In Case 148/77

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

H. HANSEN JUN. & O. C. BALLE GMBH & CO, having its registered office in Flensburg,

and

HAUPTZOLLAMT (Principal Customs Office) FLENSBURG,

on the interpretation of Articles 9, 37, 92, 93, 95 and 227 of the EEC Treaty in relation to the application of the German Gesetz über das Branntweinmonopol (Law on the spirits monopoly) of 8 April 1922,

THE COURT,

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

Advocate General: F. Capotorti
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 pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows

I — Facts and written procedure

H. Hansen jun. & O. C. Balle GmbH & Co. (hereinafter referred to as Hansen), having its registered office in Flensburg, produces spirits for human

consumption. For that purpose it uses various types of alcohol, some of which are imported *inter alia* from Guadeloupe, Surinam, Jamaica and Indonesia, then stored in its own warehouse.

In September 1974, Hansen cleared through customs into free circulation spirits with a declared wine-spirit content of 427 884.3 litres.

By notice of 11 October 1974, the Hauptzollamt (Principal Customs Office) Flensburg required Hansen to pay DM 6 476 473.50 tax on the spirits, basing its calculations on a quantity of 431 764.9 litres of wine-spirit and a rate of DM 1 500 per hectolitre of wine-spirit.

On 16 October 1974 Hansen lodged an administrative objection against that notice but the Hauptzollamt Flensburg dismissed it by a decision of 19 August 1976.

Hansen appealed against that decision on 1 September 1976 before the Finanzgericht (Finance Court) Hamburg.

In support of its case, Hansen argued *inter alia* that the Monopolausgleich (monopoly equalization duty) levied under Article 151 (1) of the Branntweinmonopolgesetz (Law on the spirits monopoly) of 8 April 1922 on rum imported by it may not be in excess of the lowest rate of the Branntweinaufschlag (spirits surcharge) provided for in Article 79 (2) of the said Law. Since at the material time that surcharge was DM 1 210.60 per hectolitre of wine-spirit, under Article 95 (1) and (2) of the EEC Treaty only that amount, and not the amount of DM 1 500 per hectolitre of wine-spirit, should be levied on rum imported either from non-member countries or from the French overseas departments.

By an order of 24 October 1977, the Fourth Senate of the Finanzgericht Hamburg decided pursuant to Article 177 of the EEC Treaty to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

1. Is Article 227 (2) of the EEC Treaty, under which the general and particular provisions of the Treaty relating to the free movement of goods shall apply with regard to the French overseas departments, to be interpreted as meaning that the said provisions also include the tax provisions in Part 3, Title I, Chapter 2 of the EEC Treaty, in particular Article 95, or do the provisions relating to the free movement of goods within the meaning of Article 227 (2) only include the provisions in Part 2, Title I?

2. Are Article 37 of the EEC Treaty, and where necesary, if Article 95 of the EEC Treaty is applicable to trade with the French overseas departments, the last mentioned provision, to be interpreted as meaning that goods from Member States or from the French overseas departments may not be made subject to charges on importation in the form of taxes on consumption which are in excess of those borne by the same, similar or substitutable home-produced goods at the lowest rate of charge even if the lowest rate of charge is applicable only to a small proportion of domestic production and for special social reasons?

3. Can a reduction of the burden of charges on a proportion of national production constitute a State aid which falls under the provisions of Articles 92 to 94 of the EEC Treaty or by what criteria are State aids within the meaning of Article 92 of the EEC Treaty to be distinguished from reductions in charges whose compatibility with the Treaty must be assessed under the tax provisions in Article 95 and possibly also under the provisions concerning State

monopolies of a commercial character under Article 37?

4. If the burden of charges on importation of goods imported from Member States or also from the territories mentioned in Article 227 (2) of the EEC Treaty must not be in excess of the lowest charge for the same, similar or substitutable home-produced goods, must the concept of a charge having an effect equivalent to a customs duty used in Article 9 of the EEC Treaty be interpreted as also including consumer taxes if taxes on consumption are levied on imports from non-member countries in excess of those on imports of the same, similar or substitutable goods from Member States or from the territories mentioned in Article 227 (2) of the EEC Treaty?

5. If Question 4 is answered in the affirmative:

   Must Article 9 of the EEC Treaty in conjunction with Regulation (EEC) No 950/68 and Article 189 of the EEC Treaty be interpreted as meaning that after 1 July 1968 the Member States cannot introduce any charges having an effect equivalent to a customs duty which would lead to a charge on goods imported from non-member countries which is in excess of that borne by the same, similar or substitutable goods from Member States or from the territories mentioned in Article 227 (2) of the EEC Treaty?

The order of the Finanzgericht Hamburg was received at the Court Registry on 7 December 1977.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 13 February 1978 by the Commission of the European Communities, on 23 February 1978 by H. Hansen jun. & O. C. Balle GmbH & Co., the plaintiff in the main action, and on 24 February 1978 by the Government of the Federal Republic of Germany.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

However, it requested the Government of the Federal Republic of Germany, the Government of the French Republic and the Commission of the European Communities to provide written answers to a certain number of questions before the opening of the oral procedure. These requests were complied with after extension of the time-limit originally set.

II — Written observations submitted to the Court

H. Hansen jun. & O. C. Balle GmbH & Co., the plaintiff in the main action, divides its observations into four main points:

(a) Article 37 (1) and (2) are by nature directly applicable; that direct applicability operates in respect of imports not only from other Member States of the Community but also from the countries expressly mentioned in Article 227 (2) of the EEC Treaty, which include the French overseas departments. In referring to the general and particular provisions of the Treaty relating to the free movement of goods, Article 227 (2) also refers to the principle of non-discrimination enshrined in Article 37; that principle applies in the particular form of the prohibition on charges having an effect equivalent to a customs duty, and also applies in trade with non-member countries. In the present case, it is also necessary to take account of the fact that the imported goods were put into free circulation in the Community, within the meaning of Article 10 of the EEC Treaty, and are therefore the

subject-matter of intra-Community trade.

