In Case 153/80

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

RUMHAUS HANSEN GMBH & CO., having its registered office in Flensburg,

and

HAUPTZOLLAMT [Principal Customs Office] FLENSBURG

on the interpretation of Article 95 of the EEC Treaty in relation to the application of the German Gesetz über das Branntweinmonopol [Law on the Monopoly in Spirits] of 8 April 1922,

THE COURT (Second Chamber)

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

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

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

Rumhaus Hansen GmbH & Co. (hereinafter referred to as "Hansen"), which has its registered office in Flensburg, imports and produces spirits intended for

human consumption. For this purpose it uses spirits of very varied origin which it stores and blends in its own warehouse.

During the period from 17 April to 12 October 1973 Hansen declared to the Hauptzollamt Flensburg for entry into free circulation and release from bond several consignments of light rum from Guadeloupe.

The German Gesetz über das Branntweinmonopol of 8 April 1922, as variously amended, renders spirits liable to a tax on consumption imposed in three different forms:

(a) Domestic spirits must in principle be delivered to the Bundesmonopolverwaltung [the Federal Monopoly Administration] at a price (the Branntweinübernahmepreis [delivery price for spirits]) calculated from the Branntweingrundpreis [basic price for spirits] fixed by the administration; these spirits, which are marketed by the Federal Monopoly Administration, are liable to the Branntweinsteuer [tax on spirits] in accordance with Article 84 (1). For the period at issue in the main action that tax on spirits was at the rate of DM 1 500 per hectolitre of wine-spirit.

(b) Spirits exempted pursuant to Article 76 of the Law on the Monopoly in Spirits from the obligation to deliver to the German Federal Monopoly Administration or which, in breach of that obligation, are not so delivered, are liable to a Branntweinaufschlag [spirits surcharge] under Article 78. Until the entry into force of the Law of 2 May 1976 amending the Law on the Monopoly in Spirits (Bundesgesetzblatt I, p. 1145), enacted following the judgments of the Court of 17 February 1976 (*Rewe*, Case 45/75, [1976] ECR 181 and *Miritz*, Case 91/75, [1976] ECR 217), the spirits surcharge amounted, according to the first sentence of Article 79 (1) of the Law on the Monopoly in Spirits, in the version applicable at that time, to the difference between the normal selling price of the spirits and the basic price less the average saving effected by the Federal Monopoly Administration through not having taken such spirits over; according to the second sentence of Article 79 (1) of the former version the last-mentioned amount was fixed annually by order of the Federal Minister of Finance or by the Federal Monopoly Administration.

During the period at issue in the main action the normal selling price of spirits amounted, per hectolitre of wine-spirit, to DM 1 673, the basic price to DM 203 (from April to September 1973) and subsequently to DM 214 (in October 1973) and expenses saved to DM 23 so that the spirits surcharge amounted to DM 1 537 and subsequently to DM 1 526 per hectolitre of wine-spirit.

The first sentence of Article 79 (2) of the Law on the Monopoly in Spirits provided for a reduction in the spirits surcharge in the case of spirits produced either in an Abfindungsbrennerei [distillery for which production is estimated at a standard level for tax purposes] or by a Stoffbesitzer [owner of the raw materials] on preferential production conditions within the monopoly arrangements either in a Verschlußkleinbrennerei [small bonded distillery with an annual production not exceeding 4 hectolitres of wine-spirit] and in the case of spirits considered to have been produced within the limits of its production quota by an Obstgemeinschaftsbrennerei [cooperative fruit-farm distillery]. That reduction in the spirits surcharge (DM 203 and subsequently DM 214) which gave a surcharge amounting to DM 1 334 and subsequently DM 1 312 per hectolitre of wine-spirit.

In the case of spirits manufactured exclusively from stone-fruit, berries or gentian roots the spirits surcharge was further reduced by an amount corresponding to 60 % of the basic price of the spirits, DM 121.80 and subsequently DM 128.40. These spirits were accordingly liable to a spirits surcharge amounting to DM 1 212.20 and subsequently DM 1 183.60 per hectolitre of wine-spirit.

In accordance with Article 79 (3), (4), (5) and (8) there were also certain increases in the spirits surcharge in respect in particular of alcohol produced under certain conditions by bonded distilleries, industrial-scale distilleries and fruit distilleries under bond.

