1. Although, in the context of proceedings under Article 177 of the Treaty, it is not for the Court to rule on the compatibility of the provisions of a national law with the Treaty, it does, on the other hand, have jurisdiction to provide the national court with all the criteria of interpretation relating to Community law which may enable it to judge such compatibility.
2. The first paragraph of Article 95 produces direct effects and creates individual rights which national courts must protect.
3. A comparison must be made between the taxation imposed on products which, at the same stage of production or marketing, have similar characteristics and meet the same needs from the point of view of consumers. In this respect, the classification of the domestic product and the imported product under the same heading in the Common Customs Tariff constitutes an important factor in this assessment.
4. The first paragraph of Article 95 must be interpreted as prohibiting the imposition of taxation on an imported product according to a method of calculation or manner of imposition which differs from those applying to the tax imposed on the similar domestic product and leads to higher taxation on the imported product, such as the imposition of a uniform amount in one case and a graduated amount in the other, even if such disparity only occurs in a minority of cases, and that it is inappropriate to take into consideration the possibly different effects of such taxation on the price levels of the two products.
5. The first paragraph of Article 95 does not prohibit the imposition of the same taxation on an imported product and a similar domestic product, even if a part of the tax levied on the domestic product is allocated for the purposes of financing a State monopoly, whilst that levied on the imported product is imposed for the benefit of the general budget of the State.
6. When the transitional period has expired, the duty laid down in Article 37 (1) is no longer subject to any condition, nor can its performance or effects be subject to the adoption of any measure either by the Community or the Member States, and, by its very nature, it is capable of conferring on those concerned individual rights which national courts must protect.
7. The application of Article 37 (1) is not limited to imports or exports which are directly subject to the monopoly but covers all measures which are connected with its existence and affect trade between Member States in certain products, whether or not subject to the monopoly, and thus covers charges which would result in discrimination against imported products as compared with national products coming under the monopoly. However, that provision does not prohibit the imposition of identical taxation on an imported product and a similar domestic product, even if the charge imposed on the latter is, in part, allocated for the purposes of financing the monopoly, whilst the charge levied on the imported product is imposed for the benefit of the general budget of the State.

In Case 45/75

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Rheinland-Pfalz (Rheinland-Palatinate Finance Court) for a preliminary ruling in the action pending before that court between

REWE-ZENTRALE DES LEBENSMITTEL-GROSSHANDELS EGMBH, Köln,

and

HAUPTZOLLAMT LANDAU/PFALZ,

on the interpretation of Article 37 (1) and the first paragraph of Article 95 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, R. Monaco and H. Kutscher, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

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

gives the following

JUDGMENT

Facts

The judgment containing the order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. In January 1971 the plaintiff in the main action put 16 000 litres of Vermouth imported from Italy into free circulation in the Federal Republic of Germany. This importation was subject, *inter alia*, to payment of a so-called 'monopoly equalization duty' (Monopolausgleich) of DM 9 824.

2. The payment of the monopoly equalization duty results from Article 151 of the German Spirits Monopoly Law (Gesetz über das Branntweinmonopol — BrMonG) of 8 April 1922. This Law provides that nationally-produced alcohol must in principle be sold to the monopoly administration at a price (Branntweinübernahmepreis) which is calculated in terms of the basic price (Branntweingrundpreis) fixed by the administration. This alcohol is put on sale by the Federal administration at sales prices which are also fixed and which include the net market value, an amount to cover administrative costs and the tax on alcohol known as the 'Branntweinsteuer' (tax on spirits).

Certain domestic alcohols, in particular fruit alcohols (Article 76 BrMonG), including those used within the country to produce Vermouth, are exempt from the obligation to sell to the State monopoly. The exempted alcohol is subject to the payment of a charge known as the 'Branntweinaufschlag' (spirits surcharge) (Article 78 BrMonG). The amount of this charge is determined by the difference between the sale price and the basic price of the monopoly alcohol, less the flat rate average amount of the costs which the monopoly administration is spared by not taking responsibility for the alcohol. However, the spirits surcharge calculated in this way is only applicable to a maximum annual production of 60 hectolitres of wine-spirit. Beyond this amount the rate of the spirits surcharge rises and as from an annual production of approximately 330 hectolitres it reaches the level of the monopoly equalization duty, discussed below. The spirits surcharge is always higher than the spirits tax and the difference between the two amounts is known as the 'Aufschlagspitze' (surcharge margin).

Imported alcohol bears a compensatory duty known as the monopoly equalization duty which is calculated in the same way as the spirits surcharge, except that the flat rate overheads are not deducted. The so-called 'Monopolausgleichspitze' (monopoly equalization margin) is that part of the compensatory duty which exceeds the spirits tax. This Monopolausgleichspitze is deemd to correspond to and to constitute compensation for the marketing costs borne by the monopoly administration and burdening the domestic products which it markets.

