OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 2 APRIL 1981 [1]

Mr President,
Members of the Court,

The reference for a preliminary ruling with which we are today concerned again centres on the interpretation of Article 95 of the EEC Treaty against the background of the German arrangements for the taxation of spirits which are based on the Gesetz über das Branntweinmonopol [Law on the Monopoly in Spirits] of 8 April 1922 (Reichsgesetzblatt [German Official Journal] I pp. 335, 405 as last amended by the Law of 13 November 1979, Bundesgesetzblatt [German Official Journal] I p. 1937).

As the Court is acquainted with these arrangements from a series of earlier cases I shall merely point out that with regard to the taxation of spirits for human consumption the German Law on the Monopoly in Spirits draws a distinction between the Branntweinsteuer [tax on spirits], the Branntweinaufschlag [spirits surcharge] and the Monopolausgleich [monopoly equalization duty]. The legal position, in so far as it is relevant to the main action, accordingly corresponded in broad outline to that which formed the basis of the judgment of the Court of Justice in Case 45/75 *(Rewe-Zentral* v *Hauptzollamt Landau-Pfalz,* judgment of 17 February 1976, [1976] ECR 181).

The undertaking Rumhaus Hansen GmbH & Co., Flensburg, (hereinafter referred to as "Hansen"), the plaintiff in the main action, is likewise known to the Court of Justice from the first Hansen case (Case 148/77,*H. Hansen jun. & O. C. Balle GmbH* v *Hauptzollamt Flensburg,* judgment of 10 October 1978, [1978] ECR 1787) and the second Hansen case (Case 91/78, *Hansen GmbH & Co.* v *Hauptzollamt Flensburg,* judgment of 13 March 1979, [1979] ECR 935). It produces spirits for human consumption and for this purpose obtains *inter alia* light rum from the French overseas department, Guadeloupe, which it stores in a spirits warehouse.

The Hauptzollamt [Principal Customs Office] Flensburg, the defendant in the main action, by 71 notices of assessment to tax which it issued in the period from 17 April to 13 October 1973, assessed the plaintiff or its predecessor to taxation in respect of the removal of the spirits from bond, such taxation taking the form of the monopoly equalization duty at the rate in force at the time of 1 500 DM per hectolitre of wine-spirit in respect of the light rum originating in Guadeloupe. The rate of duty in excess of that sum had already been charged as Monopolausgleichspitze [marginal rate of monopoly equalization duty] on obtaining customs clearance.

Hansen lodged a complaint against the assessments to tax on the removal of the goods from bond and the Hauptzollamt Flensburg amended the notices of assessment by decision of 20 September 1974. In the course of the procedure before the Finanzgericht [Finance Court] a further correction of 30 notices was issued by decision of 19 September 1979. Nevertheless both corrective decisions left unaltered the basic rate of tax of DM 1 500 per hectolitre of wine-spirit.

Hansen thereupon brought an action before the Finanzgericht [Finance Court] Hamburg. In principle Hansen claims that the charging of the monopoly

1 — Translated from the German.

equalization duty at the rate of DM 1 500 per hectolitre of wine-spirit in addition to the marginal rate of monopoly equalization duty is contrary to Article 95 of the EEC Treaty in that the product in question consists of spirits from the Member States or the French overseas departments. It claimed that higher taxes might not be applied to such spirits than those imposed, for example, on domestic spirits produced from fruit by the application of the lowest rate of tax provided for by the Law on the Monopoly in Spirits — for the precise figures reference is made to the Report for the Hearing.

The Joint Senate for Matters Concerning Customs Duties and Consumer Taxes of the Finanzgericht Hamburg, by order of 12 June 1980, stayed the proceedings and referred the following question in accordance with Article 177 of the EEC Treaty to the Court of Justice for a preliminary ruling:

"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?"

By this question, on which I shall give my opinion, the court making the reference requests more precise information as to the criterion of Article 95 of the EEC Treaty so that for its part it may be able to decide whether and under what conditions imported spirits may qualify for tax advantages which in accordance with national law are reserved to certain categories of products or to certain classes of producers. Since the Court of Justice has already delivered a number of rulings on this group of questions, the question is also particularly concerned to obtain a description of the scope of this case-law.