(c) In accordance with Article 151 (1) of the Law on the Monopoly in Spirits imported spirits are subject to a Monopolausgleich [monopoly equalization duty]. That duty, which corresponds to the difference between the normal selling price of the spirits (DM 1 763 at the time) and the basic price of the spirits (DM 203 and subsequently DM 214), amounted in the period relevant to the main action to DM 1 560 and subsequently DM 1 549 per hectolitre of wine-spirit.

The difference between the monopoly equalization duty (DM 1 560 or DM 1 549) and the duty on spirits (DM 1 500), representing the Monopolausgleichspitze [marginal rate of monopoly equalization duty], was deemed to correspond to the marketing expenses borne by the Federal Monopoly Administration and charged against the domestic products sold by the Monopoly Administration.

When the rum imported by Hansen was released for free circulation the marginal rate of monopoly equalization duty was charged.

The Hauptzollamt Flensburg, by 71 tax notices which it issued between April and October 1973, claimed from Hansen, when the goods were released from bond, payment of the Monopolausgleich [monopoly equalization duty] in accordance with the law in force at the rate of DM 1 500 per hectolitre of wine-spirit.

Hansen challenged that assessment and the Hauptzollamt Flensburg altered the 71 notices by a corrective assessment of 20 September 1974. However, the correction did not affect the rate of tax of DM 1 500 per hectolitre of wine-spirit.

Hansen instituted proceedings before the Finanzgericht [Finance Court] Hamburg. Its application was based principally on the claim that the charging of monopoly equalization duty at the rate of DM 1 500 per hectolitre of wine-spirit in addition to the marginal rate of equalization duty was contrary to Article 95 of the EEC Treaty because spirits produced from fruit in the Federal Republic of Germany were liable to a much lower duty than rum imported from Guadeloupe.

The Finanzgericht Hamburg, by an order of its IVth Senate of 12 June 1980, decided to stay the proceedings and to refer to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty the following question:

"Must the first and second paragraphs of Article 95 of the EEC Treaty be understood to apply only where the similar (first paragraph) domestic goods or domestic goods otherwise competing (second paragraph) with imported goods are subject to similar conditions of production to those which apply to the imported goods or is the determining factor solely the similarity of the goods or the fact that they are in competition or may the extension of the tax advantages for domestic goods to imported goods be made additionally dependent upon the volume of production of each manufacturing concern recognized as a legal or economic unit?"

The order of the Finanzgericht Hamburg was received at the Court Registry on 27 June 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 28 August by the Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, on 17 September by Rumhaus Hansen GmbH & Co., the plaintiff in the main action, represented by Dietrich Ehle, of the Cologne Bar,

and on 19 September 1980 by the Government of the Federal Republic of Germany, represented by Hinrich Boie, Oberregierungsrat [Senior Adviser] at the Federal Ministry of Economics.

The Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. However, it requested the Government of the Federal Republic of Germany to submit to it a comparative survey of the provisions of the Law on the Monopoly in Spirits at issue in the main action as they were in 1973 and in their present version and the views of the parties to the main action were sought on the question submitted by the Finanzgericht Hamburg in the light of the judgment of the Court of 30 October 1980 (*Schneider-Import*, Case 26/80). These requested were met within the periods laid down.

By an order of 3 December 1980 the Court, pursuant to Article 95 (1) and (2) of the Rules of Procedure, decided to assign the case to the Second Chamber.

II — Written observations submitted to the Court

Rumhaus Hansen GmbH & Co., the plaintiff in the main action, states that in proceedings parallel to the main action the Finanzgericht Hamburg declared in a judgment of 15 February 1977 that the imposition of the Monopolausgleichspitze was contrary to Articles 37 and 95 of the EEC Treaty and that when an appeal was made on a point of law to the Bundesfinanzhof [Federal Finance Court] the latter gave a preliminary decision on 6 November 1979 and subsequently a final judgment on 16 July 1980 as to the legality of the charge. The Bundesfinanzhof, in interpreting the judgment of 10 October 1978 (*Hansen & Balle*, Case 148/77, [1978] ECR 1787) in which the Court of Justice ruled that tax advantages accorded under national legislation to certain types of spirits or to certain classes of producers must be extended to spirits imported from other Member States "which fulfil the same conditions, taking into acount the criteria which underlie the first and second paragraphs of Article 95", held that with regard to imported spirits the relevant rate of tax is that applicable to German spirits manufactured in an undertaking comparable to the foreign undertaking and that in that connexion it was necessary to make a comparison of the respective conditions or circumstances of production. In the main action, the Finanzgericht Hamburg plainly does not concur in this view, which is highly debatable having regard to the case-law of the Court of Justice. The questions submitted by the Finanzgericht Hamburg to the Court of Justice call for the following observations:

