In Case 13/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht der Freien Hansestadt Bremen (Administrative Court of the Free Hanseatic City of Bremen) for a preliminary ruling in the action pending before that court between

JOH. EGGERS SOHN & CO. Bremen,

and

DIE FREIE HANSESTADT BREMEN, on the interpretation of Articles 30, 31, 36,86 and 90 of the EEC Treaty,

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: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The order making the reference and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and procedure

Article 40 of the Law on wines *(Weingesetz)* of 14 July 1971 (Bundesgesetzblatt 1971, I, page 893) provides that home-produced spirits

from wine (inländischer Branntwein aus Wein), that is to say spirits from wine which have been manufactured on the territory of the Federal Republic of Germany, may be designated as "Qualitätsbranntwein aus Wein" (high quality spirits made from wine) or as "Weinbrand" (Brandy) only if:

(1) At least 85% of the alcoholic content is derived from wine distillate home-produced (im Inland) by distillation;

(2) ...

(3) ...

(4) The whole of the wine distillate used has been kept for at least six months in oaken casks at the factory in Germany (inländischer Betrieb) where the home-produced wine distillate (inländisches Weindestillat) was extracted by distillation;

...

(8) The spirits have been given a certification number (Prüfungsnummer) which is assigned by the competent authority only if the conditions laid down in subparagraphs 1 to 7 of Article 40 (1) have been fulfilled.

At the beginning of 1976 the undertaking Joh. Eggers Sohn & Co., the plaintiff in the main action, imported a small quantity of French wine distillate. Since it does not have a distillery of its own it kept the distillate for six months in bond in oaken casks at its own factory and then processed it into spirits made from wine. In order to obtain the designation "Qualitätsbranntwein and Wein" or "Weinbrand" it applied to the municipality of Bremen, the defendant in the main action, for a certification number to enable it to use those designations. The certification number at first assigned to it was withdrawn when it had become clear that the product in question had not been manufactured from distillate, 85 % of which had been extracted in the Federal Republic, and that the wine distillate had not been stored at the factory in Germany where the wine distillate was extracted.

The plaintiff in the main action has commenced proceedings against this decision in which it claims that subparagraphs 1 and 4 of Article 40 (1) of the *Weingesetz* are incompatible with Community law because the article in question is, in its view, an obstacle to the free movement of wine distillates which is not justified by Article 36 of the Treaty and discriminates between German manufacturers of "Weinbrand" according to whether they have their own distilleries or not.

Since the Verwaltungsgericht of the City of Bremen took the view that the action gave rise to questions of interpretation of Community law it asked the Court of Justice in its order of 18 January 1978 to give a preliminary ruling on the following questions:

1. Are Articles 30 and 31 of the EEC Treaty as well as the prohibition of discrimination under Community law to be interpreted as meaning that the rules laid down in subparagraphs 1 and 4 of Article 40 (1) of the Weingesetz of 14 July 1971 (Bundesgesetzblatt: Part I, page 893 *et seq.* at 908) according to which home-produced spirits from wine may be designated as "Qualitätsbranntwein aus Wein" (high quality spirits made from wine) or as "Weinbrand" (Brandy) only if:

   — At least 85% of the alcoholic content is derived from wine distillate home-produced by distillation;

   — The whole of the wine distillate used has been kept for at least six months in oaken casks at the factory in Germany (inländischer Betrieb) where the home-produced wine distillate was extracted by distillation,

are incompatible with the prohibition of measures having an effect equivalent to quantitative restrictions and also with the prohibition of discrimination?

2. If the answer to Question 1 is in the affirmative, is Article 36 of the EEC Treaty to be interpreted as meaning that the rules laid down in subparagraphs 1 and 4 of Article 40 (1) of the Weingesetz are not justified?

3. If the answers to the above questions are in the affirmative, are the provisions of Articles 90 (1) and 86 (b) of the EEC Treaty to be interpreted as meaning that the rules laid down in subparagraphs 1 and 4 of Article 40 (1) of the Weingesetz are incompatible with the said provisions of the EEC Treaty?

The order making the reference was entered at the Court Registry on 9 February 1978. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC the plaintiff in the main action, the Government of the Federal Republic of Germany and the Commission submitted written observations.

Having heard 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.

II — Observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations submitted by the plaintiff in the main action

The plaintiff in the main action describes the disadvantages which it suffers as a result of Article 40 of the *Weingesetz*, which was only incorporated in that Law at the request of the *Verband der Deutschen Weinbrennereien* (the Association of German Distilleries). The effect of the application of Article 40 of the *Weingesetz* is that, if it wants those of its products which are classified as home-produced spirits to be given the high quality designations "Qualitätsbranntwein aus Wein" or "Weinbrand", it can neither buy wine distillates in France nor choose its brandy distillers and must obtain its supplies from German distillers whose prices are higher than those of their French competitors and who furthermore in their capacity as manufacturers of spirits are often its own competitors. German brandy distillers purchase the raw material, that is the crude distillates (Rohbrände) which are necessary for the manufacture of wine distillates, mainly from abroad, and in particular from France, and these so-called crude distillates from France are in fact merely ready-prepared wine distillates (fertige Destillate) which French exporters classify as crude distillates for the sole purpose of formally complying with German legislation. This question is concerned with two problems. First, the prohibition of measures having an effect equivalent to quantitative restrictions and, secondly, the prohibition of discrimination.

The first question

The plaintiff in the main action, as far as concerns the prohibition of measures having an effect equivalent to quantitative restrictions, states that it relies on the interpretation of this concept contained in the case-law of the Court and in particular in the judgment of 20 May 1976 in Case 104/75 *(De Peijper* [1976] ECR 635). It takes the view that it may be inferred from those decided cases that, for the prohibition to apply, there is no need to establish that measures of this kind actually restrict intra-Community trade, provided that it can be shown that they are likely to do so. The article providing

that wine distillate extracted by distillation in a Member State other than the Federal Republic of Germany may be used in German spirits made from wine of high quality entitled to the designations "Qualitätsbranntwein aus Wein" and "Weinbrand" only up to a maximum of 15% of the alcoholic content is in principle an obstacle to imports of wine distillates. Furthermore, having regard to the fact that the plaintiff in the main action does not have a distillery of its own, it is unable to procure supplies of French wine distillates with a view to manufacturing (German) high quality spirits made from wine.