3. It is the payment of this part of the monopoly equalization duty which is contested by the plaintiff in the main action on the ground that it constitutes a monopoly charge which discriminates against imported products. The plaintiff in the main action brought a direct application (Sprungklage) before the Finanzgericht Rheinland-Pfalz. As that court considered that Articles 37 and 95 of the EEC Treaty on which the plaintiff based its action give rise to a question of interpretation, it addressed the following questions to the Court:

(1) Are Article 37 (1) and the first paragraph of Article 95 of the EEC Treaty to be interpreted as giving nationals of the Member States from the end of the transitional period individual rights which the national courts must protect?

(2) Does the levying of the part of the monopoly equalization duty called the Monopolausgleichspitze (monopoly equalization margin) on imports of Italian Vermouth violate the principles of the first paragraph of Article 95 of the EEC Treaty — and, in the event of Question 1 being answered in the affirmative, also those of Article 37 (1) — because it is intended not to compensate by way of a duty for the tax borne by the comparable domestic product but rather to cover the administrative cost of the State monopoly?

(3) In the event of Question 2 being answered in the negative: In applying Article 37 (1) and the first paragraph of Article 95 of the EEC Treaty, are only the Monopolausgleichspitze on the one hand and the monopoly costs on the other to be compared with one another or must it be ascertained whether the imported product is not, in terms of its total price, placed in a worse position by the levying of the Monopolausgleichspitze than the comparable domestic product?

(4) In the event of the first alternative of Question 3 being answered in the affirmative:
Is imported Italian Vermouth discriminated against within the meaning of Article 37 (1) and the first paragraph of Article 95 of the EEC Treaty in that the Spirits Monopoly Law provides, in respect of the wine-spirit content of products imported for consumption, a Mono-

polausgleichspitze of a uniform amount whereas for comparable domestic products the charges consist of the costs of the administration of the national monopoly graduated according to the quantity produced?

The order making the reference of 10 April 1975 was received at the Court Registry on 12 May 1975.

The plaintiff in the main action, the Commission of the European Communities and the Government of the Federal Republic of Germany submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

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

II — Observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations submitted by the Commission

The Commission suggests that an affirmative reply be given to the *first question*. Article 37 (1) left the Member States a certain discretionary power only for the duration of the transitional period. Since the expiry of this period Article 37 contains a clear and absolute duty which is independent of any intervention on the part of the Member States or the Community institutions. In Case 6/64 (Judgment of 15 July 1964, *Costa* v *Enel*, [1964] ECR 585) the Court has already acknowledged the direct applicability of Article 37 (2) which is based upon the same concept of discrimination as paragraph (1).

As regards the *second question*, after observing that it is for the Court to extract from it those factors concerning the interpretation of Community law, the Commission points out that this question concerns that part of the monopoly equalization duty which is intended to cover or at least for reasons of competition to compensate for, the costs of acquisition and sale which are borne by the monopoly administration. Is it possible for such charges, which arise out of the existence of the monopoly and must finance it, to burden products which are imported from other Member States and which are therefore not acquired by the monopoly administration? The Commission maintains that Article 95 refers not only to charges of a purely fiscal nature but also to charges which contribute towards the financing of a public authority such as a monopoly administration and are intended to cover its costs. This wide interpretation results, *inter alia*, from the judgment of the Court of Justice in Joined Cases 2 and 3/62 (Judgment of 14 December 1962, *Commission* v *Grand Duchy of Luxembourg and Kingdom of Belgium*, [1962] ECR 425) and the Commission concludes therefrom that the fact that the monopoly charge is not fiscal in nature is of secondary importance, from the point of view of the first paragraph of Article 95, once domestic products and imported products must contribute in the same way and at the same rate to financing the monopoly. However, it must be noted that both as regards the application of the first paragraph of Article 95 and the application of Article 37 (1) the imposition of a charge cannot be questioned on the sole ground that it is intended to contribute towards financing the activities of a public authority. Some discrimination must exist.

As regards Article 37 the Commission considers that, since the expiry of the transitional period, the prohibition on discrimination contained in Article 37 brings about the same result as the prohibition contained in Article 95. It is for the national court to consider

whether the question falls within the scope of the first paragraph of Article 95 or Article 37 (1), or whether, in the light of its purpose, the charge must be regarded as having an effect equivalent to a customs duty on imports (Judgment of 19 June 1973, Case 77/72 *Carmine Capolongo* v *Azienda Agricola Maya,* [1973] ECR 611 and Judgment of 18 June 1975, Case 97/74 *IGAV* v *ENCC,* [1975] ECR 699).

