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

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 29 April 1982.

For the Registrar

A. W. H. Meig

Legal Secretary

G. Bosco

President of the First Chamber

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

Mr President,
Members of the Court,

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

The facts are as follows:

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

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

1 — Translated from the French.

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

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

The German authorities, complying with these judgments, immediately abolished the protection against imports provided for spirits (Branntwein) coming from other States of the Community. Such spirits could thus be marketed at prices below those of the spirits marketed by the Monopoly. In order to remain competitive the Federal Monopoly Adminstration [Bundesmonopolverwaltung] was obliged to reduce its selling prices by DM 150 per hectolitre of wine-spirit. However, since the Monopoly was bound by the delivery prices fixed by law prior to the amendment, a deficit was inevitably produced. The deficit could only be met through the State budget. An amendment dated 2 May 1976 of the Law on the monopoly in spirits thus increased the rate of the tax on spirits (Branntweinsteuer) by DM 150 per hectolitre of wine-spirit so that the rate of duty per hectolitre of wine-spirit increased from DM 1 500 to 1 650.

It was also decided, in order to avoid all discrimination, that the amount of tax [Branntweinaufschlag, spirits surcharge] applied to domestic spirits not covered by the requirement of delivery to the monopoly and that of the tax on imported spirits [Monopolausgleich — monopoly equalization duty], which in principle are higher, should immediately be aligned on the amount of the tax on spirits. Accordingly, as the Finance Commission of the Bundestag explains in its report on the amendment of the Law on the monopoly in spirits (Deutscher Bundestag, Document No 7/4897, p. 4), the component of these taxes representing the difference between their amount and that of the tax on spirits, respectively called "the marginal element of the monopoly equalization duty", as we have seen, and the "marginal element of the spirits surcharge" [Branntweinaufschlagspitze] was automatically removed.

The sudden increase in the taxes on the various categories of spirits forced the authorities to adopt special measures with regard to spirits which were held in warehouses at the time. On the one hand those spirits had been purchased at the earlier, higher price, regardless of their category (monopoly spirits, domestic spirits not subject to the requirement of delivery to the monopoly and imported spirits). On the other hand they had formed the subject-matter, in accordance with current commercial practice, of long-term contracts based on prices which did not include the increase in tax. It was thus impossible to pass on that increase, unlike the practice with regard to consumption taxes.

It must also be explained that imported spirits held in individually-owned spirits warehouses (Branntweineigenlager) had already borne the marginal element of the monopoly equalization duty at the time when it was abolished.

2. It was in those circumstances that the Federal Minister of Finance organized, by circulars of 23 March, 15 April and 1 July 1976 a system of tax relief for spirits which at a reference date, 22 February, were held in individually-owned spirits warehouses and in bonded warehouses (Zollager) subject to deferment of duty (unter Steueraufschub) except for goods removed from warehouses up to 17 March 1976. It was the order of 15 April which established the system with which the main action is concerned (unchallenged observation by Pabst, p. 4).

In examining this system a distinction should be drawn between two different reliefs and between the spirits held in bonded warehouses and those in individually-owned spirits warehouses.

A first relief (Entlastung) of DM 70 per hectolitre of wine-spirit was granted in respect of a quantity known as the "reference quantity" (Referenzmenge). That reference quantity corresponded to one-sixth of the quantity of spirits

withdrawn from an individually-owned spirits warehouse during the financial year 1974 to 1975 and, with regard to bonded warehouses, to one-sixth of the quantity of spirits withdrawn during the financial year 1975, with the exception of withdrawals intended for export. A turnover covering a period of two months was chosen for reference: it corresponded, according to the estimates, to the stock which was held in the warehouses at the time of the increase in the taxes and in respect of which it was no longer possible, by reason of the contracts which were already concluded, to pass on the increase to purchasers. That reduction of DM 70 was intended to compensate for the tax increases which occurred as from 18 March 1976. As can be seen, that amount permitted only partial compensation for the increase in the tax of DM 150 per hectolitre.