The plaintiff in the main action also relies on Commission Directive No 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17) on the abolition of measures which have an effect equivalent to quantitative restrictions on imports. The fact that it is able to obtain wine distillate only through German distilleries forms such an obstacle to the free movement of that product as is mentioned in Article 2 (3) (g) and (k) of the said directive.

The fact that the plaintiff in the main action has to buy the wine distillate from German distilleries increases the price of the goods and, in comparison with German distilleries, is a disadvantage from the point of view of competition which in turn amounts to a measure having an effect equivalent to a quantitative restriction.

As far as concerns the prohibition of discrimination the plaintiff in the main action points out that it applies in particular as between manufacturers of the same product. In a common market where the plaintiff in the main action and German distilleries are in competition the fact that French distilleries are unable to supply it with a distillate originating in France and in no way different from wine distillate manufactured in Germany from French crude distillate or fortified French wine is a breach of the principle of non-discrimination. The sole aim of subparagraphs 1 and 4 of Article 40 (1) of the *Weingesetz* is to give German brandy distillers a discriminatory monopoly in the distillation of wines for the manufacture of high quality German spirits from wine. On the basis of these considerations the plaintiff in the main action concludes that the answer to the first question must be in the affirmative.

The second question

The plaintiff in the main action, starting from the principle that the exception provided by Article 36 of the EEC Treaty must be interpreted strictly, takes the view that a purely technical production process such as the distillation of fortified wines may be carried out at least as well in other Member States as in the Federal Republic of Germany. The provisions of Article 40 of the *Weingesetz* are therefore a typical example of arbitrary discrimination and a disguised restriction on trade between Member States within the meaning of the second sentence of Article 36 of the EEC Treaty.

Moreover, Article 40 of the *Weingesetz* cannot be justified on grounds of public policy within the meaning of Article 36 of the EEC Treaty. Since the defendant in the main action has not specified the grounds of public policy upon which it relies, it thereby acknowledges that in France, the country where "Weinbrände" originated, distilling is carried out carefully and correctly. Furthermore, the reference made by the defendant in the main action to Article 44 of the *Weingesetz* concerning foreign spirits is irrelevant, because Article 44 of the *Weingesetz* itself conflicts with Articles 30 and 31 of the EEC Treaty.

The third question

Since this question has been referred only in case the Court should hold that subparagraphs 1 and 4 of Article 40(1) of the *Weingesetz* are compatible with Articles 30, 31 and 36 of the EEC Treaty and also with the prohibition of discrimination the plaintiff in the main action submits only a few, short observations on this point.

When the Federal Republic of Germany adopted the rules at issue it infringed Article 86 of the EEC Treaty, because German brandy distillers occupy, in the Federal Republic of Germany, that is to say in a substantial part of the common market, a dominant position as far as concerns the manufacture of wine distillate for high quality spirits made from wine and because trade between Member States is clearly affected by that dominant position.

The rules amount to an abuse because they create a monopoly of the manufacture and storage of wine distillate intended to be sold later as "Qualitätsbranntwein aus Wein" or as "Weinbrand". This restriction moreover penalizes the ultimate consumer or intermediaries such as the plaintiff in the main action.

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

1. The German Government first of all explains the objectives which the legislature had in mind in Article 40(1) of the *Weingesetz*, by stating that the aim of the reorganization in 1969 of the legislation relating to the wine sector (the Law of 16 July 1969, BGBl. I, p. 871) was to encourage quality production on a national basis by attaining the objective of the Community legislators (see the second recital of the preamble to Regulation (EEC) No 817/70 of the Council of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions, Official Journal, English Special Edition 1970 (I), p. 252). The aim of Article 40, namely to establish a designation of quality, which is moreover optional, achieves this objective, owing to the conditions to which the use of that designation is made subject.

As for the condition laid down in subparagraph 4 of Article 40 (1) (storage of the whole of the distillate for six months in oaken casks at the factory in Germany), the draft law of 1967 had first of all provided for the entire production to be concentrated at a single undertaking, since quality is better guaranteed if one undertaking is alone responsible. In order to avoid special difficulties for the traditional structure of what are for the most part medium-sized undertakings, the legislature made this requirement less stringent while at the same time remaining as close as possible to the objective envisaged: the harmonization of distillation and storage has a decisive effect on the most important constituents of Weinbrand and is one of the prerequisites for the quality of the product.

As for the condition laid down by subparagraph 1 of Article 40 (1) to the effect that at least 85% of the alcoholic content must be derived from wine distillates obtained in the Federal Republic, the Federal Government states that the Federal legislature took the view that for the purpose of guaranteeing quality and protecting the consumer it was absolutely necessary to make the use of the designation of quality in the case of domestic products dependent on regular supervision, which would in particular cover the condition laid down in subparagraph 1 of Article 40 (1) of the *Weingesetz*. That provision is based on the fact that German Weinbrand has without question a particular taste which suits the traditional habits of consumers. It is therefore in the interests of consumers

that the designation of quality given to domestic products should depend on the crucial manufacturing processes which determine quality being carried out on the national territory. To this must be added the fact that to permit designations of quality to be given to blended products and coupages of a different origin would be a breach of all the normal rules.

For these reasons the legislature made the right to use the designation of quality for spirits from home-produced wine subject to the requirement that the vital distillation process should take place in Germany. The fixing of 85% of the minimum proportion deemed to determine the origin was prompted by the first subparagraph of Article 30 (3) of Regulation (EEC) No 816/70 of 28 April 1970 (Official Journal, English Special Edition 1970 (I), p. 234).