In this connexion it is significant that the reference for a preliminary ruling was made before judgment was given by the Court of Justice on 30 October 1980 in Case 26/80 *(Schneider-Import GmbH & Co* v *Hauptzollamt Mainz)* in which the Court had to settle a similar question posed by the Finanzgericht [Finance Court] Rheinland-Pfalz.

Both courts were ultimately prompted to make these references for a preliminary ruling by the judgment of the Court of Justice in the first *Hansen* case in which it ruled *inter alia* that "where national tax legislation favours certain classes of producers or the production of certain types of spirits by means of tax exemptions or the grant of reduced rates of taxation, even if such advantages benefit only a small proportion of domestic production or are granted for special social reasons, those advantages must be extended to imported Community spirits which fulfil the same conditions, taking into account the criteria which underlie the first and second paragraphs of Article 95 of the EEC Treaty".

The Finanzgericht referring the present question also states that the Bundesfinanzhof [Federal Finance Court], in an appeal on a point of law [Revision] in a case similar to that in the main action decided in preliminary decision [Vorbescheid] of 6 November 1979, Reference VII R 24/77, with regard to the judgment in the first *Hansen* case,

that the rate of tax applicable to imported spirits was the same as that applicable to German spirits originating with a distillery similar to the foreign distillery and that in this connexion it was necessary to compare the respective conditions or circumstances of production. In the view of the court making the reference, however, it is impossible, on the basis of the case-law of the Court of Justice on Article 95 of the EEC Treaty, to have regard to the similarity of conditions of production, which include the most diverse circumstances, such as the level of wages and prices, social circumstances and, in the case of agricultural products, climate and soil. The case-law of the Court of Justice instead indicates that only graduation in accordance with the criterion of the quantity of goods produced, which is in large measure neutral seen from the point of view of competition, is compatible with Community law.

Likewise in the opinion of the plaintiff, in which the Commission concurs, the criterion of "similar conditions" laid down by the Court of Justice in the first *Hansen* case is not interchangeable with "similar conditions of production" since Article 95 of the EEC Treaty would otherwise in practice be rendered a cipher by reason of these very diverse circumstances. In the view of the plaintiff, however, if regard were had to the "circumstances of production" a comparison would be entailed with a number of national undertakings having various forms, such as Abfindingsbrennereien [distilleries for which production is estimated at a standard level for tax purposes], Stoffbesitzer [owners of raw materials used to produce spirits], Obstgemeinschaftsbrennereien [cooperative fruit-farm distilleries], Verschlußbrennereien [small bonded distilleries with an annual production not exceeding four hectolitres of wine-spirit] and the like, which owe their existence to the monopoly in spirits, require official authorization, are endowed with further privileges and would have been quite differently constituted in conditions of free competition. The conditions mentioned in Article 79 (2) of the former version of the Law on the Monopoly in Spirits cannot however be fulfilled, either in substance or in law, by undertakings in the French overseas department of Guadeloupe, which are all large-scale distillers. The preliminary question accordingly relates rather to the wider prohibition on discrimination contained in Article 37 than to the prohibition of discrimination in matters of taxation contained in Article 95 of the EEC Treaty.

In the view of the plaintiff, relating tax advantages to the quantity of production is ultimately permissible only if such quantities have been created in competition, that is, when clear and objective criteria existed which were justified from the point of view of both national and of Community law.

The plaintiff is of the view that a breach of Article 95 is to be found especially in the fact that, according to Article 79 (2) of the former version of the Law on the Monopoly in Spirits, cooperative fruit-farm distilleries could also qualify for the privileges provided for in these provisions. In the final analysis such cooperative fruit-farm distilleries are by no means small-scale distilleries whose products, which obtain preferential tax treatment, are restricted to specified distillation rights but are really large distilleries whose volume of production is related to the number of their members or associates. The distillation itself, the marketing of the alcohol and all other significant circumstances correspond to those of a large distillery. The legal structure underlying that economic entity is irrelevant in the context of Article 95.

Having regard to this abbreviated account of the argument, it appears to

me sufficient for the solution of the dispute in the main action to refer to the judgment of the Court which has been delivered in the meantime in the *Schneider* case and to my opinion in that case in which I have set out the relevant case-law of the Court of Justice on Article 95. In the main action in the present case, just as in that in the *Schneider* case, the crux of the matter is how far certain national provisions on the taxation of spirits, which provide differentiated rates of tax according to the kind of distillery, the extent of the distillation right, the kind of raw materials and the volume of wine-spirit produced, are compatible with Article 95 of the EEC Treaty. It is accordingly sufficient to indicate to the court making the reference the points of Community law, already specified in the *Schneider* judgment, relevant to the interpretation on the basis of which it is possible to settle this question.