The German federal spirits monopoly is a State monopoly of a commercial character within the meaning of Article 37 of the EEC Treaty. That article also applies to any body entrusted by the State with the management of the monopoly. Therefore that article covers all measures and effects of a State monopoly of a commercial character which are discriminatory and which restrict the free movement of goods.

The Court of Justice has defined the scope of the prohibition on discrimination in Article 37: its application is not confined to imports and exports which are the direct subject-matter of the monopoly; it extends to any action connected with the existence of the monopoly and having an effect on trade between Member States in certain products, whether or not those products are under the monopoly. Article 37 (1) prohibits any discrimination; in that connexion, account should be taken of all the factors which affect the price of goods owing to the monopoly. The obligation imposed on the Member States to adjust State monopolies so as to remove any discrimination by the end of the transitional period entails an obligation on their part to eliminate even mere possibilities of discrimination.

Article 37 also applies to taxation which creates discrimination against imported products in relation to domestic products coming under the monopoly. The combination in Article 37 of the prohibition on discrimination and the obligation to adjust State monopolies gives that article a wider scope even than the second paragraph of Article 95: it applies to imports or exports which are not directly the subject-matter of the monopoly; a new charge constitutes discrimination when it has the effect of imposing heavier burdens on imported products than on similar domestic products.

In interpreting Article 95, the lowest rate of taxation on a domestic product should be taken for the purpose of comparing taxation on similar products, even if such disparity arises only in a minority of cases. The same interpretation must be adopted for the principle of fiscal non-discrimination in Article 37.

Moreover, the benefit of the reduced rate of the Branntweinaufschlag under the first subparagraph of Article 79 (2) of the Branntweinmonopolgesetz was not in fact restricted to "a small proportion of domestic production", and at all events according to the case-law of the Court of Justice even a tax advantage which benefits only a small proportion of production is sufficient to constitute a concrete breach of the principle of non-discrimination.

It is also a mistake for the Finanzgericht Hamburg to assume that the reduction in the Branntweinaufschlag benefits underprivileged sections of society; in any case, neither social reasons nor any other considerations can be used to found an argument to exclude tax advantages benefiting small proportions of domestic production from any comparison of the tax burdens on imported products and on domestic products.

The second question referred to the Court of Justice should be answered as follows:

Article 37 of the EEC Treaty is to be interpreted as meaning that spirits and products based on spirits coming from Member States or from the French overseas departments mentioned in Article 227 (2) of the Treaty may not be made subject upon importation to any monopoly equalization duty (tax on consumption) which is in excess of that borne by the same, similar or substitutable home-produced goods at the lowest rate of charge. This is the case even if the lowest rate of charge is applicable only to a small proportion of

domestic production or for special social reasons.

(b) The concept of charges having an effect equivalent to customs duties also includes taxes on consumption where, upon the importation of products from non-member countries, taxes on consumption are levied which are in excess of those borne by imports of the same, similar or substitutable products from Member States.

The Court of Justice has held that internal taxation levied both on imported products and on domestic products also constitutes a charge having equivalent effect if it is not applied systematically to the imported goods and the home-produced goods according to the same criteria. In this connexion, the Court should find in this case that the fiscal element in the Monopolausgleich is in no wise calculated according to the same criteria as the fiscal element in the Branntweinaufschlag (Article 78 of the Branntweinmonopolgesetz) and the fiscal element in the normal selling price for spirits subject to the monopoly (Article 88 *et seq.* of the said Law).

Article 152 of the Branntweinmonopolgesetz does not provide that the Monopolausgleich must correspond to the Branntweinsteuer (tax on spirits); but neither does it provide that the Monopolausgleich must be reduced in accordance with Article 79 (2) and (3). It thus gives rise to discrimination.

In the absence of criteria for the calculation of the Monopolausgleich similar to those enabling the Branntweinaufschlag and the normal selling price to be calculated, the fiscal element contained in the Monopolausgleich is also in the nature of a charge having equivalent effect. Not only does the calculation system fail to provide any guarantee that domestic products and imported products are charged in the same way in all cases, but the system also necessarily leads to the same, similar or substitutable products being taxed differently.

The prohibition on charges having an effect equivalent to customs duties applies to all imports from non-member countries; it is not necessary to refer to Article 227 (2) of the EEC Treaty. The prohibition itself is based on Regulation No 950/68 on the introduction of the Common Customs Tariff, and has been applicable since the Common Customs Tariff entered into force on 1 July 1968. It is prohibited to amend the level of protection as defined by the Common Customs Tariff by means of charges supplementing the duties laid down in that tariff.

The prohibition on levying charges having an effect equivalent to customs duties does not make unlawful either the whole of the fiscal element in the Monopolausgleich or, in view of the unlawfulness of the Monopolausgleichspitze (monopoly equalization margin), the whole of the Monopolausgleich itself. The Court of Justice has held that it is only subsequent to the introduction of the Common Customs Tariff on 1 July 1968 that the Member States are prohibited from unilaterally introducing any new charges or from raising the level of those already in force. As regards charges already in existence, it is for the Community authorities to establish whether they are incompatible with the Treaty and to require their elimination.

The fiscal element in the Monopolausgleich applying on 1 July 1968, which amounted to DM 1 200 per hectolitre of wine-spirit, is also applicable to imports of rum from Guadeloupe, since they are part of intra-Community trade for the purposes of Article 227 (2).

(c) The questions concerning the direct applicability and the interpretation of Article 95 of the EEC Treaty

are asked merely in the alternative: if the Monopolausgleich charged on imported goods is unlawful in whole or in part by virtue merely of the combined application of Article 37 of the Treaty and the provisions on the Common Customs Tariff, application of Article 95 ceases to be relevant both in fact and in law; moreover, as regards discriminatory duties charged within the framework of a monopoly, the scope of the prohibition laid down in Article 37 is at least as broad as that of the prohibition laid down in Article 95.