Moreover, the German Government stresses that under Article 44 of the *Weingesetz* the same conditions apply to foreign spirits, except that the latter are not subjected to the intensive checks carried out on home-produced products. From now on foreign products can also use the designation Weinbrand in accordance with the judgment of the Court of 20 February 1975 in Case 12/74, *Commission of the European Communities* v *Federal Republic of Germany* [1975] ECR 181.

2 The German Government further purports to refute various assertions by the plaintiff in the main action.

Its answer to the allegation that crude distillate (Rohbrand) from France is in fact ready-prepared wine distillate (fertiges Destillat), which does not need any further distillation, or wine fortified for distillation (Brennwein), is that almost all the primary products for the manufacture of home-produced spirits from wine are imported from other States. It is not understood why the use of wine fortified for distillation within the meaning of item No 21 of Annex II to Regulation (EEC) No 816/70 should have no meaning from the economic point of view.

In the second place, the assertion that crude distillate can be used without further treatment as a ready-prepared distillate is incorrect. On the contrary, what is known as crude distillate is the result of the first distillation which yields an alcoholic content of about 60% so that, in order to obtain the requisite alcoholic content of approximately 80 to 85% for the subsequent production, there must be a second distillation. Next, the assertion that under the provisions of the *Weingesetz* imported wine distillate can only be processed into high quality spirits made from wine by distilleries and not by undertakings such as that of the plaintiff in the main action is also incorrect. If the imported product is a crude distillate any distiller can process it into home-produced spirits and the fact that the plaintiff in the main action does not have its own distillery is the outcome of its own freedom of economic choice. On the other hand, if the imported product is a ready-prepared distillate no-one can process it into home-produced spirits.

3. The German Government then proceeds to examine the questions referred and submits the following observations.

It first proposes the following reformulation of those questions:

"(1) Are Article 30 as well as the prohibition of discrimination under Community law to be interpreted as meaning that rules adopted by a Member State which make the use of optional designations of quality for home-produced spirits made from wine subject to the condition that:

— At least 85% of the alcoholic content is derived from wine

distillate home-produced by distillation;

— The whole of the wine distillate used is kept for at least six months in oaken casks at the factory in Germany where the home-produced wine distillate was extracted by distillation,

are incompatible with the said provisions of Community law if corresponding rules relating to quality apply to imported products?

(2) If the answer to Question 1 is in the affirmative, is Article 36 of the EEC Treaty to be interpreted as meaning that national provisions as to quality of the kind mentioned above are justified by that Article?

(3) If the answer to Question 1 is in the affirmative and the answer to Question 2 is in the negative, are Articles 90 (1) and 86 (b) of the EEC Treaty to be interpreted as meaning that national provisions as to quality of the kind mentioned above are incompatible with the said provisions of Community law?"

The first question

This question is concerned not only with the interpretation of Article 30 of the Treaty (prohibition of measures having an effect equivalent to quantitative restrictions) but also with the prohibition of discrimination, it being understood, however, that to this extent it cannot refer either to the second subparagraph of Article 40 (3) of the Treaty, since the products in question do not fall within Annex II to the Treaty and are not therefore covered by a common organization of the market, or to Article 7 of the Treaty, since Article 40 (1) of the *Weingesetz* amounts — if there is any discrimination — to discrimination between German undertakings according to whether they have a distillery or not, and not to discrimination on grounds of nationality.

It must therefore be accepted that when the national court referred to the concept of "discrimination" it had in mind that "arbitrary discrimination" which consists in setting different quality standards for goods according to whether they are intended for domestic consumption or to be exported, within the meaning which the Court gave that concept in its judgment of 3 February 1977 in Case 53/76 *(Bouhelier* [1977] ECR 197) and which moreover Article 2 (1) (measures other than those applicable equally to domestic or imported products) of Commission Directive No 70/50/EEC of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports (Official Journal, English Special Edition 1970 (I), p. 17) is directed against and forbids.

Since the discrimination thus described is bound up with a measure having an effect equivalent to a quantitative restriction the German Government proposes to deal with these two aspects of the interpretation of the scope of Article 30 of the Treaty jointly.

The German Government analyses the case-law of the Court relating to quality standards controls which apply only to products intended for export and points out that, while the judgment of 26 February 1975 in Case 63/74 *(Cadsky* [1975] ECR 290) left open the possibility of regarding such measures as being compatible with the Treaty, the Court in its judgment of 3 February 1977 in Case 53/76 *(Bouhelier* [1977] ECR 197) held that the discriminatory nature of quality standards — due to the fact that they were only required for products which were to be exported — determines their classification as measures having an effect equivalent to quantitative restrictions. An examination

of the provisions of the *Weingesetz* which are at issue shows that they differ in two material respects from those which were dealt with in the judgments analysed above. On the one hand, they relate to an optional designation of quality and, on the other hand, the rules as to quality are applied "equally" to home-produced products, whether they are intended for export or not, and to products from other Member States, as is shown by comparing Articles 40 and 44 of the *Weingesetz*.

They are not therefore obligatory quality standards upon which importation or exportation depend, nor is there any question of any unequal treatment of domestic products compared with foreign products. Nor can any argument be based on the wide interpretation adopted by the Court in its judgments of 15 December 1976 in Case 35/76 *(Simmenthal* [1976] /ECR 1871) and of 16 November 1977 in Case 13/77 *(GB-INNO-BM* [1977] ECR 2115) of the concept of a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty when it held that to fall within the prohibition of Article 30 "it is sufficient that the measures in question are likely to hinder, directly or indirectly, actually or potentially, imports between Member States" *(GB-INNO-BM* [1977] ECR at p. 2147). Although this is in fact a necessary condition it is not, however, sufficient to establish an infringement of Article 30, because otherwise all domestic technical or quality standards would be prohibited since they may all affect trade between Member States. The first paragraph of Article 100 of the Treaty, which provides for the approximation of laws for the purpose of eliminating obstacles of this kind, proves that such obstacles cannot be classified as measures having an effect equivalent to quantitative restrictions. In its judgment in the *GB-INNO-BM* case the Court specifically acknowledged that there are many national rules which, even though they have a restrictive effect on trade, are compatible with Article 30 of the Treaty because they fall within the powers retained by the Member States. The German Government agrees, in accordance with the judgment of the Court of 11 July 1974 in Case 8/74 *(Dassonville* [1974] ECR 837), that commercial rules would infringe Article 30 if the Member States went beyond the limits placed on a reasonable exercise of the powers which they have retained in this field. But this is not the case as far as Article 40 of the *Weingesetz* is concerned. The objective, which is legally unchallengeable, of encouraging quality is in fact pursued by means which meet the relevant objective requirements, since the principle of "undivided responsibility" during the stages of distillation and storage on the national territory, which is implemented by Article 40, is essential both to guarantee the traditional quality and taste and also to protect consumers and, should the need arise, this can be proved by the statement of experts.