Comparison of the undertakings and of the conditions of production

(a) The criteria for appraising conditions of production may be of a very different nature and relate not only to economic, social or climatic conditions but also to the legal and administrative conditions for production and to quantitative conditions. The Bundesfinanzhof even invokes the concept of "circumstances of production" based on Article 79 (2) to (6) of the Federal Law on the Monopoly in

Spirits. Those provisions concern forms of undertakings which are peculiar to the Law on the Monopoly in Spirits such as distilleries for which production is estimated at a standard level for tax purposes, distelleries run by owners of the raw materials, cooperative fruit distilleries, bonded distilleries, industrial distilleries and bonded fruit distilleries; these forms are described in detail in the Law on the Monopoly in Spirits and in the provisions in implementation thereof; certain of them require official authorization; furthermore, they enjoy other privileges which are not formally laid down in Article 79, such as the exercise of distilling rights in ten-year periods (Brennen im Abschnitt) and the right to a tax-free surplus yield (Überausbeute).

According to the Bundesfinanzhof the comparison with foreign manufacturing undertakings must thus be made with a large number of German undertakings displaying widely differing characteristics, certain of which owe their very existence to the monopoly in spirits and which would be established in an entirely different form in conditions of free market competition.

(b) From the substantive point of view similar conditions for the production of alcoholic beverages cannot be envisaged in regions as different as Guadeloupe, the Federal Republic of Germany or other European States. What the Bundesfinanzhof has done, namely to confront a person relying upon a fact with the impossibility of proving it, presupposes that the comparability of the circumstances of production is not only admissible in law in relation to the objectives of Article 95 of the Treaty but that such comparison is also possible and conceivable in fact. That is clearly not so in this case.

(c) In any case such a comparison of undertakings or of conditions of production would in practice be contrary to the prohibition on discrimination in tax matters contained in Article 95: in court proceedings the Member States would be at pains to stress the "special conditions" of domestic production in order to avoid according to imported products equality of treatment in tax matters. Such an interpretation would rapidly bring about the creation of "separate tax markets"; the essential objective of Article 95, namely ensuring the complete neutrality of internal taxation as regards competition between domestic products and imported products, would very quickly be disregarded.

(d) In deciding in its judgment in *Hansen & Balle* that, according to the requirements of Article 95, preferential tax systems must be extended without discrimination to spirits coming from other Member States and that Article 95 does not allow any distinction to be drawn either according to the reasons, whether social or otherwise, on which such special systems are based, or according to the relative importance of such systems as compared with the ordinary taxation system, the Court intended to indicate that the advantage must be accorded as widely as possible. It gave a very wide interpretation to the word "similarity".

In its judgment of 27 February 1980 (*Commission* v *France*, Case 168/78, [1980] ECR 347) the Court stated that the judgment in *Hansen & Balle* cannot be understood as legitimating tax differences which are discriminatory or protective; such tax advantages may be accorded at purely national level only in exceptional cases, having regard to the state of development of Community law.

(e) Article 79 (2) of the Law on the Monopoly in Spirits is based on considerations peculiar to monopoly systems; it concerns undertakings which are bound within the framework of that

Law and of its implementing provisions by numerous legal and administrative conditions; it constitutes a system intended to promote the sale and maintenance of price-levels of agricultural products within the framework of a State monopoly of a commercial character.

The question submitted to the Court of Justice concerns the wider prohibition of discrimination contained in Article 37 rather than in Article 95 of the Treaty.

(f) A distillery for which production is estimated at a standard level for tax purposes may constitute an economic, unit which, through its collaboration with a large number of owners of raw materials, produces several hundred hectolitres each year. A "comparison of undertakings" must not be based exclusively on legal relationships; it must have regard above all to actual economic circumstances which ultimately determine the market and thereby competition.

(g) In its judgment in the *Schneider-Import* case, the Court answered in the negative the question whether a "comparison of undertakings" was to be understood as meaning a comparison of all the conditions of production; it further stated that, apart from the similarity of products, only conditions which may be fulfilled by producers in other Member States justify a varied assessment.

The factor of the volume of production

(a) The only relevant factor for Article 95 of the Treaty is the similar nature of the products; the prohibition on discrimination in taxation does not resort to other restrictive criteria.