As regards the direct effect of Article 37 the Commission adds that the recent case-law of the Court concerning the consequences of the expiry of the transitional period (Judgments of 21 June 1974, Case 2/74, *Jean Reyners* [1974] ECR 631; 3 December 1974, Case 33/74, *van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metallnijverheid,* [1974] ECR 1299; 12 December 1974, Case 36/74, *Walrave and Koch* v *Association Union Cycliste Internationale,* [1974] ECR 1405 and of 10 December 1974, Case 48/74, *Charmasson* v *Ministry for Economic Affairs and Finance (Paris),* [1974] ECR 1383) shows that the exception in relation to the German alcohol monopoly which the Commission believed it could permit until the establishment of a common organization of the market (Recommendation of 22 December 1969 to the Federal Republic of Germany concerning the adjustment of the state alcohol monopoly, OJ L 31 of 9. 2. 1970, p. 20), became inapplicable as from the expiry of the transitional period in spite of the fact that a common market organization has not yet been established. Therefore, in pursuance of the principles laid down by the Court of Justice in the abovementioned Cases 77/72 and 94/74 the continued imposition of the Monopolausgleichspitze may constitute an infringement of the prohibition on the levying of charges having an effect equivalent to customs duties to the extent to which their imposition is 'intended exclusively to support activities which specifically benefit the taxed domestic product.'

The Commission maintains that the *third question* has been referred because the plaintiff in the main action maintained before the national court that if the 'total price position' is considered it is nationally produced alcohol rather than imported alcohol which is discriminated against, as a result of the lower prices obtaining abroad. The Commission considers that under the terms of the treaty it is only necessary to compare the charges imposed on the domestic product and on similar products originating in other Member States. No provision is made for taking the total price or the constituent elements of the cost price of an imported product into account and to do so is not permissible.

As regards the *fourth question* the Commission observes that to graduate the charge on the basis of the quantities produced is not certain to prevent discrimination, even taking into account the fact that if 95 % of national alcohol production exceeds the exempted minimum, this discrimination has only a limited effect.

B — Observations submitted by the Government of the Federal Republic of Germany

The Federal Government maintains that an affirmative reply must be given to the *first question.* Like Articles 9, 12 and 37 (2), Article 37 (1) contains a prohibition on discrimination which, as a fully effective Community rule, is by its very nature capable of producing direct effects in relations between individuals and between the Member States and their nationals. The duty to adjust monopolies progressively before the end of the transitional period is also directly applicable.

However, the German Government calls attention to Article 37 (4) according to which the rule contained in paragraph (1) only applies to monopolies of a commercial character which are designed

to make it easier to dispose of agricultural products or obtain for them the best return, provided that equivalent safeguards have been ensured for the employment and standard of living of the producers concerned. To this extent the duty of adjustment provided for in Article 37 (1) is subject to the adoption of appropriate measures by the Community and thus does not have direct effect.

The Federal Government maintains that the essence of the *second question* is Article 37 and not Article 95. This latter provision may not be applied to a charge on imports such as the Monopolausgleichspitze, which is levied in order to compensate for the fact that a monopoly tax is imposed on the domestic product, because such internal taxation is an essential constituent element of the monopoly. The imposition of a charge to compensate for the monopoly costs is in fact an essential part of a German monopoly since, under German law, monopolies of a commercial or revenue-producing character must resort to financing by users of the monopoly in order to cover their administrative costs. The abandonment of the Monopolausgleichspitze would also make it necessary to give up seeking compensation for the monopoly costs (Monopolkostenausgleich), in order to avoid putting domestic products into a less favourable position than spirits imported for consumption. The financing of these costs by the Federal State would lay the burden on the population as a whole, which would be unacceptable. As it represents an essential part of the German alcohol monopoly the levying of the Monopolausgleichspitze may only be assessed in the light of Article 37 of the Treaty.

If the context of the second question is defined in this way then, in order to consider whether the levying of the Monopolausgleichspitze accord with the prohibition on discrimination contained in Article 37, it is necessary, in the opinion of the German Government, to determine whether it is possible to compensate for the burden of the monopoly costs.

The Federal Government considers that the general principles contained in the Treaty provisions concerning the free movement of goods enable charges other than taxes to be compensated for. The Court has already found that pecuniary charges which form part of a general system of internal charges imposed systematically on domestic and imported products according to the same criteria are not covered by the prohibition on charges having an effect equivalent to customs duties (Judgment of 14 December 1972, Case 29/72, *SpA Marimex* v *Amministrazione Finanzaria dello Stato,* Rec. 1972, p. 1319). This type of charge may therefore be compensated for.

A consideration of the question whether discrimination exists between domestic and imported products within the context of Article 37 must take account of the special features of monopolies. In this respect it must be emphasized that the tax on the domestic product and the Monopolausgleichspitze are similar in terms of public law: the amount of both charges is fixed basically according to the same criteria, they are recoverable in the same way and both benefit from the criminal law provisions protecting debts arising under revenue law. It is impossible to go further and insist that these two charges are absolutely and formally identical since the monopoly constitutes a market organization which is not viable unless the system which applies to domestic products is different from that applying to imported products.

To the extent to which Article 37 provides for the adjustment of monopolies of a commercial character and not for their abolition it must be acknowledged that the rules which are indispensable for the existence of the monopoly should continue to exist. The

abolition of the Monopolausgleichspitze would lead to a distortion of the monopoly system in that it would compel the State to support the monopoly at the expense of the population as a whole rather than at the expense of users.