Article 95 is without question directly applicable. The question is whether it also comes within the "general and particular provisions ... relating to the free movement of goods" within the meaning of Article 227 (2). In this connexion, it is striking that the provisions relating to the free movement of goods, agriculture, the liberalization of services and the rules on competition must be applied to trade with Guadeloupe, whereas the tax provisions, in particular the principle of fiscal non-discrimination laid down in Article 95, are not specifically referred to. According to Article 227 (2), the conditions under which the other provisions of the EEC Treaty are to apply to the French overseas departments shall be determined by decision of the Council, acting on a proposal from the Commission. The Council and the Commission have not formally determined the conditions under which Article 95 is to apply: they have clearly taken the view that that article is an integral part of the rules on the free movement of goods. On the basis of Article 227 (2) alone, the prohibition on fiscal discrimination should apply to trade between the Community and Guadeloupe. Furthermore, Article 37, which is one of the provisions on the free movement of goods, contains a prohibition on fiscal discrimination the scope of which is at least as broad as that of Article 95 as regards duties levied or created on the basis of State monopolies of a commercial character.

According to the case-law of the Court, the lowest rate of taxation applied to domestic products must be taken for the purpose of comparing the charges borne by imported goods on the one hand and home-produced goods on the other. The requirements of Article 95 are not satisfied if the charge on an imported product is higher than the charge on a similar domestic product, even if only in certain cases. It is irrelevant that such cases concern only a small proportion of domestic production and are based on special, allegedly social, reasons.

The first and second questions referred to the Court of Justice for a preliminary ruling should be answered in the affirmative.

(d) The provisions concerning aid of Article 92 *et seq.* of the EEC Treaty apply to the main action inasmuch as it concerns prohibited aid. With regard to Article 42 of the Treaty, it should be found that spirits for human consumption are not regarded as being agricultural products.

The reduction of the tax burden which is enjoyed by a certain proportion of the domestic production of alcohol and spirits may constitute an aid granted by the State or through State resources "in any form whatsoever", within the meaning of Article 92 (1) of the Treaty. As not only the tax rates but also the factors making up prices have been altered several times without the Commission's having been notified since the Treaty came into force, any person may raise a plea of unlawful aid under Article 93 (3) before any courts having jurisdiction.

Articles 92 and 93 on the one hand and Article 95 on the other have different objectives. The fact that a national measure satisfies the requirements of Article 95 does not imply that it is

lawful with regard to Articles 92 and 93; this is true *a fortiori* where measures adopted by a State are also incompatible with Article 95. Both sets of provisions are applicable in this case; since the question is whether or not the imported products are subject to taxation in excess of that imposed directly or indirectly on similar domestic products, it is necessary to take account of aid in so far as it is in the nature of a government tax which is introduced and quantified by the public administration. Only such taxation as is lawfully imposed, directly or indirectly, on similar domestic products is taken into account. If the aid is not a tax which is introduced by the public administration, it is excluded from any comparison, within the framework of Article 95, of the taxes borne by the products concerned.

The objectives of Article 37 are also different from those of Articles 92 and 93, even though it includes a prohibition on granting aid in so far as such aid is an integral part of a State monopoly of a commercial character. In the context of the spirits monopoly, all the discriminatory effects deriving from subsidized acceptance prices and from tax abatements are already covered by the very extensive prohibitions in Article 37. However, Articles 92 and 93 may become relevant if, instead of monopoly measures, States lay down "equivalent safeguards" within the meaning of Article 37 (4) which are contrary to the provisions on aid.

The *Government of the Federal Republic of Germany* submits in essence the following observations:

(a) The chapter "Tax Provisions" does not appear among the sections of the EEC Treaty which are to apply to the French overseas departments under the first subparagraph of Article 227 (2). Since the designation of the sections listed in that subparagraph corresponds word for word to certain titles and certain chapter headings in the Treaty, it is not possible to bring in titles or chapters designated in a different way; accordingly, the reference to the free movement of goods relates only to Title I of Part Two of the Treaty and does not include other titles or chapters, such as the chapter on tax provisions.

Moreover, the Council has taken no decision pursuant to the second subparagraph of Article 227 (2) to extend the ambit of the first subparagraph thereof. And the fact that any application of other provisions of the Treaty is subject to a decision by the Council also excludes the view that the list contained in the first subparagraph is merely by way of example and can be extended at will by way of interpretation.

Therefore on a strictly literal interpretation of Article 227 (2), the first question should be answered in the terms of the second alternative set out therein.

However, the Government of the Federal Republic of Germany doubts whether such a solution would be compatible with the purpose of Articles 95 and 227 and with the objectives of the Treaty.

Article 95 is of fundamental importance for the achievement of the objectives of the Treaty, since the prohibition on fiscal discrimination is one of the preconditions of the setting up of the common market, and it is closely connected as regards its content with the provisions on the free movement of goods. The role played by Article 95 in the Community's external relations is no less important: by prohibiting taxation which has the effect of distorting competition, it encourages the progressive development of trade; based on Article III (2) of the General Agreement on Tariffs and Trade (GATT), it is almost an integral part of the commercial agreements and association agreements concluded by

the Community with many non-member States.

There are therefore objections to preferring a purely literal interpretation of Article 227 (2) and to a ruling to the effect that the provisions of Article 95 cannot apply to the French overseas departments. However, in view of the other questions asked, it is not necessary to give a definitive answer to this first question.

(b) Article 37 (1) of the Treaty provides the criterion applicable under Community law to the taxation of products imported from the French overseas departments which would be subject to the monopoly if they were of domestic manufacture. That paragraph covers any activity connected with the existence of a State monopoly, and applies *inter alia* to taxation; on this point it repeats the prohibition laid down in Article 95 on any fiscal discrimination in the treatment of imported goods which are subject to the monopoly within national territory.

This is also true of products imported from the French overseas departments. As a provision coming within Title I of the Treaty relating to the free movement of goods, Article 37 also applies to the French overseas departments pursuant to Article 227 (2); with regard to imports from those departments, the prohibition on fiscal discrimination therefore applies indirectly to part of the trade, that is the part which is affected by the monopoly. This interpretation does not involve an excessive extension of Article 227 (2), since Article 37 constitutes a special provision: the obligation to adjust State monopolies would be incomplete if discrimination of a fiscal nature could continue for certain products.