The Federal Government concludes that Article 40 of the *Weingesetz* does not therefore amount to arbitrary discrimination within the meaning of the *Bouhelier* judgment (quoted above) and is a "reasonable" rule within the meaning of the *Dassonville* judgment (also quoted above). Its proposed answer to the first question is that rules adopted by Member States which make the use of optional designations of quality for home-produced spirits made from wine subject to the condition that:

— at least 85% of the alcoholic content is derived from wine distillate home produced by distillation;

— the whole of the wine distillate has been kept for at least six months in oaken casks at the factory in Germany where the home-produced wine distillate was extracted by distillation,

do not contravene Community law as far as either the prohibition of measures having an effect equivalent to quantitative restrictions on imports and exports or the prohibition of discrimination are concerned.

The second question

Having regard to the answer which it has given to the first question the Federal Government points out that the arguments developed in connexion with Article 30 of the Treaty must in any case be decisive, where necessary, for the application of Article 36 of the Treaty.

The third question

The third question has been referred in case the answer to the first question should be in the affirmative and the answer to the second question in the negative — that is to say, if Article 40 of the *Weingesetz* is found to be justified by Article 36 of the Treaty — and its purpose is to ascertain whether, in that case, Articles 90 and 86 of the Treaty do not prohibit measures such as those laid down by the disputed article.

This question is connected with the complaint made by the plaintiff in the main action relating to the allegation that there is a monopoly of imported distillate which benefits German distilleries.

The German Government is of the opinion that the very wording of Article 40 of the *Weingesetz* precludes the existence of any such monopoly. If the question refers to imports of ready-prepared wine distillate (fertiges Weindestillat), there can be no question of any monopoly, since there is no restriction on imports of that product, whereas there is a total prohibition — which includes German distilleries — on giving home-produced spirits derived from that "feruges Destillat" the designations of quality "Qualitatsbranntwein aus Wein" or "Weinbrand". Nor, if it refers to imports of crude distillate (Rohbrand), is there monopolization there, since every undertaking, without distinction, is allowed to process this "Rohbrand" into ready-prepared distillate and it is for each manufacturer of spirits to decide whether to undertake the preliminary distillation himself or to confine himself to undertaking the subsequent operations.

The preceding considerations also show that there is no evidence in support of the assumption that subparagraphs 1 and 4 of Article 40 (1) of the *Weingesetz* might encourage an abuse of a dominant position within the meaning of the judgment of the Court in Case 13/77, *GB-INNO-BM* (which has been quoted above).

C — *Observations submitted by the Commission*

The Commission first of all describes the German wine-growing legislation and draws attention to the fact that the Law of 25 July 1930 (RGBl. I, p. 356), which applied until the entry into force of the *Weingesetz* of 1971, did not provide for specific designations depending on the quality of the product.

The *Weingesetz* of 1971, on the other hand, introduces a distinction based on quality by reserving the designations "Qualitätsbranntwein aus Wein" and "Weinbrand" for certain products and, in the case of both ordinary and quality products (distillates and spirits), also draws a distinction between home-produced and foreign products (Articles 36, 38, 40, 42 and 44 of the *Weingesetz* 1971).

As for quality products from other Member States (Article 44), the Court in its judgment of 20 February 1975 in Case 12/74 *(Commission of the European Communities* v *Federal Republic of Germany* [1975] ECR 181) held that to forbid the use of the

designation "Weinbrand" for foreign products contravened Article 30 of the EEC Treaty.

As for home-produced quality products (Article 40), that provision gives preferential treatment to German distilleries as compared with manufacturers of spirits who do not have a distillery and it forces the latter to use home-produced wine distillates if they intend to manufacture "Weinbrand".

According to the Commission, the requirement contained in Article 40 of the *Weingesetz* that 85% of the ready-prepared distillate must be derived from domestic distilleries, as the German authorities have acknowledged (Report of the Bundestag Public Health Committee, BT Drucksache 1969, V/4072), is intended to "afford undertakings which have acquired or set up distilleries abroad the added opportunity to use at least a specific proportion of the wine distillate obtained from those distilleries". If the provisions governing the manufacture of "Weinbrand" (home-produced or foreign) are considered as a whole, the conclusion is reached that all but 15% of foreign wine distillate can be used only for the manufacture of foreign "Weinbrand", and home-produced "Weinbrand" and that product does not therefore enjoy freedom of movement within the Common Market.

According to the Commission it cannot be inferred from the fact that it has not so far criticized Article 40 of the *Weingesetz* that it fully endorses its content. As soon as the departments of the Commission had taken note of the facts of this case they considered whether there were any grounds for recommending that the Commission should initiate a procedure against the Member State concerned for failure to fulfil an obligation within the meaning of Article 169 of the Treaty. In these proceedings, however, all that has to be done is to provide the national court with an interpretation of Community law which will enable it to decide whether it must refuse to apply the national provisions because they are incompatible with Community law.

The first and second questions

In order to evaluate such appellations as "cognac" and "Weinbrand" and the requirements connected with those designations various factors must, in the view of the Commission, be distinguished.