The Federal Government suggests that the following reply be given to the second question:

'The first paragraph of Article 95 must not be understood to mean that the imposition of compensatory charges within the framework of a monopoly of a commercial character falls within the scope of that provision. Article 37 (1) must not be understood to mean that the levying of the part of the monopoly equalization duty called the Monopolausgleichspitze on imports of Italian Vermouth violates that provision because it is intended not to compensate by way of a duty for the tax borne by the comparable domestic product but rather to cover the administrative costs of the State monopoly.'

As regards the *third question* the Federal Government maintains that in order to apply Article 37 (1) (it considers that Article 95 is not applicable) the comparison must concern only the Monopolausgleichspitze and the monopoly costs.

As regards the *fourth question* the Federal Government observes that the progressive taxation of domestic products does not concern all the products subject to the monopoly but only fruit-based spirits such as Vermouth and grain alcohols. In the case of fruit-based spirits the imposition of a graduated internal charge is, as regards imported products, compensated for at a flat rate by the uniform level of the monopoly equalization duty. Such a system of flat-rate taxation of imported goods is not unusual in intra-Community trade and is based upon the fact that it is difficult to determine the origin of the imported product and the quantitiy produced in its original area of production. Furthermore, in its Recommendation of 22 December 1969 to the Federal Republic of Germany OJ L 31 of 9. 2. 1970, p. 20 *et seq)* the Commission advocated the use of such a system.

In practice, the amount of the flat-rate charge imposed on imported fruit-based spirits corresponds to the charge imposed on approximately 97 % of domestic fruit-based spirits. At all events, graduated internal charges are imposed for reasons of agricultural policy and in order to favour the middle classes and are therefore governed by Article 37 (4).

As regards the view that Article 37 (4) has become irrelevant since the expiry of the transitional period, it must be borne in mind that the benefit granted to small and medium-scale producers of spirits constitutes an aid within the meaning of Article 92 *et seq.* of the EEC Treaty. As the system was already in existence when the EEC Treaty came into force. the Government of the Federal Republic of Germany was only obliged to abolish it if the Commission intervened to this effect. The Commission was aware of the system and expressed itself in favour of a flat-rate charge on imported products.

The Federal Government suggests that the following reply be given to the fourth question:

'Article 37 (1) must not be understood to mean that imported Italian Vermouth is discriminated against within the meaning of that provision of the EEC Treaty in that the Spirits Monopoly Law provides, in respect of the wine-spirit content of products imported for consumption, a Monopolausgleichspitze of a uniform amount whereas for comparable domestic products the charges consists of the costs of the administration of the national monopoly graduated according to the quantity produced.'

C — Observations of the applicant, the plaintiff in the main action

In reply to the *first question* the applicant observes that in the light of Article 8 (7) of the EEC Treaty, Article 37 (1) has direct effect.

As regards the *second question* it devotes its first comments to Article 95. That provision only allows the burden resulting from the imposition of internal taxation to be compensated for, not the costs of production and marketing of the products. In this instance, the importer is compelled to pay an amount which compensates for the handicap which national producers suffer in competitive terms as a result of having to bear the costs of administering the monopoly. The scope of Article 95 cannot be extended to allow any kind of compensation between a tax burdening imported products and a charge imposed for economic purposes on similar national products.

The applicant then turns to Article 37 (1) and maintains that the prohibition set out therein includes that laid down in Article 95, with the result that the submissions put forward with regard to Article 95 also apply to Article 37. In this instance the imported products are discriminated against in so far as it is not only the charges actually imposed on the domestic product which are compensated for but also the production and marketing costs of domestic producers and the monopoly administration costs. The effect of the Monopolausgleichspitze is to stifle at the outset all price-competition between domestic products subject to the monopoly and imported products.

The applicant suggests that the following reply be given to the second question:

'The imposition of charges on products imported from other Member States still infringes the first paragraph of Article 95 and Article 37 (1) of the EEC Treaty to the extent to which the domestic products in question are subject to a State monopoly of a commercial character and where the tax imposed when the goods cross the frontier is not intended to compensate for the taxation of comparable domestic products but solely to cover the administrative costs of the State monopoly'.

As regards the *third question* the applicant concludes from the preceding submissions that a comparison of the charges pursuant to the first paragraph of Article 95 may only concern taxation and not prices. It therefore considers that in applying Article 37 (1) and the first paragraph of Article 95 of the EEC Treaty only the Monopolausgleichspitze and the monopoly costs must be compared.