(b) The extension of a tax advantage based on a given volume of production to imported products cannot in any case be envisaged unless three conditions are fulfilled: the volume of production must be attained in a competitive situation; it must be fixed in accordance with clear and objective criteria; it must be justified under national law and Community law and thus be appropriate, necessary and proportionate to the attainment of a legitimate objective. None of these three conditions is fulfilled by Article 79 of the Law on the Monopoly in Spirits in the form in which it existed at the material time.

The volumes of production which it lays down are purely monopolistic in nature and thus also discriminatory since the percentages are calculated from the basic price of the spirits which itself is fixed by the monopoly administration. A volume of production which is not attained in a competitive situation cannot be extended to other Member States within the framework of the prohibition on discrimination; such an extension leads automatically to fresh discrimination. It is precisely the elimination of such discrimination which forms the objective of Article 37 of the Treaty. It is impossible to uphold within the framework of the interpretation of Article 95 discrimination which arises under a monopoly and which should have been abolished under Article 37.

The conditions laid down in the former version of Article 79 of the Law on the Monopoly in Spirits are not objective and transparent in nature. They are based on several different types of distilleries whose establishment and method of operating are determined by the specifically national requirements of the Monopoly in Spirits and of the Brennereiverordnung [Distilleries Order]. Furthermore, the various types of distillery are determined by the basic price of spirits which is related to the monopoly arrangements and is fixed

each year by the monopoly administration on the basis of considerations relating to the general structure of the monopoly, which introduce into the taxation of imported and domestic spirits a factor unrelated to a true fiscal charge determined on the basis of an objective chargeable event.

The volume of production fixed in Article 79 is completely unjustified and can only promote objectives which are exclusively monopolistic in nature.

(c) With regard to rum produced in Guadeloupe it must be found that in this French overseas department cooperative fruit distilleries are large distilleries and that it is absolutely impossible to transpose to rum the tax advantages accorded in the Federal Republic of Germany to small distilleries. A factual matter, which in itself is objective, like the volume of production, has a discriminatory effect if it can only be attained in the exporting territory by being adjusted to the economic structures of another Member State. The volume of production, a fact which may be established objectively, leads in this case to discrimination.

The factor of the legal or economic unit

(a) Only the criterion of economic unity can be adopted in the case of cooperative fruit distilleries; the volume of production, irrespective of the legal structure of the undertaking, is decisive for the application of Article 95. Any other view would entail a comparison of undertakings of such a nature as to frustrate the prohibition on tax discrimination contained in Article 95. Article 95 is intended to guarantee the complete neutrality as regards competition of the taxes borne by products which form the subject-matter of intra-Community trade; competition is measured exclusively according to economic factors which in their turn determine the market. Accordingly only the economic unit which benefits from tax advantages can constitute the criterion.

It is this economic unit which operates on the market in spirits and which plays a part in determining competition: the spirits are supplied for marketing by the cooperative fruit distillery as such and not by its members. The legal form (cooperative or association) which underlies that economic unit is irrelevant within the framework of Article 95. In fact cooperative fruit distilleries are large distilleries.

(b) The same considerations apply to distilleries for which production is estimated at a standard level, which, by reason of their own distilling rights and of the rights of the owners of raw materials who are associated with them, also constitute large economic units.

(c) The decisive factor is that the cooperative fruit distilleries and distilleries for which production is estimated at a standard level are able themselves to market the spirits which they produce under preferential tax arrangements through other large distilleries. The products of such large distilleries enter into competition on the market with imported products; the substantial tax advantages for which they qualify confer upon domestic spirits a great price advantage in relation to imported spirits. This constitutes discrimination for the purposes of Article 95 of the Treaty as it has been interpreted in the case-law of the Court of Justice.

The *Hauptzollamt Flensburg*, the defendant in the main action, observes that the Court has recognized, in its judgment in the *Schneider-Import* case, that the tax advantages enjoyed by distilleries for which production is estimated at a standard level for tax purposes, owners of raw materials used for distilling and small bonded distilleries are lawful under Article 95 of the Treaty; to that extent the question whether the sole determining factor is the similarity of the goods should be answered in the negative. The same applies in the case of the cooperative form of small-scale production in cooperative fruit distilleries.