The second relief, of DM 80 per hectolitre of wine-spirit, was granted only in respect of stock held in individually-owned spirits warehouses on 22 February 1976. It did not concern spirits held in bonded warehouses. It nevertheless applied to all of such stock and thus covered the part of it exceeding the reference quantity. The relief of DM 80 was at a flat rate because, according to the court making the reference, the marginal elements of the tax actually charged on the spirits held in warehouses after October 1975 and until 22 February 1976 varied between DM 16·05 and 99·54 per hectolitre of wine-spirit. The court making the reference went on to state that this additional relief corresponded to the need to reimburse the marginal element of tax which had been paid when the spirits entered the warehouses. Since, when these stocks were withdrawn from warehouses after 18 March 1976 they were, in addition, subject to the payment of the spirits tax which had been increased in the meantime, the reimbursement was necessary to prevent such stocks from being subjected to a burden heavier than the increase in tax.

In order to provide a synthesis of the effects of these two reliefs I have compiled the following table:

	Individually-owned spirits warehouse	Bonded warehouse
Reference quantity	150	70
Stock qualifying for relief as being in excess of the reference quantity	80	0

Despite their differences the reimbursements in respect of the two reliefs were effected by identical procedures. For the sake of convenience relief was written off against tax payable for the months after April 1976.

3. The undertaking Pabst & Richarz KG runs an establishment distilling spirits from wine. It has an individually-owned spirits warehouse (which is not the subject of the main action) and a storage tank, a so-called "Tanklager" which is under customs supervision. At the reference date the raw spirit in the storage tank amounted to 13 278 hectolitres of wine-spirit. That spirit came from Member States of the EEC (France and Italy) and from Greece. When the product entered the warehouse Pabst & Richarz paid the marginal element of the monopoly equalization duty amounting, according to the order making the reference, to DM 80 per hectolitre of wine-spirit. That tax was refunded to it.

The purpose of its action is to obtain a second relief of the same amount. I note that the relief of DM 70 per hectolitre of wine-spirit for spirits held in individually-owned warehouses within the limit of the reference quantity is accordingly not at issue here.

According to the undertaking the measures granting relief for spirits held in individually-owned spirits warehouses, amounting to DM 150 up to the reference quantity and to DM 80 for the remainder, involved discrimination

between imported spirits and monopoly spirits, at the expense of the former. That discrimination is said to have arisen as follows:

In the case of imported spirits on which the marginal element of the monopoly equalization duty paid at the time of entry to the warehouse the relief merely annulled that tax although, at any rate in the case of stocks exceeding the reference quantity, the increase in the DM 150 tax took full effect: the undertakings paid DM 1 650 per hectolitre of wine-spirit on such spirits.

On the other hand in the case of monopoly spirits the relief of DM 80 outside the reference quantity involved, for stocks which qualified for it, a reduction of the tax on spirits which thus ultimately amounted to DM 1 650 less DM 80, that is DM 1 570 per hectolitre. That smaller amount results from the fact that the relief could not serve to reimburse the tax charged on the occasion of entry into the warehouse because, according to the undertaking, monopoly spirits are not liable to the equivalent of the marginal element of the monopoly equalization duty.

In its view this discrimination is accordingly incompatible with the rights which private persons assert on the basis of Community law.

The Finanzgericht Hamburg also considers that the measure in dispute is contrary to the Community legal system. In order to be certain that this is the case it has submitted to this Court three questions which are intended principally to determine the provision of Community law in the light of which the measure in dispute must be appraised and, if the Court's interpretation of that provision leads it to hold that the national measure in question is incompatible with Community law, whether private persons may assert, on the basis of that provision, rights which the Finanzgericht is bound to protect.

II — In its first question the Finanzgericht asks the Court whether "a measure adopted by a State which in connection with an increase in the duty on spirits and the granting of aid to particular domestic producers of spirits provides relief to be granted through the tax assessments in respect of spirits which were in stock at the time of the said measure, but on which duty had not been charged" must be considered as a tax measure for the purposes of Article 95 of the Treaty and of Article 53 (1) of the Association Agreement with Greece or a measure concerning Article 37 of the Treaty on State monopolies of a commercial character or on the other hand as a measure of aid for the purposes of Articles 92 et seq. of the Treaty.

The question thus concerns first and foremost the choice between the Community provisions on State aids and Articles 37 and 95 which, as the judgment of the Court of 10 October 1978, *Hansen*, (Case 148/77, [1978] ECR 1807, paragraph 13 of the decision) indicates, are both founded on the same principle, the elimination of all discrimination in trade between Member States. Nevertheless, I shall also consider the question of the relation between Articles 37 and 95 since none of the parties to this action has argued in favour of the provisions concerning aids but are, on the other hand, at odds with each other in regard to the choice to be made between Article 95 and Article 37.