As regards the *fourth question* the applicant observes that to put products originating in other Member States in a more unfavourable position than products subject to the monopoly by resorting to measures which may be imputed to the monopoly constitutes discrimination within the meaning of Article 37 of the EEC Treaty. In this instance the imported products on which the Monopolausgleichspitze is imposed do not benefit, as is the case under Article 79 (1) of the German Law on the alcohol monopoly in relation to domestic products, from a deduction of the average amount of the costs which the monopoly administration is saved in respect of alcohol which is not subject to acquisition by the monopoly. Moreover, the increases and reductions provided for by Article 79 (2) to (6) of the same Law are only taken into consideration as regards the spirits surcharge, that is, as regards domestic production and not as regards the monopoly equalization duty imposed on imported products.

The applicant therefore maintains that the reply to the fourth question must be as follows:

'Goods imported from other Member States are discriminated against within the meaning of Article 37 (1) and the first paragraph of Article 95 of the EEC Treaty where the State monopoly system provides, in respect of the wine-spirit content of products imported from other Member States, a Monopolausgleichspitze of a uniform amount, whereas for comparable domestic products the charges consists of the costs of the administration of the national monopoly graduated according to the quantity produced'.

At the hearing on 28 October 1975 the applicant, represented by its Legal Adviser, G. Meier, the Government of the Federal Republic of Germany, represented by M. Seidel, and the Commission, represented by R. Wägenbauer, developed the arguments set out in the written procedure.

In particular, they gave further details as to certain questions raised by the Court.

In answer to the Court's question as to whether the spirits surcharge and/or the monopoly equalization duty or a part of these charges (the Branntweinaufschlagspitze (spirits surcharge margin) or the Monopolausgleichspitze) are allocated to the monopoly administration or to other purposes, the Government of the Federal Republic of Germany stated that the Branntweinaufschlagspitze finances the monopoly while the Monopolausgleichspitze which is imposed for the benefit of the Federal State and not for the monopoly, is solely intended to bring the price of imported products into line with the selling prices fixed for domestic products by the Federal monopoly administration.

The Government of the Federal Republic of Germany also stated that the selling price of nationally-produced alcohol includes the purchase price paid to the distiller, the tax imposed on the product and the monopoly costs, which are represented by the Spitze.

The applicant maintained that the Branntweinausgleichspitze and the Monopolausgleichspitze cover:
(1) all the costs of administration and marketing incurred by the monopoly;
(2) the cost of valuing the alcohol purchased by the monopoly; and
(3) export refunds and deficit selling prices.

In reply to a question posed by the Court the applicant also observed that the monopoly costs included in the selling price for nationally-produced alcohol for which the Monopolausgleichspitze is deemed to compensate are already borne by imported alcohol, in the form of production costs, in the State from which it originates, in particular where that State also applies a monopoly system.

The Advocate-General delivered his opinion at the hearing on 20 November 1975.

Law

1 By order of 10 April 1975, received at the Court Registry on 12 May 1975, the Finanzgericht Rheinland-Pfalz has submitted under Article 177 of the EEC Treaty certain questions concerning the interpretation of Article 37 (1) and the first paragraph of Article 95 of the EEC Treaty.

These questions are referred to the Court within the context of an action between an importer of Italian Vermouth and the customs authorities of the Federal Republic of Germany and concern the compatibility with those provisions of the excise duty known as the 'Monopolausgleich' (monopoly equalization duty) levied in the Federal Republic of Germany on imported alcohol.

2 According to the Gesetz über das Branntweinmonopol (BrMonG — the Federal Law on the Spirits Monopoly), ethyl alcohol of agricultural or nonagricultural origin must be sold to the monopoly administration at a price which is fixed by the authorities; after treatment, it is resold by the monopoly at prices which vary according to the purpose for which it is resold but which are also fixed by the public authorities.

The price at which such alcohol is resold includes the intrinsic value of the alcohol, a sum intended to cover the costs of the monopoly, including processing, storage and administrative costs, and the tax known as the 'Branntweinsteuer' (spirits tax).

As regards alcohol intended for human consumption, the so-called monopoly costs also include a price component intended to cover the losses incurred by the monopoly administration through the sale at less than cost price of certain spirits intended for other purposes.

3 Under Article 76 of the abovementioned Law certain nationally-produced spirits, in particular those produced from cereals and various fruits, are not obliged to sell to the monopoly.

Thus the situation which gave rise to the action is characterized by the existence of a State monopoly covering the purchase and marketing of a product, but extending to only part of the domestic production of that product, another part being purchased and marketed by the private sector.

4 Alcohol which is exempt from the requirement to sell to the monopoly is subject to a charge known as the 'Branntweinaufschlag' (spirits surcharge) which is equal to the difference between the basic price of the monopoly alcohol and its normal sale price and which for this reason includes, in addition to the spirits tax ('Branntweinsteuer'), a contribution to the monopoly costs of an amount equal to that imposed on monopoly alcohol.

This contribution, which is known as the 'Branntweinaufschlagspitze' (spirits surcharge margin) and is equal to the 'monopoly costs' included in the sale price of monopoly alcohol intended for human consumption, is, however, reduced by a flat rate sum (DM 21 at the time of the events which gave rise to the main action) which represents the average amount of the costs saved by the monopoly administration by not taking such alcohol over.