— The prohibition on discrimination laid down in Article 37 (1) requires that the tax burden on imported goods should be no heavier than that on domestic goods; however, it does not imply that where there are different rates of taxation, the charge on the imported product must in every case be set at the level of the lowest rate of taxation.

The principle of fiscal equality has applied unconditionally and without any exceptions since the end of the transitional period; therefore it is immaterial that the difference of treatment may be on a small scale and that a selective system of taxation may have a social purpose.

However, the principle of fiscal equality does not require that imported products should be given privileged tax treatment in comparison with similar domestic products; nevertheless, this would be the case if, where domestic products are subject to taxation at different rates, all imported products were in every case subject to the lowest rate of taxation. The principle of fiscal equality means merely that imported products must be taxed only to the same extent as domestic products coming under the monopoly. The necessary and sufficient condition is that any tax advantages should also be granted to imported products on identical conditions and in a similar manner. If it proved impossible to extend to imports the reductions granted to domestic products, the Member State concerned would be bound to establish fiscal equality by introducing a single rate of taxation or by reducing the tax to the lowest internal rate of charge.

As regards the application of the first subparagraph of Article 79 (2) of the Branntweinmonopolgesetz, it is submitted that the manner of imposing national taxation may be said to comply with the principle of fiscal equality in so far as imported products can enjoy the same advantages.

Finally, the obligation to apply the lowest rate of taxation to imported products could lead to the abandonment

of any taxation at different rates and the introduction of uniform rates of taxation, particularly in the form of a flat-rate charge; thus the national legislature in tax matters would be prohibited from making use of one of the traditional instruments of fiscal policy, namely a graduated system of taxation. Such a situation would conflict with the acknowledged power of the national legislature to make the arrangements it sees fit in connexion with the introduction of a certain tax system.

— In principle, the rule of fiscal equality applies also to imported products which within national territory do not encounter the same or similar products but merely substitutable products within the meaning of the second paragraph of Article 95.

However as regards the relationship between the same or similar products on the one hand and merely substitutable products on the other, it follows from the structure and content of Article 95 that the second paragraph of that article is subsidiary to the first: in so far as there is a domestic product similar to the imported product, comparison of the tax burden on each of them must be restricted to those products. To set the tax burden at the lower rate which might apply to substitutable products could well put the similar domestic product at a disadvantage.

Otherwise, the principle of fiscal equality applies to substitutable products in the same way as to the same or similar products for the purposes of the first paragraph of Article 95, which means that imported products must not be treated better than domestic products.

The second question should be answered as follows:

Article 37 of the EEC Treaty is to be interpreted as meaning that goods from Member States or from the French departments may not be made subject to charges on importation in the form of taxes on consumption which are in excess of those borne in the same circumstances by the same or similar home-produced goods or, in the absence thereof, by substitutable home-produced goods.

(c) The advantages conferred on small and medium-sized distillery undertakings under Article 79 (2) of the Branntweinmonopolgesetz are in the nature of an aid within the meaning of Article 92 *et seq.* of the EEC Treaty. These articles concern any aid "in any form whatsoever". Such aid must include all direct or indirect State subsidies to certain undertakings or certain sectors of production in that State.

The second part of the third question does not call for an answer; it was clearly asked only in the event of the first part being answered in the negative. In any case, the rules laid down in Article 79 (2) of the Branntweinmonopolgesetz are legal.

The *Commission of the European Communities* submits observations only on the first two questions:

(a) The general and particular provisions of the EEC Treaty relating to the free movement of goods, declared applicable to the French overseas departments by Article 227 (2), are grouped under Title I of Part Two of the Treaty (Articles 9 to 37). Other sections of the Treaty also concern or could also concern the movement of goods; it necessarily follows from the fact that the tax provisions are not among those expressly cited by Article 227 (2) as being applicable that the tax provisions, in particular Article 95, are not applicable to the French overseas departments.

Moreover, no decision has yet been taken in the field of Article 95, even

though the second subparagraph of Article 227 (2) empowers the Council, acting on a proposal from the Commission, to determine the conditions under which the other provisions of the Treaty are to apply.

Therefore the answer to the first question should be that in the present state of Community law the tax provisions, in particular Article 95, are not applicable to the French overseas departments.

(b) The second question raises the preliminary question whether Article 37, paragraph (1) of which provides that by the end of the transitional period no discrimination regarding the conditions under which goods are procured and marketed shall be allowed between nationals of Member States, may still be relied upon before national courts after the end of that transitional period in order to challenge the application of a discriminatory fiscal charge to an imported product.

In relation to the Member States, Article 37 (1) is in the nature of an obligation to perform an action, which obligation had to be carried out during the transitional period; the purpose of Article 37 (1) was to ensure that by the end of the transitional period products coming under a State monopoly should be subject to the same conditions as had been created for trade in freely-marketed products not coming under a monopoly by the elimination of customs duties, quantitative restrictions, charges and measures having equivalent effect and by the prohibition on fiscal discrimination. As from 31 December 1969, State monopolies of a commercial character should have been adjusted so as to remove any exclusive right to import from other Member States. Since the end of the transitional period, the same principle has applied as regards exclusive rights to export from Member States and to market products within Member States, since such exclusive rights are the essence of a monopoly. The abolition of the exclusive rights put an end to the existence of monopolies as such. Therefore Article 37 (1) is no longer applicable, except in order to seek the elimination of exclusive rights to import, export or market goods. In relation to all other measures, the general provisions of the Treaty are applicable, in particular Articles 12, 30, 34 and 95.

In the case of imports from the French overseas departments, this does not lead to unfair results: it is patently not justified to make the validity of a prohibition on fiscal discrimination depend on whether or not the importing country has a commercial monopoly for the product in question.

Therefore the answer to the second question should be that, since the end of the transitional period, it is possible to rely on Article 37 (1) only in order to seek the elimination of exclusive rights to import, export or market goods, but that otherwise the general provisions of the Treaty are applicable.