The main action differs from the *Schneider* case principally inasmuch as in 1973 the Federal Law on the Monopoly in Spirits did not make express provision for a reduction in tax in the case of imported spirits coming from distilleries similar to the national distilleries which qualified for that reduction. Nevertheless it does not follow from the foregoing that all imported spirits, regardless of their origin, qualify for domestic tax advantages. Only foreign producers who correspond to the national categories obtaining preferential treatment may claim the same tax advantages under Article 95; any other interpretation would lead to discrimination against 95 % of the domestic production of spirits which is liable to taxes up to and exceeding DM 1 500 and would be entirely unrelated to the attainment of Community objectives prescribed by the Treaty.

The rum distilleries in Guadeloupe are not comparable, even approximately, to the small distilleries or national cooperatives.

The concept of "conditions of production" is extremely vague; neither the level of wages and prices, nor the social environment, nor the climate or the quality of the soil constitute tax criteria under the national law in force at the material time.

The *Government of the Federal Republic of Germany* refers to the observations which it submitted in Case 26/80 (*Schneider-Import*) and which in this case relate essentially to the following points:

(a) According to the case-law of the Court of Justice there is no breach of Article 95 of the EEC Treaty if a Member State applies to a specific product on the national territory graduated rates of tax and does not grant similar imported products a reduced rate of tax unless they fulfil the same conditions as those prescribed for domestic products in order to qualify for the correspondingly reduced rate of tax.

(b) The extension to all imported spirits of the lowest rate of tax in the Federal Republic far exceeds the content of the prohibition against discrimination in tax matters laid down in Article 95 of the EEC Treaty.

(c) The case-law of the Court shows that at the present stage of its development Community law does not prohibit Member States from granting tax advantages to certain types of spirits or to certain classes of producers since tax advantages of that kind may serve legitimate social or economic purposes; in stating that such preferential systems must be extended without discrimination to spirits coming from other Member States the Court refers, with regard to the treatment of imported spirits, not only to the amount entailed under such preferential systems but also to the

conditions to which they are subject. Imported products cannot in principle qualify for the tax advantage prescribed by the national system unless they satisfy the same conditions as competing domestic products. According to the Court, Article 95 requires that tax advantages granted in respect of domestic products be extended without discrimination to spirits coming from other States. In a situation in which a Member State lawfully applies different rates of tax to similar products the application of the lowest rate of tax to all similar imported products alone necessarily results in discrimination at the expense of products which do not qualify for that advantage under national law and which are nevertheless in competition with the imported products in a similar fashion to the products qualifying for the advantage in question.

(d) The question whether indirect discrimination may arise from the fact that the importation at the reduced rate of tax is linked exclusively to an annual production limit, whilst, with regard to domestic products, Article 79 (2) of the Law prescribes a number of other conditions which may be laid for the grant of the fiscal advantage and which foreign producers cannot normally fulfil falls within the exclusive jurisdiction of the court dealing with the main action.

In any case the German system corresponds to the requirement which follows from the case-law of the Court of Justice that the criteria to which the tax advantage is subject under national law must not be designed in such a way that they may be satisfied without difficulty by domestic producers but not by foreign producers.

(e) Distilleries whose production is estimated at a standard level constitute a means for facilitating the collection of revenue and social considerations and considerations of agricultural policy are also involved.

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

(f) The system whereby distilleries are assessed over a fixed period does not come within the scope of Article 95: it does not constitute a tax advantage. The mere procedure whereby it is possible to distil on favourable tax conditions a larger quantity of spirits in certain years, that quantity being reduced by as much in other years, does not constitute an advantage in view of the balance which is achieved within the period; the fact that this advantage is not extended to foreign products does not fall within the prohibition on tax discrimination laid down in Article 95. In any case the system in question is compatible with the principles laid down by Article 95: an

extension to foreign producers of spirits of the right to distil a certain quantity over a fixed period would not mean equality of treatment in tax matters but rather the granting of a considerable advantage in favour of imported spirits.

The *Commission* states that the Finanzgericht Hamburg is requesting the Court to clarify the question whether, and under what conditions, imported spirits may qualify for tax advantages which under national law are reserved to certain types of products or to certain categories of producers; it is thus necessary to determine the criteria for the application of Article 95 of the Treaty. Since the Court has already delivered a number of rulings on this problem the question of the Finanzgericht is thus also intended to obtain clarification of the scope of such rulings.

