration (Bundesmonopolverwaltung), which under Paragraph 85 (1) of the Law were liable to the tax on spirits (Branntweinsteuer);

(b) spirits exempted from the requirement to be sold to the Federal Monopoly Administration (some grain and fruit spirits) or spirits which, in breach of that requirement, were not so sold; according to Paragraph 78 of the Law such spirits were liable to a spirits surcharge (Branntweinaufschlag). That surcharge corresponded to the difference between the normal selling price for spirits sold by the Federal Monopoly Administration and the basic price for spirits, less a flat-rate deduction of the average costs which the Federal Monopoly Administration saved by not taking delivery of the spirits. By virtue of Paragraph 79 (2) to (8) and Paragraph 79a, the spirits surcharge was, in certain circumstances, reduced or increased on the basis *inter alia* of criteria relating to the type of distillery, the quantities produced and the type of raw material used. In principle, the spirits surcharge always exceeded the amount of the tax on spirits, the difference between the two amounts being known as the marginal element of the spirits surcharge (Aufschlagspitze);

(c) imported spirits, which under Paragraph 151 (1) of the Law were liable to monopoly equalization duty (Monopolausgleich). Monopoly equalization duty was calculated in the same way as the spirits surcharge except that no flat-rate deduction was made to take account of expenditure saved by the Federal Monopoly Administration since, under Paragraph 152 (1) of the Law, which determined the amount of the said duty, 'monopoly equalization duty constitutes the difference between the normal selling price and the basic price for spirits'. The excess of monopoly equalization duty over the tax on spirits was known as the monopoly equalization margin (Monopolausgleichspitze).

4 For the period from 23 February to 17 March 1976 the amount of monopoly equalization duty payable on the products imported by Kupferberg was fixed (in accordance with a circular of 23 March 1976 of the Federal Minister for Finance) at DM 1 500 per hectolitre of spirit, that is to say at a rate corresponding to the tax on spirits in force at the time when Kupferberg brought an action before the Finanzgericht Rheinland-Pfalz in which it contended that, in accordance with Paragraph 152 (1) of the Law on the Monopoly in Spirits and in view of the fact that the normal selling price actually charged by the Federal Monopoly Administration between 1 March and 17 March 1976 had been reduced from DM 1 833 to DM 1 683 per hectolitre of spirit, the amount of monopoly equalization

duty should have been fixed at DM 1 430 per hectolitre of spirit, corresponding to the difference between the actual selling price and the basic price for spirits which at that time was DM 253 per hectolitre of spirit.

5 By a judgment of 13 February 1978 the Finanzgericht allowed Kupferberg's application. On appeal on a point of law by the Hauptzollamt, the Bundesfinanzhof [Federal Finance Court], by a decision of 5 August 1980, quashed that judgment on the ground that the actual selling price of DM 1 683 per hectolitre of spirit which had been applied as from 23 February 1976 was not the 'normal selling price for spirits' within the meaning of Paragraph 152 of the Law. The normal selling price had remained the price that had been properly fixed and published in Bundesanzeiger No 174 of 19 September 1975, namely DM 1 833 per hectolitre of spirit. If the calculation method stipulated in the first sentence of Paragraph 152 (1) of the Law was used the monopoly equalization duty on imported spirits came to DM 1 580 per hectolitre of spirit. The Bundesfinanzhof stressed that the Hauptzollamt in its decision fixing the duty had applied the German rules to a limited degree only, since by fixing the amount of equalization duty at DM 1 500 per hectolitre of spirit it had not claimed payment of that part of the equalization duty known as the monopoly equalization margin (Monopolausgleichspitze). The Bundesfinanzhof concluded therefore that, in view of the aim of the proceedings, the levying of equalization duty of DM 1 500 per hectolitre of spirit, as set out by the contested decisions, was at all events proper from the point of view of German law.

6 The Bundesfinanzhof found, however, that the judgment of the Finanzgericht had failed to examine the question of the possible incompatibility with Articles 37 and 95 of the EEC Treaty of fixing the monopoly equalization duty higher than DM 1 430. In its view, the decision fixing the duty was liable to infringe Article 95 of the EEC Treaty together with Article 3 of the Agreement between the EEC and Spain and the first paragraph of Article 21 of the Agreement between the EEC and the Portuguese Republic only in so far as the Finanzgericht on re-examining the facts should hold that domestic spirits, exempted from the requirement to be sold to the Federal Monopoly Administration and comparable with the imported products, had been accorded the advantages conferred by Paragraphs 79 (2) and 79a of the Law on the Monopoly in Spirits.