(c) Since the third, fourth and fifth questions are asked only in the event of Articles 37 or 95 being applicable they are purposeless.

III — Answers to the questions put by the Court

According to the *Government of the Federal Republic of Germany*, the amount of alcohol produced for human consumption which benefited from Article 79 (2) of the Branntweinmonopolgesetz in the financial year 1973/1974 represented 4.84% of the total volume produced.

Under the first subparagraph of Article 79 (2), the privilege provided for in Article 79 (2) concerns Abfindungsbrennereien (distilleries for which production is estimated at a standard level for tax purposes) (approximately

30 000 undertakings), Stoffbesitzer (owners of the raw materials used to produce spirits) (approximately 200 000 undertakings), Verschlußkleinbrennereien (small "bonded" distilleries) (46 undertakings) and Obstgemeinschaftsbrennereien (collective fruit farm distilleries) (11 undertakings comprising approximately 5 000 members); under the second subparagraph of Article 79 (2) the tax privilege is also granted to distilleries with an annual production not exceeding 300 hectolitres of wine-spirit.

Not counting production of this latter kind, the proportion of production which enjoyed the reduced rate of Branntweinaufschlag (spirits surcharge) was 2.09% of the total production in the financial year 1973/1974. Despite the privilege which it grants, the second subparagraph of Article 79 (2) of the Branntweinmonopolgesetz — which moreover has been repealed as from 18 March 1976 — does not result in a charge to tax of less than DM 1 500 per hectolitre, so that such production should not be taken into account for the purpose of any comparison with total production.

On the interpretation of Article 227 (2) of the EEC Treaty, the *Government of the French Republic* considers it appropriate to make certain comments concerning the concept of free movement of goods and the application of the provisions of the Treaty to the French overseas departments.

(a) On the question of freedom of movement, a distinction is to be drawn between the obligations imposed on the Member States on the one hand by Articles 12 and 13 of the Treaty on the free movement of goods, and on the other by Article 95 concerning non-discrimination as regards taxation. However, this distinction does not remove the need to examine in each case whether what appears to be a charge to tax is not, in fact, a charge having an effect equivalent to a customs duty.

As regards the main action, the criteria laid down in the case-law of the Court of Justice lead, by way of reasoning *a contrario,* to the conclusion that the taxation in the Federal Republic of Germany of rum imported from Guadeloupe is a charge having an effect equivalent to a customs duty within the meaning of Article 12 of the Treaty.

(b) Article 227 (2) of the EEC Treaty expressly provided for the Treaty to apply to the French overseas departments, which are an integral part of the French Republic; the intention was that this application would take place in two stages, certain provisions of the Treaty being applicable immediately (those appearing in the first subparagraph of Article 227 (2)), and others being applicable only after a transitional period not exceeding two years and subject to any possible adjustments (other provisions of the Treaty referred to in the second subparagraph of Article 227 (2)). That transitional period is over; even though the Council has power to adopt, where necessary, any special provisions for the overseas departments which may be required to allow for their special nature, which is acknowledged in the Treaty, those departments are an integral part of the Community and consequently all the provisions of the Treaty apply to them automatically.

The *Commission of the European Communities* submitted to the Court a chronological list of 44 instruments adopted by the Council pursuant to Article 227 (2) of the EEC Treaty, and on the question whether the present legislative situation is definitive it expressed the view that the period laid down in the second subparagraph of Article 227 (2) does not entail a strict time-limit but merely a target date. The Community's legislative activity for the

purpose of extending provisions of Community law to the French overseas departments is not yet completed. Thus, the Commission's proposal concerning a Council regulation on the common organization of the market in ethyl alcohol provides that the Council may, on a proposal from the Commission, adopt measures intended to maintain the level of employment among sugar-cane producers in the French overseas departments and to assure them of an adequate income; the extension of further provisions of the Treaty and of secondary Community law to the French overseas departments is probable and should be examined in detail, in particular where it is likely to involve additional burdens on the Community budget. At all events, it is the Commission's intention to reserve to itself the power to continue to submit proposals of this kind to the Council.

As regards the extension of the tax provisions of the Treaty to the French overseas departments, it is to be noted that France is currently applying special tax provisions to those departments: thus, value-added tax is not applied in Guyana, and is subject to certain alterations in the other departments; imports of rum into metropolitan France benefit from certain reductions in the normal rate of tax on consumption; the production tax on spirits is occasionally applied at reduced rates in the overseas departments.

As to whether it follows from Article 95 of the EEC Treaty that goods from Member States or from the French overseas departments may not be made subject on importation to taxes on consumption which are in excess of those borne by the same, similar or substitutable home-produced goods at the lowest rate of charge, even if the lowest rate of charge is applicable only to a small proportion of domestic production and for special social reasons, it should be noted first of all that the criterion contained in Article 95 is in fact more subtle than the wording of the question would indicate. The second paragraph of Article 95 does not mention "substitutable home-produced goods"; the criterion adopted is the capacity "to afford indirect protection to other products". It is not a question merely of comparing the tax charge imposed on the imported product with that borne by such home-produced goods as may be "substitutable"; the second paragraph of Article 95 imposes an obligation to examine the economic effects of internal taxation: the prohibition which it lays down applies only if those effects are of such a nature as to afford indirect protection to "other" products. Therefore it is incumbent upon the national court to assess whether any differences between the tax burdens imposed fulfil the conditions laid down in the second paragraph of Article 95.

According to the case-law of the Court, the first paragraph of Article 95 is infringed where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product. A Member State may apply to an imported product a system of taxation different from the one to which the similar domestic product is subject, provided that the charge to tax on the imported product remains at all times the same as or lower than the charge applicable to the similar domestic product; the first paragraph of Article 95 does not restrict the freedom of each Member State to establish the system of taxation which it considers the most suitable in relation to each product. If the home-produced product is subject to a graduated tax calculated on the basis of the yearly production, it must be ensured that the foreign product is taxed at the same or a lower rate and is also taxed on the basis of the quantities produced by each production unit during a given period.