The question whether the decisive factor in the interpretation of Article 95 is the similarity of imported products and domestic products (first paragraph of Article 95) or the existence of a competitive relationship between the products (second paragraph of Article 95) or the fact that imported products and domestic products are subject to similar conditions of production

(a) The judgments of the Court of 27 February 1980 (*Commission* v *French Republic*, Case 168/78, *Commission* v *Italian Republic*, Case 169/78 and *Commission* v *Kingdom of Denmark*, Case 171/78, [1980] ECR 347, 385 and 447 respectively) indicate that Article 95, which supplements the provisions on the abolition of customs duties and charges having equivalent effect, has as its aim to ensure the free movement of goods between Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation which discriminates against products from other Member States; Article 95 is intended to guarantee the complete neutrality of national taxation as regards competition between domestic products and imported products.

According to the case-law in general of the Court, and more particularly the judgments of 17 February 1976, *Rewe*, Case 45/75, [1976] ECR 181 and of 10 October 1978, *Hansen & Balle*, Case 148/77, [1978] ECR 1787, products must be regarded as similar where, from the point of view of consumers, they have similar characteristics or meet the same needs; the scope of the first paragraph of Article 95 is therefore to be determined not on the basis of the criterion of the strictly identical nature of the products but on that of their identical or comparable use. Reasonable flexibility is therefore needed for the interpretation of the concept of "similar products", the first paragraph of Article 95 should make it possible to cover all taxation procedures which conflict with the principle of the equality of treatment of domestic products and imported products.

The function of the second paragraph of Article 95 is to cover all forms of indirect tax protection in the case of products which, without being similar, are nevertheless in competition, even partial, indirect or potential, with certain products of the importing country.

(b) The Court has also ruled that the advantages which national tax legislation confers, in the form of tax exemptions or reduced rates of taxation, on the production of certain types of spirits or on certain classes of producers must be extended to imported Community spirits

"which fulfil the same conditions, taking into account the criteria which underlie the first and second paragraphs of Article 95". These "conditions" must be distinguished from the "similar conditions of production" as understood by the court making the reference, which include "the most diverse circumstances" such as the level of wages and prices, the social environment or, in the case of agricultural products, climate and the quality of the soil. The case-law of the Court of Justice does not provide any grounds for considering that the application of the prohibition on tax discrimination contained in Article 95 may depend upon the existence of such an implied additional criterion. The Court has always upheld a strict interpretation of Article 95; if the application of the principle of non-discrimination in tax matters were to be made conditional on imported products and similar domestic products being in additional produced under similar conditions this would amount to depriving Article 95, by means of interpretation, of all practical effect.

The question whether the extension to imported goods of a tax advantage for domestic goods may be made dependent upon the volume of production of each manufacturing concern as a legal or economic unit

(a) The case-law of the Court of Justice recognizes that the Member States may, where no Community arrangements exist, choose for national production the tax system which appears to them the most appropriate; such a system may, within the framework of the economic policy followed by the Member State in question, accord tax advantages to certain types of products or to certain categories of producers. Nevertheless it is not compatible with Article 95 unless the advantages extend, or may be extended, without discrimination, to similar products from other Member States.

(b) Such an extension to imported products of tax advantages granted at national level on very precise conditions give rise to difficulties; these difficulties are due to the fact that that "extension" ultimately signifies that a domestic tax system is "exported", inasmuch as it is applied to a factual situation in a foreign country for which it was not originally designed. The Court itself has recognized the existence of these troublesome problems of assimilation and comparison. The essential point is, however, that the extension of tax advantages to imported products must be effected without discrimination; differences in taxation of a discriminatory or protectionist nature cannot be justified.

(c) The need to effect such an extension without discrimination constitutes a limit to the freedom of action of Member States. That limit is attained, or indeed exceeded, if the national tax system cannot be transposed to imported products. Specific instances of this occur where technical barriers which originate in the structure of national law, prevent such an extension (for example, "distillation over a period") or if the national tax system links the grant of tax advantages to characteristics and procedures which are peculiar to the national legal system but unknown in the

exporting State. In such conditions the tax advantage granted at national level is not "exportable" for substantive or legal reasons; it therefore constitutes discrimination against imported products and comes under Article 95.

The replies to be given to the questions submitted

The Commission suggests that the replies to the questions submitted by the Finanzgericht Hamburg should be as follows:

1. The decisive criterion for the application of Article 95 is whether the products in question are "similar" (first paragraph) or whether the taxation is of such a kind as to afford indirect protection to other products (second paragraph). If these material conditions are fulfilled it is of little relevance that the imported products and domestic products are subject to similar conditions of production.

2. At the present stage of Community law the Member States remain free to grant tax advantages to certain national producers or to certain products on condition that such advantages may be extended to imported products without any discrimination against them or any indirect protection of domestic products.