The amount thus obtained is subsequently reduced by amounts varying from 5 % to more than 100 % of the basic price ('Branntweingrundpreis') in the case of alcohol from distilleries with a small production, or increased on a rising scale in proportion to annual production in the case of distillers producing large quantities.

The imposition of a part of the administrative costs of the monopoly on spirits which are exempt from the requirement to sell to the monopoly reflects the desire of the national legislature that the monopoly costs should be borne by consumers of nationally-produced spirits, both these exempt from the requirement to sell to the monopoly and those marketed by the administration.

This Branntweinaufschlagspitze is therefore allocated to the monopoly administration, for which it represents a source of income.

5 Imported spirits and spirituous beverages — the latter in proportion to their alcohol content — are subject to a charge known as the 'Monopolausgleich' (monopoly equalization duty) which includes, apart from the tax on monopoly alcohol ('Branntweinsteuer'), a surcharge which is deemed to correspond to the amount included in the sale price of monopoly alcohol to cover the 'monopoly costs' referred to above.

As this surcharge, which is known as the 'Monopolausgleichspitze', contributes not to the financing of the monopoly but, like the Monopolausgleich of which it is a component, to the general budget of the State, it is levied, according to the statements made by the Government of the Federal Republic of Germany, in order to re-establish equality of conditions of competition between imported spirits and spirituous beverages and nationally-produce between imported spirits and spirituous beverages and nationally-produced spirits and spirituous beverages produced from alcohol which is exempt from the requirement to sell to the monopoly.

Moreover, during the oral procedure the Federal Republic of Germany stated that 'indirectly, this protection enables the monopoly to be financed, since, if

this margin ('Spitze') were not levied, it would be impossible to lay the burden of the monopoly's operating costs on nationally-produced alcohol'.

However, unlike the practice applying to exempt nationally-produced alcohol, this amount is neither reduced by a flat rate figure nor subsequently proportionately reduced or increased but is determined once and for all, and the amount thus fixed also constitutes the upper limit of the proportionate increase in the Branntweinaufschlag.

However, the Government of the Federal Republic of Germany observes that, at least as regards the distilleries 'under seal' producing fruitbased spirits, the effect of the proportionate increase in the amount of the Branntweinaufschlag is that this charge and the Monopolausgleich reach the same level in the case of alcohol from distilleries producing more than 330 hectolitres per year, that is, in the case of 95 % of production.

6 As the case concerns a tax which is imposed on both imported products and similar domestic products within the context of the adjustment of a monopoly of a commercial character, it is the compatibility of this tax with Articles 95 and 37 which is at issue and which, moreover, forms the subject-matter of the action before the national court.

These factors must be taken into account in deciding upon the reply to be given to the questions put by the national court.

7 It is necessary to consider first the questions concerning the interpretation of the first paragraph of Article 95 of the Treaty and, secondly, those concerning Article 37.

As regards the first paragraph of Article 95

8 The first question asks whether the first paragraph of Article 95 gives nationals of the Member States from the end of the transitional period individual rights which national courts must protect.

9 As the Court ruled in its judgment of 16 June 1966 in Case 57/65 *(Alfons Lütticke GmbH* v *Hauptzollamt Saarlouis,* [1966] ECR 205) that provision produces direct effects and creates individual rights which national courts must protect.

10 The second question asks whether the levying of the part of the monopoly equalization duty called the 'Monopolausgleichspitze' on imports of Italian vermouth infringes the first paragraph of Article 95 in so far as it is intended not to compensate by way of a duty for the tax borne by comparable domestic products but rather to cover the State monopoly's own administrative costs.

11 Although, in the context of proceedings under Article 177 of the Treaty, it is not for the Court to rule on the compatibility of the provisions of a national law with the Treaty, it does, on the other hand, have jurisdiction to provide the national court with all the criteria of interpretation relating to Community law which may enable it to judge such compatibility.

12 According to the first paragraph of Article 95 of the Treaty: 'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products'.

The implementation of this provision implies the application of criteria by which the existence or absence of such similarity may be judged.

In this respect, the fact that the same raw material — for example, alcohol — is to be found in the two products is not sufficient reason to apply the prohibition contained in the first paragraph of Article 95, even if the charge is wholly or partially imposed with reference to that raw material; a comparison must however be made between the taxation imposed on products which, at the same stage of production or marketing, have similar characteristics and meet the same needs from the point of view of consumers.

The fact that the domestic product and the imported product are or are not classified under the same heading in the Common Customs Tariff constitutes an important factor in this assessment.

13 It follows that, where in a Member State ethyl alcohol is covered by special regulations which have particular consequences as regards taxation, the similar product for the purposes of Article 95 is imported ethyl alcohol.

On the other hand, if the imported product, although based on ethyl alcohol, is a spirituous beverage, the taxation imposed upon it must be compared with the taxation on similar domestic products.