The relationship between the prohibition on discrimination contained in Article 95 and the prohibition on granting aid contained in Article 92 is such that in no case can both provisions apply to the same situation. In the case of a tax abatement coming under Article 92, because it particularly affects certain undertakings or branches of production, Article 92 *et seq.* apply, to the exclusion of all other articles; in such a case, to rely upon Article 95 in order to seek an extension of the tax abatement to similar imported products amounts to ignoring the fact that national aid always has a discriminatory effect to some extent. On the other hand, a general tax measure involving different rates of tax does not involve any granting of aid; and Article 95 alone applies to it.

A distinction must be made between two situations:

Either a Member State makes a particular product subject to a uniform tax system within its territory. Although that system provides for different levels of taxation, it applies to all producers; thus there is no question of preferential treatment restricted to certain undertakings. This is not an aid within the meaning of Article 92; as a general principle, such a tax system must be assessed according to Article 95 in so far as the taxation of imports is concerned.

Or a Member State imposes a tax on certain products within its territory at different rates depending *inter alia* upon the nature and size of the manufacturing establishment, the raw material or the intended use. In such a case there is treatment "favouring certain undertakings or the production of certain goods"; any tax abatements resulting from a tax system with different rates based on such criteria must be assessed solely according to Article 92 *et seq.*

It is open to a Member State to combine these two systems. Subject to more detailed examination, this is the case with the taxation of spirits for human consumption under the German Branntweinmonopolgesetz.

In the other Member States there are no provisions exactly comparable to the tax system set up in Germany by Article 79 of the Branntweinmonopolgesetz. However, there are tax provisions which allow a comparable effect to be obtained, to the extent to which spirits manufactured from certain raw materials and/or manufactured by certain producers are subject to more favourable tax treatment.

Article 95 is not applicable to arrangements for spirits imported from non-member countries; that provision concerns only intra-Comunity trade.

Since the entry into force of the Common Customs Tariff, the prohibition on charges having an effect equivalent to customs duties has also applied to direct imports from non-member countries. However, that prohibition is not decisive in the present case: the principle that the provisions of Article 9 *et seq.* and those of Article 95 cannot be applied simultaneously to one and the same situation also applies in relation to non-member countries.

Surinam and Jamaica, but not Indonesia, are among the signatory States of the ACP-EEC Convention of Lomé. That convention contains *inter alia* a prohibition on charges having an equivalent effect, but does not contain any tax provisions corresponding to Article 95.

Jamaica and Indonesia are signatories of the General Agreement on Tariffs and Trade (GATT), and Surinam applies the provisions of GATT *de facto*. Article III (2) of GATT contains provisions broadly corresponding to Article 95. However, the questions asked by the Finanzgericht Hamburg confine themselves to the interpretation of Article 9 of the EEC Treaty, and therefore do not constitute a question

on the interpretation of the provisions of GATT. For this reason alone, consideration of the question asked is superfluous; furthermore, Article 177 provides for the interpretation of Community law alone.

IV — Oral procedure

H. Hansen jun. & O. C. Balle GmbH & Co., the plaintiff in the main action, represented by Dietrich Ehle, Advocate of Cologne, the Government of the Federal Republic of Germany, represented by Martin Seidel, Ministerialrat at the Federal Ministry for Economic Affairs, assisted by Egon Scherping, Ministerialrat at the Federal Ministry of Finance, and the Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, presented oral argument and answered questions asked by the Court at the hearing on 6 June 1978.

The Advocate General delivered his opinion at the hearing on 4 July 1978.

Decision

1 By an order of 24 October 1977 which was received at the Court on 7 December 1977, the Finanzgericht (Finance Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions on the interpretation of Articles 9, 37, 92 to 94, 95 and 227 (2) of the EEC Treaty in relation to the system of taxation applicable to certain imported spirits.

2 It appears from the case file that in 1974 the plaintiff in the main action marketed spirits of various origins, either unprocessed or as coupages made from both home-produced spirits and products from Guadeloupe, Surinam, Jamaica and Indonesia.

3 A dispute arose between the plaintiff and the tax administration concerning the rate of taxation applicable to the various spirits: the administration assessed them at the ordinary rate, whereas the plaintiff claims that the imported spirits should be assessed at the minimum rate of tax which under Article 79 (2) of the Branntweinmonopolgesetz (Law on the spirits monopoly) is restricted by German law to certain types of products, in particular spirits made from fruit, and to certain classes of distilleries such as Abfindungsbrennereien (distilleries for which production is estimated at a standard level for tax purposes), Verschlußkleinbrennereien (small "bonded" distilleries) and Obstgemeinschaftsbrennereien (collective fruit farm distilleries).

4 Taking the view that the spirits which it had imported were entitled to the same tax advantages, the plaintiff in the main action brought proceedings before the Finanzgericht Hamburg, which has asked the following questions in order to reach a decision on the case:

1. Is Article 227 (2) of the EEC Treaty, under which the general and particular provisions of the Treaty relating to the free movement of goods shall apply with regard to the French overseas departments, to be interpreted as meaning that the said provisions also include the tax provisions in Part 3, Title I, Chapter 2 of the EEC Treaty, in particular Article 95, or do the provisions relating to the free movement of goods within the meaning of Article 227 (2) only include the provisions in Part 2, Title I?

2. Are Article 37 of the EEC Treaty, and where necessary, if Article 95 of the EEC Treaty is applicable to trade with the French overseas departments, the last mentioned provision, to be interpreted as meaning that goods from Member States or from the French overseas departments may not be made subject to charges on importation in the form of taxes on consumption which are in excess of those borne by the same, similar or substitutable home-produced goods at the lowest rate of charge even if the lowest rate of charge is applicable only to a small proportion of domestic production and for special social reasons?

3. Can a reduction of the burden of charges on a proportion of national production constitute a State aid which falls under the provisions of Articles 92 to 94 of the EEC Treaty or by what criteria are State aids within the meaning of Article 92 of the EEC Treaty to be distinguished from reductions in charges whose compatibility with the Treaty must be assessed under the tax provisions in Article 95 and possibly also under the provisions concerning State monopolies of a commercial character under Article 37?