3. The limit thus drawn to the freedom of action of the Member States would in particular be exceeded, and Article 95 infringed, if technical barriers were to prevent any extension or if the tax advantages granted at national level were to be linked to special features of national law unknown to the law of the exporting State.

III — Oral procedure

Rumhaus Hansen GmbH & Co., the plaintiff in the main action, represented by Dietrich Ehle, Rechtsanwalt, and the Commission, represented by Rolf Wägenbaur, presented oral argument at the sitting on 19 February 1981.

The Advocate General delivered his opinion at the sitting on 2 April 1981.

Decision

1 By order of 12 June 1980, which was received at the Court on 27 June 1980, the Finanzgericht [Finance Court] Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 95 of the EEC Treaty to enable it to determine the conditions under which the provisions of the German Law on the Monopoly in Spirits [Gesetz über das Branntweinmonopol] providing for the application of reduced rates of tax in respect of various categories of products must be extended to certain alcoholic products originating in other Member States.

2 The order for reference shows that the plaintiff in the main action imported and released onto the market in 1973 various consignments of light rum from Guadeloupe, on which it paid on so doing the *Monopolausgleich* [monopoly equalization duty] at the regular rate of tax then in force amounting to DM 1 500 per hectolitre of wine-spirit. The plaintiff instituted proceedings against the decision of the customs authorities, claiming that there was discrimination against the imported spirits contrary to Article 95 of the Treaty because certain categories of domestic spirits qualified for a more advantageous rate of tax.

3 It is clear from the file and from the explanations provided by the plaintiff in the course of the proceedings that it is not in dispute that the rate of tax applied in this matter by the customs authorities in fact corresponds to the general rate of tax applicable to domestic spirits. The plaintiff's objection is based on the fact that national legislation makes provision for certain exceptions from that general rate for various categories of small producers who benefit from a reduced rate of tax. It claims the application to the products which it imported of the most favourable rate of tax applied to domestic spirits made from fruit and refers more particularly to the tax arrangements laid down at the time by the Law for spirits from cooperative fruit-farm distilleries *(Obstgemeinschaftsbrennereien).* It considers that, as a result of the combination of the individual distillation rights enjoyed by such distilleries, they in fact constitute industrial undertakings so that it is possible to compare them with producers of rum.

4 In its order making the reference the Finanzgericht finds that there is a state of uncertainty arising from the recent case-law of the Bundesfinanzhof [Federal Finance Court] following a preliminary decision [Vorbescheid] of 6 November 1979 delivered in another case concerning the same plaintiff in which the Bundesfinanzhof ruled that the prohibition of tax discrimination under Article 95 of the EEC Treaty applied only to such foreign products as fulfil the same conditions of production as domestic products obtaining preferential treatment. It should be noted that, as is established by a document lodged by the plaintiff in the course of the proceedings, that preliminary decision was confirmed on 16 July 1980 by a judgment of the Bundesfinanzhof.

5 The Finanzgericht expresses doubts on the point whether a criterion derived from the comparable nature of the conditions of production is compatible with the system of Article 95 which, according to it, is based on the similar nature of the products, and not on the conditions in which they were

produced. These conditions in fact include a wide variety of natural, economic and social factors, which, if they were taken into consideration, might render the rule of non-discrimination in Article 95 largely inoperative. The Finanzgericht recalls that, in the case-law of the Court of Justice, the only criterion for making a distinction hitherto permitted has been that of the quantities produced (cf. judgment of 22 June 1976, *Bobie*, Case 127/75 [1976] ECR 1079) so that the application of tax reductions may not depend on conditions other than the quantity produced by each undertaking.

6 In view of that uncertainty the Finanzgericht formulated the following question:

"Must the first and second paragraphs of Article 95 of the EEC Treaty be understood to apply only where the similar (first paragraph) domestic goods or domestic goods otherwise competing (second paragraph) with imported goods are subject to similar conditions of production to those which apply to the imported goods or is the determining factor solely the similarity of the goods or the fact that they are in competition or may the extension of the tax advantages for domestic goods to imported goods be made additionally dependent upon the volume of production of each manufacturing concern recognized as a legal or economic unit?"

7 The problems thus raised by the national court have been largely resolved in a case which was pending before the Court of Justice at the time when the Finanzgericht made its order of reference for a preliminary ruling, and to which the Finanzgericht has furthermore referred. That case gave rise to the judgment of 30 October 1980 (Case 26/80, *Schneider-Import* v *Hauptzollamt Mainz*).