1. According to the order making the reference it is an important matter for German law to establish whether the relief in question constitutes a tax measure or an aid. The Finanzgericht considers, by taking account in particular of the objective pursued by the system of relief, that it constitutes in German law a measure designed to achieve equity in taxation. On the other hand according to an interlocutory decision of the Bundesfinanzhof [Federal Finance Court] of 1 April 1980 (VIII R 17/78) that system must instead be classified as a subsidy.

However the court making the reference also considers that in order to reply to the questions submitted to the Court the classification of the measure in relation to Community law is the sole determinant factor. I can only concur with that opinion. As the Commission has rightly remarked, even if the relief in dispute were deemed under national law to constitute an aid, that classification would not be binding so far as Community law is concerned. As the Finanzgericht itself has emphasized, the uniform application of Community law in all the Member States presupposes that it will be interpreted independently. If the appraisal, under Community law, of a measure adopted by a Member State depended on its classification within the national legal system of that State the measure might be considered, for example, as an aid in the State and an identical measure adopted in another State as a tax refund.

That observation applies in this case not just to the classification of the relief in question as an aid by the Bundesfinanzhof but also to the passage in the report of the Finance Committee of the Bundestag according to which the relief in question must be considered as compensation for previous taxation applied in the form of the marginal element of the spirits surcharge or of the marginal element of the monopoly equalization duty.

2. With regard to Community law none of the parties to these proceedings has maintained that the relief in question must be considered as an aid for the purposes of Article 92 of the Treaty.

The Oberfinanzdirektion Hannover [Principal Revenue Office, Hanover] considers that the measure in question comes within the framework of the monopoly provisions (monopolrechtliche Regelung) and thus falls under Article 37 of the Treaty. Pabst & Richarz and the Commission on the other hand consider that the measure should be classified as a tax provision under Article 95.

I concur in the latter point of view.

As the judgment of this Court in the *Hansen* case, ([1978] ECR 1787), which I have already cited, emphasizes and as is repeated in the judgment of 27 February 1980, *Commission* v *France*, (Case 168/78 [1980] ECR 347) Article 95 "must be interpreted widely so as to cover all taxation procedures which conflict with the principle of the equality of treatment of domestic products and imported products" (judgment in Case 168/78, paragraph 5 of the decision, at p. 359). That provision must thus be interpreted in such a way as to render illegal under Community law any taxation policy of a protectionist nature regardless of the form which it takes.

In this case it certainly appears that the relief in question has had a discriminatory effect which is prohibited by Article 95 of the EEC Treaty and by Article 53(1) of the Association Agreement with Greece.

The amount paid on monopoly spirits in respect of their being placed in a warehouse did, it is true, include a sum corresponding to the marginal element

of the monopoly equalization duty (Preisspitze) which also amounted to DM 80 per hectolitre of wine-spirit at the time of the events which gave rise to the dispute, it might well have been considered whether that sum, too, was in the nature of taxation. However, the Court has recently replied to the Bundesfinanzhof which submitted that question to it that "in the computation of the selling price of monopoly spirit, only the amount representing the tax on spirits" — thus excluding the marginal element — "may be taken into consideration for the purposes of comparison of fiscal charges envisaged by Article 95 of the Treaty" (judgment of the Second Chamber of 25 November 1981, *Andresen*, Case 4/81 [1981] ECR 2835, paragraph 18 of the decision). Accordingly there is in fact discrimination between monopoly spirits and imported spirits since the nature of the marginal element of the monopoly equalization duty charged on the latter spirits is not contested.

3. In those circumstances, having regard to the case-law of the Court on the relation between Article 95 of the Treaty and Articles 92 to 94, it is likewise unnecessary to determine whether the measure in question may also be classified as an aid.

As this Court has held in its judgment of 21 May 1980, *Commission* v *Italy* (Case 73/79 [1980] ECR 1547, paragraph 9 of the decision), "a measure carried out by means of discriminatory taxation, which may be considered at the same time as forming part of an aid within the meaning of Article 92," is "governed both by the provisions of the first paragraph of Article 95 and by those applicable to aids granted by States". In such a case, nevertheless, the procedure provided for by Articles 92 and 93 "must never produce a result which is contrary to the specific provisions of the Treaty concerning ... internal taxation" (ECR 1547, paragraph 11 of the decision).