4. If the burden of charges on importation of goods imported from Member States or also from the territories mentioned in Article 227 (2) of the EEC Treaty must not be in excess of the lowest charge for the same, similar or substitutable home-produced goods, must the concept of a charge having an effect equivalent to a customs duty used in Article 9 of the EEC Treaty be interpreted as also including consumer taxes if taxes on consumption are levied on imports from non-member countries in excess of those on imports of the same, similar or substitutable goods from Member States or from the territories mentioned in Article 227 (2) of the EEC Treaty?

5. If Question 4 is answered in the affirmative:

Must Article 9 of the EEC Treaty in conjunction with Regulation (EEC) No 950/68 and Article 189 of the EEC Treaty be interpreted as meaning that after 1 July 1968 the Member States cannot introduce any charges having an effect equivalent to a customs duty which would lead to a charge on goods imported from non-member countries which is in excess of that borne by the same, similar or substitutable goods from Member States or from the territories mentioned in Article 227 (2) of the EEC Treaty?

Question 1 (application of the tax provisions of the Treaty to the French overseas departments)

5 Since some of the spirits in question were imported from Guadeloupe, a French overseas department, the Finanzgericht asks whether the tax provisions of the Treaty, in particular the rule on non-discrimination laid down in Article 95, apply to those products.

Doubt on this point arises from the fact that Article 227 (2) of the Treaty provides that certain stated groups of provisions shall apply to the French overseas departments, and the tax provisions are not mentioned in that list.

6 It appears from the case file that the plaintiff in the main action sought to base its claim primarily on the prohibition of discrimination laid down in Article 95, which it considers to apply to the French overseas departments.

7 The opinions expressed on this point in the course of the proceedings by the Commission on the one hand and the Government of the French Republic on the other are contradictory.

According to the Commission, the tax provisions of the Treaty are not applicable to the French overseas departments, because they are not expressly referred to in Article 227 (2) and have not been declared applicable by any subsequent instrument.

On the other hand, the French Government expressed the opinion that the French overseas departments belong to the Community inasmuch as they are an integral part of the French Republic, and that consequently all the provisions of the Treaty apply to them automatically, save as otherwise provided in any special provisions adopted where necessary by the Council in order to allow for their special nature, which is acknowledged in the Treaty.

The Government of the Federal Republic of Germany did not adopt any position on this question of principle, but expressed the view that in any case Article 95 is applicable as being the necessary complement to the provisions on the elimination of customs duties and charges having equivalent effect.

8 Article 227 (1) provides that the Treaty shall apply to the "French Republic" in its entirety.

The special position of the French overseas departments is dealt with in the following terms by Article 227 (2):

"With regard to ... the French overseas departments, the general and particular provisions of this Treaty relating to:

— the free movement of goods;

— agriculture, save for Article 40 (4);

— the liberalization of services;

— the rules on competition;

— the protective measures provided for in Articles 108, 109 and 226;

— the institutions,

shall apply as soon as this Treaty enters into force.

The conditions under which the other provisions of this Treaty are to apply shall be determined, within two years of the entry into force of this Treaty, by decisions of the Council, acting unanimously on a proposal from the Commission.

The institutions of the Community will, within the framework of the procedures provided for in this Treaty, in particular Article 226, take care that the economic and social development of these areas is made possible."

9 The legislative practice of the Community shows that, except for a few isolated provisions, the Council has not made use of the power conferred in the second subparagraph of Article 227 (2).

On the other hand, many special provisions have subsequently been adopted in favour of the French overseas departments in the context of legislation on the most diverse subjects, but none of that legislation refers to the tax provisions.

The question raised by the national court is to be answered in the light of these factual and legal considerations.

10 It follows from Article 227 (1) that the status of the French overseas departments within the Community is primarily defined by reference to the French constitution under which, as the French Government has stated, the overseas departments are an integral part of the Republic.

However, in order to make due allowance for the special geographic, economic and social situation of those departments, Article 227 (2) made provision for the Treaty to be applied by stages, and in addition it made available the widest powers for the adoption of special provisions commensurate to the specific requirements of those parts of the French territories.

11 For that purpose, Article 227 precisely stated certain chapters and articles which were to apply as soon as the Treaty entered into force, while at the same time reserving a period of two years within which the Council could determine special conditions under which other groups of provisions were to apply.

Therefore after the expiry of that period, the provisions of the Treaty and of secondary law must apply automatically to the French overseas departments inasmuch as they are an integral part of the French Republic, it being understood, however, that it always remains possible subsequently to adopt specific measures in order to meet the needs of those territories.

It follows from these considerations that Article 95 applies to the tax treatment of products coming from the French overseas departments.

12 Therefore the answer to Question 1 should be that Article 227 (2) of the EEC Treaty, interpreted in the light of Article 227 (1), must be taken to mean that the tax provisions of the Treaty, in particular the prohibition of discrimination laid down in Article 95, apply to goods coming from the French overseas departments.

Questions 2 and 3 (treatment of spirits coming from within the Community in relation to Articles 37, 92 to 94 and 95 of the Treaty)

13 By Questions 2 and 3 the Finanzgericht seeks to obtain at the same time guidance on the interpretation of Article 37 relating to State monopolies of a commercial character, of Articles 92 to 94 relating to the arrangements for aid and of Article 95 relating to the non-discriminatory application of internal taxation, in order to be able to assess the compatibility with the

Treaty of the provisions of national law in favour of certain types of spirits or certain classes of producers and to deduce from such assessment the requisite consequences for the tax treatment of imported spirits coming from within the Community.

14 It emerges from a comparative study supplied by the Commission at the request of the Court that preferential arrangements comparable to those contained in Article 79 of the Branntweinmonopolgesetz exist in several Member States, albeit in widely varying forms.

It appears from the same study that such arrangements can exist independently of any connexion with a commercial monopoly, within the framework of legislation of a purely fiscal character.