Registered designations of origin, which are also protected and recognized by Community law, indicate that a product has a certain number of special features. Those conditions are fulfilled in the case of "cognac" but not in that of "Weinbrand" (judgment of the Court of 20 February 1975 in Case 12/74, cited above). Nevertheless, the Commission has not raised any objection against the general requirement that the country of origin must be indicated. The determinative factor in this case is to ascertain whether the prescribed conditions have been laid down in order to make it possible to determine when manufacture takes place on the national territory and whether those conditions are justified.

In two cases conditions of this kind may go further than is justified by the useful purpose served by information as to the producing country:

— they may both state that the goods have particular features or a special quality and, accordingly, endeavour to add to the statement of the country of origin an indication that this is a guaranteed registered designation of origin; if that is combined with the prohibition on using the generic term for designating the product in the case of foreign products one is confronted with a measure having equivalent effect which is prohibited by Community law;

— they may require home-produced products to be used or processed, thereby endeavouring to conceal measures having equivalent effect forbidden by Community law.

That is why it is necessary to examine very critically the specific conditions to which the right to designate a specific producing country is subject.

By applying this policy to the designation "German Weinbrand" the Commission comes to the following conclusions:

— since "Weinbrand" is not a registered designation of origin, this word may also be used in the case of foreign high quality spirits made from wine (judgment in Case 12/74, cited above);

— since the designation "German" can be linked only with a manufacturing process carried out in Germany, it does not in particular afford any justification for the requirement that the wine distillate used be manufactured and stored in Germany, let alone in the same German distillery;

— nor can this condition be justified by considerations as to quality.

The Commission then examines the rules at issue in the light of the directives on the abolition of measures having an effect equivalent to quantitative restrictions.

The right to use the quality designation "Weinbrand" is an advantage other than an aid within the meaning of Article 1 (c) of Commission Directive No 66/683 of 7 November 1966 (Journal Officiel, p. 3748). The exception provided for in the said directive concerning designations and marks of origin does not apply here whereas, on the other hand, a justification based on the concept of public policy can only be founded on an erroneous understanding of that concept. If by public policy is meant the need for effective supervision that argument may be countered with the proposition that such supervision can just as well be guaranteed by other arrangements which do not restrict the free movement of goods (see Case 104/75, *De Peijper*, cited above).

The disputed provisions also make imports dearer and give preferential treatment to home-produced goods and are for this reason incompatible with Article 2 (3) (f) and (k) of Commission Directive No 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 18). The fact that the *Weingesetz* contains corresponding provisions for foreign Weinbrand aggravates the infringement of Article 30 of the EEC Treaty, rather than legitimizing it, because the effect of the rules in question might be a restriction of the free movement of goods between Member States.

The third question

The Commission considers that in the light of the conclusions which it has reached as a result of examining the preceding questions it need consider only briefly the other Community law provisions cited by the Verwaltungsgericht.

As far as Article 90 of the EEC Treaty is concerned, it is doubtful whether the provisions of the *Weingesetz* at issue grant German distilleries special or exclusive rights and whether those distilleries are to be regarded as public undertakings. Nevertheless, when the Federal Republic of Germany laid down the disputed rules it may have created a situation which conflicts with the rules on competition contained in the Treaty and may thereby have contravened the combined provisions of Articles 5, 85 and 86 of the EEC Treaty. However, this point of view, which entails an examination of the facts, can be considered only in the context of proceedings under Article 169 of the

EEC Treaty and not in connexion with a reference under Article 177 of the Treaty.
Considerations similar to those mentioned in relation to Article 90 apply, according to the Commission, to the prohibition of discrimination. Moreover, in so far as the complaint is directed against discrimination between producers, the second subparagraph of Article 40 (3) of the Treaty is not applicable because high quality spirits made from wine are not an agricultural product included on the list contained in Annex II to the EEC Treaty.

At the hearing on 5 July 1978 the plaintiff in the main action, represented by D. Ehle of the Cologne Bar, the Government of the Federal Republic of Germany, represented by J. Sedemund, also of the Cologne Bar, and the Commission of the European Communities, represented by its Agent, H. Matthies, answered certain questions put by the Court and submitted oral observations.

The Advocate General delivered his opinion at the hearing on 13 July 1978.

Decision

1 By order of 18 January 1978 which was received at the Court Registry on 9 February 1978 the Verwaltungsgericht of the Freie Hansestadt Bremen referred to the Court, pursuant to Article 177 of the EEC Treaty, three questions on the interpretation of Articles 30, 31 and 36 (the first two questions), 86 (b) and 90 (1) (the third question) of the said Treaty.

2 Those questions have been raised in an action brought by a German manufacturer of spirits against the competent authority of the City of Bremen relating to the former's right to use the designations "Qualitätsbranntwein" and "Weinbrand" in connexion with its products made from wine distillates imported from another Member State.

The replies to the questions referred are intended to enable the national court to decide whether the whole or part of Article 40 of the Federal Law of 14 July 1971 on wine, liqueur wine, sparkling wine, wine-based beverages and spirits made from wine (Bundesgesetzblatt I 1971, p. 893) and hereinafter referred to as the Weingesetz is compatible with Community law and in particular with the provisions cited by the national court.

Preliminary considerations

3 For the purpose of answering the questions referred to the Court attention should be drawn to some of the matters of law and fact with reference to which the national court has raised them.

4 According to Article 35 of the *Weingesetz* "spirits made from wine are the liquid derived from wine distillate which has an alcoholic strength of at least 38° and may be drunk as such or simply diluted with water (preparation)".

Article 36 of that Law provides that wine distillate is the liquid obtained by heating either wine or wine fortified for distillation (Brennwein), that is to say, according to the explanations given to the Court, wine to which a distillate has been added and having an alcoholic strength of about 24°, or again by heating "crude distillate" (Rohbrand aus Wein oder aus Brennwein), that is to say, again according to the explanations given to the Court, a wine, whether fortified for distillation or not, which has undergone an initial distillation, or finally by heating a blend of the above-mentioned products until a distilled product is manufactured having an alcoholic strength of at least 52° and not more than 86°; no other substance may be added to or extracted from the distilled liquid obtained in this way.