In the absence of any domestic product which is specifically similar, the prohibition on discrimination contained in Article 95 is satisfied if the charge imposed on the imported product corresponds to an internal charge of the same nature and the same level.

14 The equality between the level of taxation imposed on the domestic product and on the imported product, required by Article 95, is valid independently of the effect of factors other than taxation on the respective production costs of the products to be compared.

In particular, the scope of that article could not be so extended as to allow any kind of compensation between a tax created so as to apply to imported products and a charge of a different nature imposed, for example, for economic purposes, on the similar domestic product.

However, this is not the case where the imported product and the similar domestic product are both equally subject to a government tax which is introduced and quantified by the public administration, even if a part of the charge imposed on the domestic product is, incidentally, allocated for the purposes of financing a State monopoly, whilst the charge levied on the imported product is imposed for the benefit of the general budget of the State.

15 On the other hand, 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.

This finding cannot be refuted by the claim that although the imported product is taxed at a flat rate whilst the domestic product is taxed according to a sliding scale this is because the investigations which would be necessary in the former case could not be carried out.

Even though it might indeed be impossible to introduce the same sliding scale for the increase or reduction of taxation on both domestic and imported products, it is nevertheless possible to impose a single flat rate or fixed charge on both products in order to observe the prohibition on discrimination laid down in Article 95.

Moreover, in its Recommendation addressed to the German Government on 22 December 1969 — on which, however, no action was taken — the Commission suggested that conditions of taxation should be aligned in this way.

16 Furthermore, in the context of Article 95 it is the taxation imposed on the two categories of product which must be equal and it is inappropriate to consider the effect of this taxation on the final price of the nationally-produced and imported products.

17 The answer to the second, third and fourth questions, to the extent to which they concern the interpretation of the first paragraph of Article 95, must therefore be that that provision must be interpreted as prohibiting the imposition of taxation on an imported product according to a method of calculation or manner of imposition which differs from those applying to the tax imposed on the similar domestic product and leads to higher taxation on the imported product, such as the imposition of a uniform amount in one case and a graduated amount in the other, even if such disparity only occurs in a minority of cases, and that it is inappropriate to take into consideration the possibly different effects of such taxation on the price levels of the two products.

On the other hand, the first paragraph of Article 95 does not prohibit the imposition of the same taxation on an imported product and a similar domestic product, even if a part of the tax levied on the domestic product is allocated for the purposes of financing a State monopoly, whilst that levied on the imported product is imposed for the benefit of the general budget of the State.

As regards Article 37 (1)

18 The essential point of the questions concerning Article 37 is whether, to the extent to which it includes the Spitze (margin) calculated as outlined above, the Monopolausgleich infringes Article 37 of the Treaty.

19 In view of the finding that Article 95 of the Treaty does not prohibit taxation such as that in question, provided that it is imposed equally on the domestic product and the similar imported product, it might appear unnecessary to reply to the questions concerning the interpretation of Article 37, as they

seem to have been put in order to discover whether, as a *lex specialis,* Article 37 allows an exception to be made in the case of a monopoly to the prohibition contained in Article 95.

20 However, these questions may also be intended to discover whether, even if it is brought into line with the Branntweinaufschlag, the Monopolausgleich infringes Article 37 of the Treaty on the ground that, as it is intended to cover the monopoly costs, at least in part and even if only indirectly, it constitutes discrimination regarding the conditions under which the goods are procured and marketed.

21 The fact that a national measure complies with the requirements of Article 95 does not imply that it is valid in relation to other provisions of the Treaty, such as Article 37.

A reply must therefore be given to the questions concerning the interpretation of Article 37.

22 The first question asks whether Article 37 (1) of the Treaty is to be interpreted as conferring on those concerned, from the end of the transitional period, individual rights which national courts must protect.

23 After providing that, during the transitional period, the Member States are progressively to adjust any State monopolies of a commercial character, Article 37 (1) sets out the guiding principle in the matter by providing that it is to be ensured that at the end of this period 'no discrimination ... exists between nationals of Member States' regarding the conditions under which goods which in certain Member States are subject to a monopoly are procured and marketed.

24 In the field of application of the Treaty the prohibition on all discrimination regarding the conditions under which goods produced or put into circulation by nationals of the various Member States are procured and marketed constitutes a basic principle which, by its very nature, directly concerns the economic and legal position of those nationals.

As a reference to a set of provisions which are actually applied to nationals, this rule is, by its very nature, capable of being directly invoked by those to whom it applies.

The prohibition on all discrimination in this field after the expiry of the transitional period constitutes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the progressive nature of the adjustment provided for.

In this respect, it must be pointed out that under paragraph (3) of the same Article 37 the time-table for the adjustment measures was to be harmonized with the abolition of quantitative restrictions on the same products.

The provisions of the Treaty requiring Member States to abolish all discrimination within a specific period become directly applicable even where the duty has not been discharged before the expiry of that period.