Accordingly, it appears preferable to examine the problem raised by the national court primarily from the point of view of the rule on taxation laid down in Article 95, because it is of a general nature, and not from the point of view of Article 37, which is specific to arrangements for State monopolies.

This approach is further justified by the fact that Article 37 is based on the same principle as Article 95, that is the elimination of all discrimination in trade between Member States.

It also appears preferable to consider the question raised by the national court from the point of view of Article 95 rather than in the light of the provisions on aid contained in Articles 92 to 94, since the latter also rest on the same basic idea as Article 95, namely the elimination of State interventions — including tax abatements — which might have the effect of distorting the normal conditions of trade between Member States.

15 From the point of view of Article 95, the questions asked by the Finanzgericht are essentially intended to ascertain whether and, if appropriate, in what circumstances imported spirits may enjoy preferential treatment reserved by national tax legislation to certain types of products or certain classes of producers.

16 At the present stage of its development and in the absence of any unification or harmonization of the relevant provisions, Community law does not prohibit Member States from granting tax advantages, in the form of exemption from or reduction of duties, to certain types of spirits or to certain classes of producers.

Indeed, tax advantages of this kind may serve legitimate economic or social purposes, such as the use of certain raw materials by the distilling industry, the continued production of particular spirits of high quality, or the continuance of certain classes of undertakings such as agricultural distilleries.

17 However, according to the requirements of Article 95, such preferential systems must be extended without discrimination to spirits coming from other Member States.

In this connexion Article 95 does not allow any distinction to be drawn either according to the reasons, whether social or otherwise, for those special systems, or according to the relative importance of such systems as compared with the ordinary taxation system.

18 Difficult problems regarding similar treatment can arise in this context in view of the elements to which the legislation of the different Member States has linked the granting of the tax advantages concerned, such as the nature of the raw materials, the technical characteristics of the equipment, the distilling processes, the taxation procedure and the methods of fiscal control.

These difficulties are particularly conspicuous in a case such as the present one, which concerns a product — rum — which comes from outside the European climatic zone.

19 With regard to these difficulties of comparison, it must be emphasized that the first paragraph of Article 95 refers to both "direct" and "indirect" discrimination, and that the application of that provision is based not on a strict requirement that the products should be identical but on their "similarity".

Furthermore, the second paragraph of Article 95 prohibits any system of internal taxation which is "of such a nature as to afford indirect protection to other products".

It follows that the special advantages provided by national legislation for certain types of spirits or certain classes of producers could be claimed for imported Community spirits wherever the criteria underlying the first and second paragraphs of Article 95 are satisfied.

20 **Therefore the answer to Questions 2 and 3 should be 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.**

Questions 4 and 5 (tax arrangements for spirits coming from non-member countries)

21 Questions 4 and 5 concern the taxation arrangements for spirits coming from non-member countries.

By its reference to Article 9 of the EEC Treaty and Regulation No 950/68 of the Council of 28 June 1968 on the Common Customs Tariff (Official Journal, English Special Edition 1968 (I), p. 275), the Finanzgericht indicates that it is concerned by the question whether, assuming that certain tax arrangements were acknowledged to be discriminatory in relation to imported goods, such a difference of treatment would fall under the prohibition on charges having an effect equivalent to customs duties or whether it should be regarded as an increase in the Common Customs Tariff duties which would be incompatible with the uniform nature of that tariff.

22 In this connexion it must be pointed out, first, that the purpose of Article 9 of the Treaty is only to prohibit charges having an effect equivalent to customs duties in trade "between Member States", so that that provision does not concern the importation of products from non-member countries, and, secondly, that save in exceptional circumstances one and the same charge to tax cannot be classified both as internal taxation and as a charge having an effect equivalent to a customs duty (judgment of 18 June 1975 in Case 94/74 *IGAV* [1975] ECR 699, and judgment of 2 March 1977 in Case 78/76 *Steinike* [1977] ECR 595).

In the light of these observations, the questions asked by the national court must be taken as asking in fact whether, in trade with non-member countries, there is any rule prohibiting fiscal discrimination analogous to that laid down in Article 95 of the Treaty.

23 For trade with non-member countries, and as far as internal taxation is concerned, the Treaty itself does not include any rule similar to that laid

down in Article 95, which applies only to products coming from the Member States.

Accordingly — subject to the provisions of regulations of which the application is not at issue here — the answer to the question raised by the national court depends upon the state of relations under treaties, whether multilateral or bilateral, between the Community and the various non-member countries falling to be considered.

24 Therefore the answer to Questions 4 and 5 should be that the EEC Treaty does not include any provision prohibiting discrimination in the application of internal taxation to products imported from non-member countries, subject however to any treaty provisions which may be in force between the Community and the country of origin of a given product.

Costs

25 The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which have 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 Finanzgericht Hamburg, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Finanzgericht Hamburg by an order of 24 October 1977, hereby rules:

1. **Article 227 (2) of the EEC Treaty, interpreted in the light of Article 227 (1), must be taken to mean that the tax provisions of the Treaty, in particular the prohibition of discrimination laid down in Article 95, apply to goods coming from the French overseas departments.**

2. **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.

3. The EEC Treaty does not include any provision prohibiting discrimination in the application of internal taxation to products imported from non-member countries, subject however to any treaty provisions which may be in force between the Community and the country of origin of a given product.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 10 October 1978.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 4 JULY 1978 [1]

Mr President,

Members of the Court,

1. The monopoly in spirits in the Federal Republic of Germany (which is based on the Law of 8 April 1922 as last amended by the Law of 2 March 1974) has already led to the submission of a number of requests to the Court of Justice for preliminary rulings, principally concerning the interpretation of Article 37 of the EEC Treaty. I refer to the judgment of 16 December 1970 in Case 13/70, *Cinzano* ([1970] ECR 1089), that of 17 February 1976 in Case 45/75, *REWE* ([1976] ECR 181) and that of 17 February 1976 in Case 91/75, *Miritz* ([1976] ECR 217).

This action also stems from a case which, in German domestic law, falls within the scope of the law on spirits; however, this case is distinguished from

1 — Translated from the Italian