5 According to the plaintiff in the main action, if the initial distillation, which yields the "Rohbrand", is carried out by the still distillation process, it produces spirits distilled from wine having an alcoholic strength of between 24 and 25° which must in fact be distilled a second time in order to fulfil the requirements of Articles 35 and 36 relating to alcoholic strength.

However, if the initial distillation is carried out using the column apparatus it produces — again according to the plaintiff in the main action — a distillate with an alcoholic strength of 70°, which makes a second distillation unnecessary.

6 On the other hand, according to the Government of the Federal Republic of Germany, the product derived from the initial distillation — whatever its alcoholic strength — is a product which has not been purified and is for this reason called crude distillate which, before it can be used for the manufacture of spirits, must undergo a second distillation which transforms it into a ready-prepared distillate (fertiges Destillat).

7 The *Weingesetz* draws a distinction in Section II of Part 2 (Articles 35 to 44) between spirits made from wine which are home-produced on the national territory (inländische Branntweine aus Wein) and are dealt with in Articles 36 to 41, and those which are manufactured abroad (ausländische Branntweine aus Wein) and are dealt with in Articles 42 to 44.

That distinction is arrived at by applying different criteria and its effects differ depending on whether the spirits in question are ordinary spirits or

those for which the designations "Qualitätsbranntwein aus Wein" and "Weinbrand" are claimed.

8 As for ordinary spirits, Article 39 (1) provides that those produced on the national territory must be marked "Branntwein aus Wein", whereas in the case of spirits of foreign origin — and especially those from another Member State — the name of the producing country or the adjective derived from that name must, according to Article 44 of the *Weingesetz*, be added to that marking.

Within the meaning of those provisions and by virtue of Article 38 of the *Weingesetz* ordinary spirits are deemed to be manufactured on the national territory where the blending of the distillates or their coupage or the addition of certain products listed in the said Article 38 is carried out on the national territory, irrespective of the origin — whether domestic or foreign — of the wines, fortified wines, crude distillate or even ready-prepared distillates, from which the spirits are manufactured.

9 On the other hand, spirits which are intended to carry the designations "Qualitätsbranntwein aus Wein" and "Weinbrand" are considered to have been produced on the national territory only if they fulfil the requirements set out in Article 40 of the *Weingesetz* and in particular the two conditions that:

(a) at least 85% of the alcoholic content is derived from wine distillate obtained as a result of distillation carried out on the national territory;

(b) the whole of the wine distillate used for the manufacture of spirits, that is to say both the distillate obtained on the national territory and any that may have been purchased — up to a maximum of 15% of the whole of the said distillate — abroad, has been kept for at least six months in oaken casks at the same factory (Betrieb) where the distillate produced on the national territory was manufactured.

Under Article 44 of the *Weingesetz* the designation "Qualitätsbranntwein aus Wein" together with the name of the producing country or the adjective derived from that name may also be used in the case of foreign spirits in respect of which the document which has to accompany them when they are imported into the Federal Republic of Germany has certified that they comply with conditions which are almost the same as those laid down in Article 40 for home-produced high quality spirits, and in particular with the two conditions that at least 85% of the alcoholic content of the distillate is derived from distillate obtained in the producing country (subparagraph 2 of

Article 44 (1)) and that the whole of the wine distillate used has been kept for at least six months in oaken casks at the factory abroad where that 85% was distilled (subparagraph 3 of Article 44 (1)).

10 Although the 1971 version of the said Article 44 allowed only the designation "Qualitätsbranntwein aus Wein" to be used for high quality spirits from abroad, while reserving the better known designation "Weinbrand" for high quality spirits produced in Germany, it is clear from the judgment of the Court of Justice of 20 February 1975 (Case 12/74, *Commission of the European Communities* v *Federal Republic of Germany* [1975] ECR 181) that high quality spirits from the other Member States which fulfil the conditions laid down in Article 44 of the *Weingesetz* must also be permitted to benefit in Germany from the use of the designation "Weinbrand", because otherwise there would be an infringement of Article 30 of the Treaty.

11 However, the plaintiff in the main action asserts that — even if the above-mentioned infringement of Article 30 of the Treaty is eliminated — there is another measure having an effect equivalent to a quantitative restriction to be found in Articles 40 and 44 of the *Weingesetz* which is concerned with imports into the Federal Republic of Germany of ready-prepared distillates (fertiges Destillat). This restriction is to be found in the fact that high quality spirits manufactured in the Federal Republic of Germany must necessarily be manufactured from wine, wine fortified for distillation or crude distillate which, to the extent of at least 85% of the alcoholic content of the distillate used, has undergone distillation, or at least final distillation, on the territory of the Federal Republic of Germany, transforming it into "fertiges Destillat" and that this ready-prepared distillate must, moreover, have been kept for at least six months in oaken casks at the factory in Germany which carried out such distillation or final distillation.

12 That provision, to which Article 44 (1) of the *Weingesetz* corresponds in so far as high quality spirits from the other Member States are concerned, prevents manufacturers of German spirits from buying distillates in other Member States with a view to using them directly, that is to say without any further distillation on German territory, for the preparation of high quality spirits from wine, whereas those distillates, in particular those coming from France and Italy, are of the alcoholic strength required by Article 36 of the *Weingesetz* (at least 52° and not more than 86°) and offer the same guarantees from the point of view of public health and quality as ready-prepared distillates (fertiges Destillat) manufactured in Germany.

Accordingly that provision is said to be a restriction on trade which is prohibited by Article 30 of the Treaty and cannot fall within the scope of Article 36 thereof, since, according to the plaintiff in the main action, its real objective is to protect German distillers by reserving, in the case of spirits manufactured in the Federal Republic, the designations "Qualitätsbranntwein aus Wein" and "Weinbrand" for those spirits in respect of which the final distillation at least has been carried out in the Federal Republic of Germany.

Furthermore, that measure forces manufacturers of German spirits made from wine, who are not distillers, to buy the distillates with which they make spirits exclusively from German distillers, who are moreover their competitors, otherwise they would be unable to use the above-mentioned designations in connexion with their products, and this is a form of discrimination between those manufacturers of spirits who are distillers and those who are not which is forbidden by the Treaty.