The priority of Article 95 over Articles 92 and 93 was confirmed by the judgment of the Court of 27 May 1981 in the *Essevi* and *Salengo* cases (Joined Cases 142/80 and 143/80) in which the Court stated that "under the system of the Treaty, an aid cannot be introduced or authorized by a Member State in the form of fiscal discrimination against products originating in other Member States" (paragraph 28 of the decision). Similarly, if it is established that a national measure is discriminatory within the meaning of Article 95 of the Treaty the author of such a measure may not rely upon the fact that the measure is also considered as an aid which may be compatible with the Common Market by virtue of Article 95(2) or (3).

4. With regard to Articles 37 and 95 their respective scope was delimited *inter alia* by the judgment of the Court of 13 March 1979 in the *Peureux* case which states that "the rules contained in Article 37 concern only activities intrinsically connected with the specific business of the monopoly and are irrelevant to national provisions which have no connection with such specific business" (Case 86/78, [1979] ECR 913, paragraph 35 of the decision).

In my view the granting of a fixed sum to the proprietors of spirits of all categories (monopoly spirits, domestic spirits exempted from the requirement of delivery to the monopoly, imported spirits) as a refund of taxes previously levied on certain of them clearly cannot constitute "a factor which determines how the specific business of the

monopoly is conducted", to repeat the words of another paragraph of the same judgment (paragraph 36, [1979] ECR p. 914). Accordingly a measure of the kind described by the Finanzgericht may only be judged in relation to Article 95 of the Treaty as regards spirits imported from the Community and in relation to Article 53(1) of the Agreement establishing an association between the EEC and Greece with regard to spirits coming from Greece.

III — In its second question the Finanzgericht asks the Court essentially whether these provisions have direct effect, as it is inclined to think, regardless of the classification and even of the lawfulness of the measure of relief at issue under national law. It puts the same question to the Court with regard to Article 37 of the Treaty.

1. First of all the independence of Community law generally precludes the direct effect of a provision of Community law from depending upon considerations of national law.

According to the settled case-law of the Court Article 95 of the Treaty confers on individuals in the Community rights which the national courts must protect (judgments of 16 June 1966, *Lütticke*, Case 57/65 [1966] ECR 209 and 211; 22 March 1977, *Iannelli*, [1977] ECR 578, paragraph 2 of the decision) and the same is true after the end of the transitional period, as regards Article 37(1) (judgment of 17 February 1976, *Rewe* Case 45/75, cited above, [1976] ECR 197 and 198, paragraphs 22 to 24 of the decision).

2. Accordingly only the question of the direct effect of Article 53(1) of the Agreement establishing an association between the EEC and Greece calls for the attention of the Court.

I recall first that the Court has already ruled that the provisions of that Agreement "form an integral part of Community law" and that it has jurisdiction "to give preliminary rulings" concerning their interpretation (judgment of 30 May 1974 *Haegemann*, Case 191/73, [1974] ECR 460, paragraphs 5 and 6 of the decision).

In my view, in order to recognize the direct effect of a provision contained in an international agreement concluded by the Community two conditions must be fulfilled. The first is that the provision in question must set out a clear, precise and unconditional obligation "which is not ... subject, in its implementation or effect, to the taking of any measure either by the institutions of the Community or by the Member States" (judgment of 16 June 1966 *Lütticke*, cited above [1966] ECR 210).

The second is based on the "ratio" of the conferment of direct effect upon provisions of that nature. The reason why it was possible to grant, on the basis of provisions which I shall qualify as "provisions of internal Community law", to individuals within the Community rights which they may ask the courts to protect is that "the ... Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights,

albeit within a limited field, and the subjects of which comprise not only the Member States but also their nationals" (judgment of 5 February 1963, *van Gend & Loos*, Case 26/62 [1963] ECR 1). The legal order established by the international agreements concluded by the Community may in certain circumstances be endowed with a similar effect.