Contrary to the view of the plaintiff in the main action, in this connexion it is irrelevant that the dispute forming the basis of the *Schneider* case concerned the importation of cognac from France whereas this case concerns the importation of rum since, as the Court is aware from the case of *Commission* v *France* (Case 168/78, judgment of 27 February 1980, [1980] ECR 347), rum is to be considered as similar to the domestic products mentioned in Article 79 of the former version of the Law on the Monopoly in Spirits, or as a product competing with them for the purposes of Article 95 of the EEC Treaty. Similarly, no importance is in principle to be attached to the fact that the legislation on which the *Schneider* case turned differs from that in the present case with regard to the determination of differentiated rates of tax. The essential point is instead that both under the legal situation in 1973, which must be taken as the basis for this case, and under that of 1978, certain small producers, in particular distilleries for which production is estimated at a standard level, including owners of the raw material from which spirits are produced, are, within a production limit, accorded preferential treatment under the monopoly, and small bonded distilleries with a production of up to four hectolitres of spirit must qualify for preferential tax treatment. In both 1973 and 1978 an additional advantage was provided in respect of spirits which were manufactured exclusively from stone-fruit, berries or gentian roots.

With regard to the tax advantages for distilleries for which production is estimated at a standard level, owners of the raw materials and small bonded distilleries — I shall disregard for the present the problem of the cooperative fruit-farm distilleries — the Court of Justice, in its judgment in the *Schneider* case, considered tax differentiation of groups of small producers permissible within the framework of Article 95 of the EEC Treaty and has accordingly already answered in the negative the question of the court making the reference whether only the similarity of the products was relevant. In that case the Court also confined itself to examining the question submitted only from the point of view of Article 95 of the EEC Treaty and not in relation to Article 37, although in that case too argument on that point had been submitted.

Unlike the legal position which formed the basis for the judgment in the *Schneider* case, Article 151 of the Law on the Monopoly in Spirits in its 1973 version did not make express provision,

in respect of imported spirits originating with a distillery with an annual volume of production of less than four hectolitres of spirit, for a reduction in tax corresponding to that in Article 79 (2). However, as the Court of Justice expressly emphasized in the first *Hansen* case, tax advantages which may serve legitimate social or economic purposes, such as the continuance of agricultural distilleries, must, in accordance with Article 95, "be extended without discrimination to spirits coming from other Member States". This means, as the Court of Justice *inter alia* ruled in its judgment in the case of *Commission* v *France*, which I have already cited, that the lawfulness of certain tax exemptions or tax concessions is subject to the conditions that the Member States using those powers "extend the benefit thereof in a non-discriminatory ... manner to imported products in the same situation".

As the Court of Justice then pointed out in its judgment in the *Schneider* case, the difficulties in the interpretation of Article 95 with regard to the German Law on the Monopoly in Spirits stem from the close connexion between the tax advantages provided for in that legislation and the methods of taxation and supervision under German law. On that ground it is especially difficult to transpose these provisions to the taxation of spirits which were manufactured in accordance with the legal provisions of another Member State. Accordingly, the requirements of Article 95 of the EEC Treaty are met when the legal system of a Member State permits the application of arrangements on the importation of spirits from other Member States which in their practical effects are the same as those applicable to domestic spirits.

It thus follows from that decision that, according to Article 95 of the EEC Treaty, it is not permissible to transpose to imported spirits technical procedures peculiar to German law which cannot be fulfilled by producers of other Member States.

Again, conversely, the prohibition of discrimination contained in that provision is complied with, as it is stated in the last-mentioned judgment, "where the arrangements applicable to spirits imported from other Member States may be considered as *equivalent* to the arrangements applicable to national production, so that imported products may *in fact* enjoy the same advantages as comparable national products" (emphasis added). The condition of compliance with an upper limit for production in order to obtain a reduction in the rate of tax in respect of imported spirits accordingly conforms to the requirements of Article 95 of the EEC Treaty "where that limit corresponds in general to the upper limit to which national producers are subject in order to qualify for the same tax advantage".