13 The Government of the Federal Republic of Germany submits that the provision at issue is not in any respect a measure having an effect equivalent to a quantitative restriction.

The *Weingesetz*, by making it obligatory that at the very least the final distillation and the six months' storage in oaken casks should take place in the same factory (Betrieb), aims at guaranteeing the quality of the spirits in question, which justifies the designations reserved for them because of that quality.

That guarantee of quality can be achieved only if there is "undivided responsibility", that is to say if at the very least the final distillation and storage are undertaken in the same factory, since such "undivided responsibility" offers "the best possible guarantee that quality will be maintained and at the same time ensures effective supervision" and thus permits "the quality and individuality of the product" to be secured; (statement of reasons for the law, Bundestagsdrucksache V/1636, p. 61).

That supervision is said to be essential for the information of consumers, since Weinbrand manufactured in the Federal Republic has a special character and taste derived in particular from the way in which it is distilled, the restrictions on refining and the treatment of the constituent parts of the distillates, especially as German Weinbrand is distilled until the alcoholic strength is 85° and without any yeast, and primarily from wine fortified for distillation and crude distillate, whereas foreign products are directly distilled from basic wine (Grundwein).

14 From all these considerations it must be recognized that the right to use the designation of quality for home-produced spirits must depend upon the fact that the distillation, which is the determinative process, is actually carried out mainly within the country.

That requirement does not contravene the prohibition on measures having an effect equivalent to quantitative restrictions, in particular because by virtue of the rule laid down in Article 44 of the *Weingesetz* and following the judgment of the Court of 20 February 1975 the Federal Government places no restriction on the use not only of the designation "Qualitätsbranntwein aus Wein" but also of the designation "Weinbrand" for spirits from other Member States which meet the requirements of the principle of "undivided responsibility" enshrined in Article 44 for spirits coming from other Member States, in a way similar to that adopted by Article 40 for home-produced spirits.

15 Furthermore, it should be pointed out that it is an established fact that German spirits are manufactured not from grapes or wines produced on the territory of the Federal Republic of Germany but from foreign wines imported mainly in the form of wines fortified for distillation (Brennweine) or of crude distillates (Rohbrände).

16 Finally, it should also be noted that the designations "Qualitätsbranntwein aus Wein" and "Weinbrand" are not, either within the meaning of the domestic laws of the Member States or that of Article 2 (3) (s) of Commission Directive No 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17), indicative of origin or source but must be regarded as designations of quality formulated by the legislation of a Member State.

Moreover, in the beforementioned judgment of 20 February 1975 the Court held that the designation "Weinbrand" was not an indication of origin (Herkunftsangabe) and the Federal Republic of Germany, drawing the relevant conclusions from that judgment, states that the designation "Weinbrand", together with the addition of the name of the Member State of origin or an adjective derived from that name, may be used in marketing spirits made from wine coming from other Member States which satisfy the conditions prescribed by Article 44 of the *Weingesetz* in order to take advantage of the designations reserved for high quality spirits.

17 It is after taking into account the various factors to which attention has been drawn above that the questions referred to the Court are to be answered.

The questions referred to the Court

18 The first question asks whether Articles 30 and 31 of the EEC Treaty as well as the prohibition of discrimination under Community law are to be interpreted as meaning that the rules laid down in subparagraphs 1 and 4 of Article 40 (1) of the *Weingesetz* of 14 July 1971 (Bundesgesetzblatt: Part I, page 893 *et seq.* at 908) according to which home-produced spirits from wine may be designated as "Qualitätsbranntwein aus Wein" (high quality spirits made from wine) or as "Weinbrand" (Brandy), only if:

— At least 85% of the alcoholic content is derived from wine distillate home-produced (im Inland) by distillation;

— The whole of the wine distillate used has been kept for at least six months in oaken casks at the factory in Germany where the home-produced wine distillate was extracted by distillation,

are incompatible with the prohibition of measures having an effect equivalent to quantitative restrictions and also with the prohibition of discrimination.

19 Although the Court has no jurisdiction within the framework of the application of Article 177 of the Treaty to decide upon the compatibility of a national provision with Community law, it may nevertheless extract from the wording of the question formulated by the national court, having regard to the facts stated by the latter, those elements which come within the interpretation of Community law.

20 The first question amounts in substance to ascertaining whether the prohibition of measures having an effect equivalent to a quantitative restriction (Article 30 of the Treaty) and the general prohibition of discrimination are aimed at measures adopted by a Member State which make the use of a designation of quality for a home-produced finished product and, in particular, for an alcoholic product manufactured from raw materials which come either from the Member State concerned or from other Member States, subject to the condition that the whole or part of the manufacturing process prior to the final stage of the latter takes place in the Member State where the final stage of production is carried out and where, therefore, the product is regarded as originating.

21 If the answer to that question is in the affirmative the next question is whether a measure of that kind is not justified by Article 36 of the Treaty.

22 It is appropriate to answer both those questions together and to do this in the first instance with reference to the interpretation of Articles 30 and 36 of the Treaty.

23 As for the prohibition of measures having an effect equivalent to quantitative restrictions, Article 30 of the Treaty prohibits all such measures in trade between Member States.

For the purpose of this prohibition it is sufficient that the measures in question are likely to hinder, directly or indirectly, actually or potentially, imports between Member States.

According to the sixth recital of the preamble to Commission Directive No 70/50/EEC of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions, measures "which, at any marketing stage, grant to domestic products a preference, other than an aid, to which conditions may or may not be attached, and where such measures totally or partially preclude the disposal of imported products", must be considered to be included among such measures and are consequently prohibited.

Having regard to these considerations Article 2 (3) (s) of the directive rightly classifies measures which "confine names which are not indicative of origin or source to domestic products only" as measures having an effect equivalent to quantitative restrictions and therefore prohibited.