8 It is clear from the consistent case-law of the Court, which is recalled in that judgment, that in the present state of Community law Member States are not prohibited from granting tax advantages, in the form of exemptions from or reduction of taxes, to certain types of spirits or to certain classes of producers. Nevertheless, according to the requirements of Article 95 such preferential systems must be extended without discrimination to imported products conforming to the same conditions as preferred domestic products.

9 It is nevertheless impossible to disregard the fact that the application of the criteria of Article 95 gives rise to particular difficulties by reason, on the one hand, of the fact that the granting of certain tax exemptions may be related to the technical procedures prescribed by the legislation of the various Member States concerning the manufacture and taxation of spirits and, on the other, of natural phenomena of production, which pose particular problems in a case such as the present one, which concerns a product which comes from outside the European climatic zone.

10 It was stated in this connexion in the judgment of 30 October 1980 that the essential point with regard to Article 95 is that imported products may in fact enjoy the same advantages as comparable domestic products even though the technical or legal conditions prescribed for domestic products qualifying for a specified tax advantage are not fulfilled. As the national court properly pointed out, it is contrary to the requirement that domestic and imported products shall enjoy real equality to prescribe, for imported products covered by the quantitative criterion laid down by national legislation, other requirements on the basis of conditions of production which, by reason of natural or legal elements, cannot be fulfilled by a product coming from another Member State.

11 Both the appraisal of the questions of fact which may be raised by the application to imported products of criteria which determine the granting of tax advantages in respect of certain domestic goods or certain domestic products or producers and the choice of the appropriate criteria for comparison are matters for the national court.

12 It should nevertheless be remarked in this connexion, with reference to the arguments set out by the plaintiff, that, although Article 95 requires that an imported product may in fact qualify for the same tax treatment as a comparable domestic product, Community law does not oblige the Member States to accord more favourable treatment to imported products than to their own domestic products. In particular, the Treaty does not require a Member State to accord tax advantages to imported spirits coming from production units which do not fulfil the specific quantitative criteria which

comparable domestic products must fulfil as a condition of obtaining a tax exemption or a reduced rate of tax.

13 It is for the national court to examine, in the light of these considerations, the argument advanced by the plaintiff with regard to cooperative distilleries and, more particularly, the quantitative limits which are a condition of the application of the preferential rates reserved, at the material time, to spirits produced in that type of undertaking in comparison with the production capacity of undertakings with which the rum imported by the plaintiff originates.

14 The reply to the question submitted must accordingly be that Article 95 of the EEC Treaty must be interpreted as meaning that tax advantages granted under the legislation of a Member State in favour of certain alcoholic products must be extended to similar products originating in other Member States which fulfil both the criterion of similarity which forms the basis of Article 95 and the conditions laid down under its national legislation for qualifying for the tax advantage in question.

15 If the tax advantage for domestic products is granted in terms of the quantities produced in each production undertaking the same advantage must be granted in favour of products from production units situated in other Member States which fulfil the same quantitative criteria. If that condition is fulfilled a Member State may not refuse that tax advantage on the basis of supplementary conditions derived from its legislation which a production unit situated in another Member State cannot fulfil by reason of its geographical situation or of the legislation on the production of spirits in force in that State.

Costs

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

On those grounds,

THE COURT (Second Chamber)

in answer to the questions referred to it by the Finanzgericht Hamburg by order of 12 June 1980, hereby rules:

1. **Article 95 of the EEC Treaty must be interpreted as meaning that tax advantages granted under the legislation of a Member State in favour of certain alcoholic products must be extended to similar products originating in other Member States which fulfil both the criterion of similarity which forms the basis of Article 95 and the conditions laid down under its national legislation for qualifying for the tax advantage in question.**

2. **If the tax advantage for domestic products is granted in terms of the quantities produced in each production undertaking the same advantage must be granted in favour of products from production units situated in other Member States which fulfil the same quantitative criteria. If that condition is fulfilled a Member State may not refuse that tax advantage on the basis of supplementary conditions derived from its legislation which a production unit situated in another Member State cannot fulfil by reason of its geographical situation or of the legislation on the production of spirits in force in that State.**

Pescatore Touffait Due

Delivered in open court in Luxembourg on 7 May 1981.

For the Registrar

H. A. Rühl

Principal Administrator

P. Pescatore

President of the Second Chamber