Thus, when the period has expired, the duty in question is no longer subject to any condition, nor can its performance or effects be subject to the adoption of any measure either by the Community or the Member States, and, by its very nature, it is capable of conferring on those concerned individual rights which national courts must protect.

The period which the Member States were allowed for the progressive adjustment of State monopolies in order to ensure that at the end of the transitional period no discrimination exists is intended to facilitate the creation of new circumstances which are compatible with the rule and, after its expiry, cannot form an obstacle to the application of that rule.

25 It is further asked whether the levying of the part of the Monopolausgleich known as the 'Monopolausgleichspitze' on imports of Italian vermouth violates the principle contained in Article 37 (1) of the Treaty because it is intended not to compensate by way of a duty for the tax borne by comparable domestic products but rather to cover the State monopoly's own administrative costs.

26 Article 37 (1) is not concerned exclusively with quantitative restrictions but prohibits any discrimination, when the transitional period has ended, regarding the conditions under which goods are procured and marketed, between nationals of Member States.

It follows that its application is not limited to imports or exports which are directly subject to the monopoly but covers all measures which are connected with its existence and affect trade between Member States in certain products, whether or not subject to the monopoly, and thus covers charges which would

result in discrimination against imported products as compared with national products coming under the monopoly.

Furthermore, this interpretation corresponds to the prohibition laid down in the second paragraph of Article 95, according to which no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

It follows from the foregoing considerations that to extract a contribution to the monopoly costs from the imported product alone, even in the form of a duty, is in principle incompatible with the prohibition contained in Article 37 (1)

27 However, this is not the case where the imported product and the similar domestic product are both equally subject to a government tax which is introduced and quantified by the public administration, even if a part of the charge imposed on the domestic product is, incidentally, allocated for the purposes of financing a State monopoly, whilst the charge levied on the imported product is imposed for the benefit of the general budget of the State.

There is, in fact, no discrimination within the meaning of Article 37 where the imported product is subject to the same conditions as the similar domestic product subject to the monopoly.

On the other hand, both Article 95 and Article 37 of the Treaty are infringed if the charge imposed on the imported product is different from that imposed on the similar domestic product which is directly or indirectly covered by the monopoly.

The answer must therefore be that Article 37 (1) must be interpreted as meaning that the discrimination regarding the conditions under which goods are procured and marketed which is referred to therein includes the extraction of a contribution to the monopoly costs from an imported product, even in the form of a duty, but that that provision does not prohibit the imposition of identical taxation on an imported product and a similar domestic product, even if the charge imposed on the latter is, in part, allocated for the purposes of financing the monopoly, whilst the charge levied on the imported product is imposed for the benefit of the general budget of the State.

28 The applicant in the main action sought the re-opening of the oral procedure on the ground that the replies given by the Government of the Federal Republic of Germany and the Commission to a question raised in Case 91/75 *(Hauptzollamt Göttingen and Bundesfinanzminister* v *Wolfgang Miritz GmbH & Co.)* might influence the Court's decision.

29 However, those replies, which concerned the existence of a so-called 'price equalization' system within the German alcohol monopoly, are in no way decisive as regards the interpretation of Community law in reply to the questions raised by the national court in the present case.

The Court does not therefore consider it necessary to re-open the oral procedure.

Costs

30 The costs incurred by the Federal Republic of Germany and 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 national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Finanzgericht Rheinland-Pfalz by order dated 10 April 1975, hereby rules:

1. **The first paragraph of Article 95 produces direct effects and creates individual rights which national courts must protect;**
2. **The first paragraph of Article 95 must be interpreted as prohibiting the imposition of taxation on an imported product according to a method of calculation or manner of imposition which differs from those applying to the tax imposed on the similar domestic product and leads to higher**

taxation on the imported product, such as the imposition of a uniform amount in one case and a graduated amount in the other, even if such disparity only occurs in a minority of cases, and that it is inappropriate to take into consideration the possibly different effects of such taxation on the price levels of the two products;

3. **The first paragraph of Article 95 does not prohibit the imposition of the same taxation on an imported product and a similar domestic product, even if a part of the tax levied on the domestic product is allocated for the purposes of financing a State monopoly, whilst that levied on the imported product is imposed for the benefit of the general budget of the State;**

4. **Article 37 (1) is capable of conferring on those concerned individual rights which national courts must protect;**

5. **Article 37 (1) must be interpreted as meaning that the discrimination regarding the conditions under which goods are procured and marketed which is referred to therein includes the extraction of a contribution to the monopoly costs from an imported product, even in the form of a duty, but that that provision does not prohibit the imposition of identical taxation on an imported product and a similar domestic product, even if the charge imposed on the latter is, in part, allocated for the purposes of financing the monopoly, whilst the charge levied on the imported product is imposed for the benefit of the general budget of the State.**

Lecourt Kutscher O'Keeffe

Donner Mertens de Wilmars Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 17 February 1976.

A. Van Houte
Registrar

R. Lecourt
President