It follows from this case-law that, on the basis of Article 95, which is directly applicable — this was also properly emphasized by the Bundesfinanzhof in its judgment of 16 July 1980, Reference VII R 24/77 confirming the preliminary decision of 6 November 1979 — in the case of imported spirits the decisive rate of tax must be that which is applicable to spirits coming from a *comparable* domestic undertaking. In particular this applies even where, as in this case, the national arrangements do not make

express provision for such a reduction. In view of what has been stated, however, an undertaking is comparable when it corresponds by and large, as regards its structure and volume of production, to the small distilleries defined in the German Law on the Monopoly in Spirits.

In other words the solution would be, apart from the problem of the cooperative fruit-farm distilleries, that the German authorities and courts should apply *mutatis mutandis* the arrangements in Article 151 (3) of the present version which were expressly approved by the judgment of the Court in the *Schneider* case to imports which were effected before the entry into force of that amendment.

However, Article 95 of the EEC Treaty, as the Court of Justice once again emphasized in its judgment in the *Schneider* case, does not require the Member States to extend the same advantages to imported products coming from undertakings whose production considerably exceeds the production limit thus fixed for domestic undertakings. Accordingly the oversight on the part of the legislature does not lead to the result, as the plaintiff in the main action considers, that all imported spirits, regardless of their origin, qualify for the domestic tax advantages. As the defendant in the main action and the Federal government rightly point out, a different interpretation would on the contrary lead to discrimination against those products which, under national law, do not qualify for preferential treatment and yet face the same competition from the imported products as the products obtaining such treatment.

In conclusion it merely remains to consider the problem of the *cooperative fruit-farm distilleries* which, in accordance with Article 79 (2) and Article 79 (a) of the Law on the Monopoly in Spirits in the version in force in 1973, also qualified on the conditions set out therein for preferential tax treatment. Cooperative fruit-farm distilleries are, as is indicated by Article 37 of the Law on the Monopoly in Spirits, small bonded distilleries which are run by a cooperative, an association or by a group of persons without legal personality and in which spirits are manufactured exclusively from fruit which the members themselves have produced. In accordance with paragraph 2 of that provision spirits are considered to have been manufactured within the distillation right when *inter alia* in one business year not more than 300 litres of wine-spirit is produced from the fruit of one member. Article 79 (2) of the former version of the Law on the Monopoly in Spirits has been amended in the meantime so that cooperative fruit-farm distilleries no longer qualify for the reduction in the spirits surcharge. Article 79 (a) of the former version was furthermore repealed and nothing put in its place.

In my opinion, having regard to the case-law of the Court of Justice, it is unnecessary further to investigate the question whether the inclusion of cooperative fruit-farm distilleries amongst the small distilleries obtaining preferential tax treatment constitutes a discrimination for the purposes of Article 95. Instead it is sufficient to point out that, as the cooperative fruit-farm distilleries could still qualify for the reduction in tax at the time in question, it is necessary, in order to prevent distortion of competition, that that advantage also be accorded to manufacturers in other Member States who, in accordance with the nature of their undertaking and of their volume of production are by and large comparable with that form of organization.

However, whether the rum manufacturers of Guadeloupe — as we have heard, they are exclusively large distillers — may be compared, having regard to the above-mentioned criteria, with the cooperative fruit-farm distilleries mentioned in the Law on the Monopoly in Spirits, is ultimately a question of fact for the national court in connexion with which it will be necessary to take account of the fact that the production of spirits in cooperative fruit-farm distilleries in the relevant period, the business year 1972/1973, amounted, according to the information of the Bundesmonopolverwaltung [Federal Monopoly Administration] to a total of only 2 111 hectolitres of spirit.

Since no grounds have emerged which could justify a departure from the case-law of the Court I accordingly propose that the question of the Finanzgericht Hamburg should be answered as follows:

The prohibition of discrimination contained in Article 95 of the EEC Treaty requires, with regard to the application of preferential tax treatment which is reserved by the legal provisions of a Member State to certain categories of producers of spirits, that the arrangements applicable to spirits imported from other Member States should form an equivalent to the arrangements for the domestic products, in which connexion particular care should be taken to ensure that imported products coming from comparable undertakings may in fact qualify for the same advantages as similar domestic products.

Article 95 of the EEC Treaty does not require the Member States to extend corresponding advantage to imported products from undertakings which, according to the nature of the undertaking, are by and large not comparable with corresponding national undertakings and whose production considerably exceeds the production limit laid down for national undertakings.