7 When the case was once again remitted to it, the Finanzgericht considered that the Bundesfinanzhof had not ruled on whether the reduction of DM 150 per hectolitre of spirit, which the Federal Monopoly Administration had made in the actual selling price of spirits owing to price competition from imported spirits, together with the retention of the former selling price for the purpose of determining the amount of monopoly equalization duty payable on imported spirits was or was not compatible with Articles 37 and 95 of the EEC Treaty and with the corresponding provisions of the Agreements concluded with Spain and Portugal.

8 With a view to resolving this matter the Finanzgericht referred the following question to the Court:

'Should Articles 37 and 95 of the EEC Treaty, together with Article 3 of the Agreement of 29 June 1970 between the European Economic Community and Spain and the first paragraph of Article 21 of the Agreement of 22 July 1972 between the European Economic Community and the Portuguese Republic, be interpreted to mean that an importer of spirits from other Member States and from Spain and Portugal may invoke the aforesaid provisions before a national court, on the ground that the Federal Monopoly Administration for Spirits (Bundesmonopolverwaltung für Branntwein) lowered its selling price for spirits between 23 February and 17 March 1976 by DM 150 per hectolitre of spirit, namely from DM 1 833 to DM 1 683 per hectolitre of spirit, whereas it retained the selling price of DM 1 833 per hectolitre of spirit during the same period for the purposes of calculating the monopoly equalization duty (Monopolausgleich) on imported spirits?'

9 That question falls into two parts: the first concerns the compatibility with Articles 37 and 95 of the EEC Treaty of the *de facto* reduction in the selling price of spirits sold by the Federal Monopoly Administration together with the concurrent retention of the former selling price for such spirits for the purpose of calculating the monopoly equalization duty payable on imported products; the second concerns the compatibility of the practice described above with the provisions corresponding to Article 95 of the EEC Treaty which are contained in the Agreements concluded with Spain and Portugal.

The first part of the question

10 According to the plaintiff in the main proceedings, between 23 February and 17 March 1976 imported spirits suffered discrimination within the meaning of Articles 37 and 95 of the Treaty in so far as during that period Paragraph 152 (1) of the Law on the Monopoly in Spirits, which prescribed the method for calculating the monopoly equalization duty payable on imported spirits, was interpreted and applied contrary to its wording. The effect of that interpretation was that imported spirits were taxed — on the basis of the normal price for monopoly spirits — at a rate of DM 1 580 per hectolitre of spirit, whereas had the actual selling price been employed the rate of taxation arrived at would have been DM 1 430 per hectolitre of spirit. Kupferberg maintains that the Federal Monopoly Administration would have had to sell its spirits at a loss if the taxation levied thereof had been the same as that levied on imported spirits. It argues therefore that spirits sold by the Federal Monopoly Administration were subject to a lower rate of taxation than imported spirits.

Article 95 of the Treaty

11 As the Commission observes, the fact that imported spirits might have been subject to lower taxation during the period in question had the reduced selling price charged by the Federal Monopoly Administration been deemed to be the normal selling price is irrelevant as far as Article 95 of the EEC Treaty is concerned given that the rate of tax actually levied on imported products during that period was neither directly nor indirectly greater than the taxation actually levied on similar or competing domestic products.

12 It should be observed in that regard that, as the Court has already stated in its judgment of 7 May 1981 (Case 153/80, *Rumhaus Hansen* v *Hauptzollamt Flensburg*, [1981] ECR 1165), although Article 95 requires imported products actually to be treated in the same way as comparable domestic products Community law does not require Member States to treat imported products more favourably than domestic products.

13 Lastly, it should be emphasized that it is not for the Court of Justice but for the national court to establish the facts underlying the dispute and to verify whether the imported spirits and the corresponding domestic spirits were in fact generally subject, during the period in question, to the same rates of taxation pursuant *inter alia* to the circular of 23 March 1976 of the Federal Minister for Finance or whether in fact they were taxed at different rates. Moreover, in reply to a question put by the Court, the Government of the Federal Republic of Germany stated that throughout the period in question the Federal Monopoly Administration paid tax at the same rate as that imposed on spirits imported from the other Member States.