3. These two conditions appear to me to be fulfilled in this case.

As the Court will find, the wording of Article 53(1) of the Agreement with Greece is practically identical to that of the first paragraph of Article 95 of the Treaty:

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

It follows that the reasons why the Court found that the first paragraph of Article 95 of the Treaty had direct effect apply *mutatis mutandis* to Article 53(1) of the Agreement signed in Athens with Greece. Like the parallel provision of the Treaty, the first subparagraph of Article 53(1) of the Athens Agreement imposes on the persons to whom it is addressed a clear and absolute obligation which is not qualified by any condition or subject, in its implementation or effects, to the intervention of any measure. That obligation was "therefore complete, legally perfect and consequently capable of producing direct effects on the legal relationships between the Member States and persons within their jurisdiction" (judgment in the *Lütticke* case, cited above, 1966 ECR 210).

4. The spirit and general plan of the Athens Agreement also satisfied the second condition.

First, its objectives, as the preamble indicates, show clearly that it constitutes much more than a free-trade agreement of the classical type with other non-member countries. The Contracting Parties in fact declared themselves determined "to establish ever closer bonds between the Greek people and the peoples brought together in the European Economic Community" with a view to the subsequent accession of Greece to the Community.

These objectives are reflected in its structure and content, based on the EEC Treaty. The Association agreement with Greece provided for — apart from the Customs Union, the adoption by Greece of the Common Customs Tariff and the elimination of quantitative restrictions on trade — the harmonization of agricultural policy, the free movement of workers and the relaxation of the rules on establishment and the provision of services, rules on competition, taxation and the approximation of laws, and the coordination of economic policy.

With regard to institutions it established a Council of Association having power to take binding decisions for the realization of the objectives of the agreement and in the cases provided for (Article 65). Provision was made in the agreement for the solution of disputes not only by reference to the Council of Association but also by bringing them

before the courts, a procedure which included the possibility of submitting the matter to the Court of Justice (Article 67). The agreement did not contain any provisions for repudiation.

Finally it follows from the very terms of the first sub/paragraph of Article 53 (1) that that provision imposed reciprocal obligations on the Member States of the Community, the Community and Greece.

In my view it is clear from these considerations taken as a whole that the association between the Community and Greece was sufficiently close for it to be recognized as having the status of a legal order applicable not only to the Contracting Parties but also to their nationals.

IV — In view of my reply to the first question I shall examine only as a subsidiary issue the question whether Community law, by virtue of the general principle of equality, confers upon an importer the right, in respect of spirits imported from other Member States, to qualify for subsidies in the same way as spirits produced or distributed domestically.

I consider that the reply to that question can only be in the negative.

According to the judgment of the Court of 22 March 1977 in Case 78/76 *Steinike & Weinlig* v *Germany* [1977] ECR 595 the right to "challenge the compatibility of an aid with Community law before national courts" and to "ask them to decide as to any compatibility which may be the main issue in actions before them or may arise as a subsidiary issue" (first sentence of paragraph 10 of the decision [1977] ECR 609) may be granted to individuals only where "the provisions of Article 92 have been applied by the general provisions provided for in Article 94 or by specific decisions under Article 93(2)" (second sentence of paragraph 10 of the decision, [1977] ECR 609).

Apart from that case it is clear from the role accorded to the Commission and to the Council by Articles 93 and 94 in considering the compatibility with the Treaty of aid granted by States (judgment in the *Steinike & Weinlig* case, paragraphs 6 to 9 of the decision [1977] ECR p. 608 and 609) that the individuals concerned have no right to obtain through a national court an aid granted to their competitors.

In conclusion I suggest that the following reply should be given to the questions put to the Court by the Finanzgericht.

1. The first paragraph of Article 95 of the EEC Treaty and the first subparagraph of Article 53(1) of the Agreement establishing an association between the European Economic Community and Greece signed in Athens on 9 July 1981 must be construed, having regard to their provisions, as meaning that it is necessary to appraise a national measure prescribing the grant of relief within the framework of the introduction of a tax when that measure is related to an increase in taxes on spirits and the granting of an aid to certain national producers of spirits for spirits existing but not yet taxed at the time when it takes effect.

2. Those provisions must be construed as meaning that they confer upon importers a legal right to have spirits imported from other Member States relieved from consumption taxes in the same way as domestic spirits on the basis of general instructions.

3. The provisions of Article 92 of the EEC Treaty do not confer any right upon an importer that goods imported from other Member States should benefit from subsidies similar to those for which certain competing domestic products qualify.