24 In order to be effective the prohibition on the reserving of certain designations (other than those indicative of origin or source), and in particular designations of quality, for domestic products only must extend to measures which distinguish between domestic products according to whether or not the raw materials or the semi-finished products from which they are manufactured have been produced or treated on national territory and which reserve for goods derived from semi-finished products, treated on national territory, special designations such as to give them an advantage in the opinion of the traders or consumers concerned.

In fact in a market which, as far as possible, must present the features of a single market, entitlement to a designation of quality for a product can — except in the case of the rules applicable to registered designations of origin and indications of origin — only depend upon the intrinsic objective characteristics governing the quality of the product compared with a similar product of inferior quality, and not on the geographical locality where a particular production stage took place.

25 However desirable may be the introduction of a policy on quality by a Member State, such a policy can only be developed within the Community by means which are in accordance with the fundamental principles of the Treaty.

Consequently, the Member States are empowered to lay down quality standards for products marketed on their territory and may make the use of designations of quality subject to compliance with such standards, but only on the condition that such standards and designations — unlike the position in the case of registered desginations of origin and indications of origin — are not linked to a requirement that the production process for the products in question be carried on within the country but are dependent solely on the existence of the intrinsic objective characteristics which give the products the quality required by law.

A presumption of quality which is linked to a requirement that the whole or part of the production process should take place on national territory, thereby restricting or treating unfavourably a process some or all of the phases whereof are carried out in other Member States is, always excepting the rules relating to registered designations of origin and indications of origin, incompatible with the common market.

This is more particularly the case where the requirement that the whole or part of the production process should take place on national territory is, in substance, justified only by a rule which, by introducing the principle of "undivided responsibility", is intended to facilitate quality controls whereas such controls may be carried out just as effectively by means which are less restrictive of trade between Member States.

26 It follows from all the foregoing considerations that a national measure which makes the right to use a designation of quality for a domestic product subject to the condition that the semi-finished product from which it was manufactured was either produced or treated on national territory, and refuses to allow the use of that designation simply because the semi-finished product was imported from another Member State, is a measure having an effect equivalent to a quantitative restriction.

The fact that the use of that designation of quality is optional does not mean that it ceases to be an unjustified obstacle to trade if the use of that designation promotes or is likely to promote the marketing of the product concerned as compared with products which do not benefit from its use.

27 It is true that, according to Article 2 (1), Commission Directive No 70/50/EEC relates solely to "measures, other than those applicable equally to domestic or imported products" and that, according to the Federal Republic of Germany, a comparison of Articles 40 and 44 of the *Weingesetz* shows that home-produced spirits and those coming from the other Member States are subject, in so far as entitlement to the designations of quality "Qualitätsbranntwein aus Wein" and "Weinbrand" is concerned, to conditions which are substantially the same.

In fact, if spirits coming from the other Member States are to benefit from the use of those designations together with the addition of the name of the Member State of origin or the adjective derived therefrom, they too must be manufactured from a distillate or at the very least from a ready-prepared distillate which has been produced and stored in a single factory in the State concerned.

28 Although it is not necessary in this case to answer the question whether a national measure which is applicable equally to home-produced products and those coming from the other Member States may nevertheless be a measure having an effect equivalent to a quantitative restriction, it is appropriate to record that equal treatment of the product when it is ready for delivery to the consumer is no justification for unequal treatment of the semi-finished products from which the finished product is made, in that in each Member State the domestic producer of the finished product is obliged or strongly encouraged to use home-produced semi-finished products wholly or in part.

The extension of that restriction both to finished products coming from the other Member States and to those from the Member State concerned, far from excusing the restriction on trade in semi-finished products, merely consolidates the partitioning of the markets.

29 However, it should further be considered whether measures such as those which have given rise to the questions referred to the Court are not permissible by virtue of Article 36 of the Treaty, even though they are measures having an effect equivalent to quantitative restrictions.

30 Article 36 is an exception to the fundamental principle of the free movement of goods and must, therefore, be interpreted in such a way that its scope is not extended any further than is necessary for the protection of those interests which it is intended to secure.

31 Article 36 of the Treaty does not cover a restriction imposed on trade which is linked to the right to use a national designation of quality, even where it is optional, which distinguishes a particular home-produced alcohol from similar home-produced alcohols, which may, even if they do not fulfil the condition on which the right to the designation of quality depends, and which restricts intra-Community trade, nevertheless be marketed on the territory of the Member State concerned without any restriction and in particular without any risk to the health of consumers.

32 Therefore the answer to the first two questions must be that measures adopted by a Member State which make the use in connexion with a home-produced product of a designation of quality — even where such designation is optional — which is indicative neither of origin nor of source within the meaning of Article 2 (3) (s) of Commission Directive No 70/50/EEC of 22 December 1969 subject to the requirement that one or more stages of the production process prior to the preparation of the finished product have been carried out on national territory are measures having an effect equivalent to a quantitative restriction which are prohibited by Article 30 of the Treaty and not justified by Article 36 thereof.

33 In view of the reply given above regarding the interpretation of Articles 30 and 36 of the Treaty the remainder of the first question and the third question need not be answered.

Costs

34 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 national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Verwaltungsgericht of the Free Hanseatic City of Bremen by order of 18 January 1978, hereby rules:

Measures adopted by a Member State which make the use in connexion with a home-produced product of a designation of quality — even where such designation is optional — which is indicative neither of origin nor of source within the meaning of Article 2 (3) (s) of Commission Directive No 70/50/EEC of 22 December 1969 subject to the requirement that one or more stages of the production process prior to the preparation of the finished product have been carried out on national territory are measures having an effect equivalent to a quantitative restriction which are prohibited by Article 30 of the Treaty and not justified by Article 36 thereof.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 12 October 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 13 JULY 1978 [1]

Mr President,
Members of the Court,

1. The Court has frequently held (the last occasion was on 29 June 1978 in the Dechmann case (154/77), paragraphs 8 and 9 of the decision that within the framework of proceedings brought under Article 177 of the Treaty it is not for the Court to give a ruling

1 — Translated from the French