Article 37 of the Treaty

14 The purpose of the question relating to Article 37 of the EEC Treaty is to enable the national court to determine whether the reduction in the selling price actually charged by the Federal Monopoly Administration from DM 1 833 to DM 1 683 per hectolitre of spirit is compatible with Article 37.

15 As the Court has already observed in the judgment of 13 March 1979 (Case 91/78, *Hansen GmbH* v *Hauptzollamt Flensburg* [1979] ECR 935), where such a measure is dictated by reasons connected with the monopoly's marketing practices, it is not automatically open to criticism unless the application of that measure is injurious to the equality of opportunity which must be accorded to imported products in so far as domestic spirits are marketed with the aid of public funds at an abnormally low resale price compared with the price, before tax, of spirits of comparable quality imported from another Member State.

16 In that regard the sole determining factor is that the object of the price reduction was to make the spirit sold by the monopoly competitive *vis-à-vis* imported products. As the Commission acknowledges, the reduction does not constitute a measure peculiar to the State monopoly but a commercial measure dictated by competition. Although the reduction in price was achieved with the aid of public funds, it should be observed that that aid, which fell to be considered in the light of Article 92 of the Treaty, was duly notified to the Commission, which considered that it constituted a transitional, short-term measure, and hence raised no objection in principle.

The second part of the question

Article 21 of the Agreement between the EEC and the Portuguese Republic

17 As the Court has already held in its judgment of 26 October 1982 (Case 104/81, *Hauptzollamt Mainz* v *Kupferberg & Cie*, [1982] ECR 3641) the first paragraph of Article 21 of the Agreement between the EEC and the Portuguese Republic — like Article 95 of the EEC Treaty — aims at the elimination of tax discrimination. *A fortiori* it may not be inferred from the wording of Article 21 that the Contracting Parties are under an obligation to treat imported products more favourably than domestic products.

18 Since the first paragraph of Article 21 of the Agreement merely requires the Contracting Parties not to practise discrimination in the fiscal field where the products concerned are of a similar nature, the fact that if in a given period a reduction in the selling price charged by the Federal Monopoly Administration had been taken into account in the method of calculating the monopoly equalization duty that would have enabled imported spirits to be less heavily taxed is of no

consequence from the point of view of that provision, provided that the rate of taxation that was actually applied to imported spirits during that period did not exceed the taxation actually applied to similar domestic products.

19 The concept of similarity contained in the first paragraph of Article 21 of the Agreement, as interpreted by the Court, implies that the products concerned are similar both as regards their method of manufacture and as regards their characteristics. Accordingly, it is for the national court to judge whether during the period at issue imported spirits were in fact taxed at a rate identical to the rate at which similar products of Community origin were taxed.

Article 3 of the Agreement between the EEC and Spain

20 The considerations set out above also apply to Article 3 of the Agreement between the EEC and Spain since the wording of that article is identical to that of the first paragraph of Article 21 of the Agreement with the Portuguese Republic and the subject-matter and the scope of the two agreements are comparable.

21 The answer to both parts of the question referred to the Court for a preliminary ruling should therefore be that Articles 95 and 37 of the EEC Treaty, Article 21 of the Agreement between the EEC and the Portuguese Republic and Article 3 of the Agreement between the EEC and Spain must be interpreted as not precluding the *de facto* reduction made in the selling price of spirit sold by the Federal Monopoly Administration in a given period provided that the rate of taxation actually applied to imported products during that period did not exceed the rate of taxation actually levied on corresponding domestic products.

Costs

22 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

23 As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the question referred to it by the Finanzgericht Rheinland-Pfalz by order of 6 October 1983, hereby rules:

Articles 95 and 37 of the EEC Treaty, Article 21 of the Agreement between the EEC and the Portuguese Republic and Article 3 of the Agreement between the EEC and Spain must be interpreted as not precluding the *de facto* reduction made in the selling price of spirits sold by the Federal Monopoly Administration during a given period provided that the rate of taxation actually applied to imported products in that period did not exceed the rate of taxation actually levied on corresponding domestic products.

Bosco Pescatore

O'Keeffe Koopmans Bahlmann

Delivered in open court in Luxembourg on 15 January 1985.

P. Heim
Registrar

G. Bosco
President of the Fourth Chamber