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Abstract

This Note examines the Court's current construction of article 95. This construction involves a fairly strict and straightforward application of article 95's broad prohibition upon discriminatory internal taxation by one member state against imports from another member state. The Court has also created an exception to this broad prohibition. This Note will define this exception in the context of cases reaching the Court by both procedural routes.

KEEPING UP THE NATION'S SPIRITS: AN EXCEPTION TO THE BROAD PROHIBITION OF ARTICLE 95 OF THE TREATY OF ROME

INTRODUCTION

Article 95 of the Treaty establishing the European Economic Community[1] (EEC Treaty or Treaty) is a broad prohibition against the imposition by the member states[2] of the European Economic Community[3] (EEC) of internal taxes that dis-

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1. Article 95's broad rule prohibits internal taxation by a member state which discriminates in favor of that country's products, either as imports or exports.

> 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.
>
> Furthermore, 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.
>
> Member States shall, not later than at the beginning of the second stage, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules.

Treaty establishing the European Economic Community, Mar. 25, 1957, art. 95, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation), 298 U.N.T.S. 3, 53 (1958) (unofficial English translation) [hereinafter cited as EEC Treaty].

2. The original member states of the European Economic Community were France, Italy, West Germany, the Netherlands, Belgium, and Luxembourg. EEC Treaty, *supra* note 1, preamble. The United Kingdom, Ireland, and Denmark joined the EEC on January 1, 1973. Treaty of Accession, Jan. 22, 1972, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-I); *see* SWEET & MAXWELL'S EUROPEAN COMMUNITY TREATIES (4th ed. 1980) 270 (unofficial translation) [hereinafter cited as SWEET & MAXWELL'S]; *see also* 11 I.L.M. 397 (report of the Commission of the European Communities (Commission) on the enlarged Community). Greece became the tenth member state in 1979. Treaty of Accession of the Hellenic Republic, May 28,1979, 22 O.J. EUR. COMM. (No. L 291) 9 (1979), 18 I.L.M. 897; *see* SWEET & MAXWELL'S, *supra*, at 335.

3. The European Economic Community (EEC) has its post World War II roots in the proposal made by M. Robert Schuman, the French Minister of Foreign Affairs, on May 9, 1950, to merge the French and German coal and steel industries. D. WYATT & A. DASHWOOD, THE SUBSTANTIVE LAW OF THE EEC 3 (1980). The Schuman proposal was accepted by the Benelux countries, France, Germany, and Italy. The Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 261 U.N.T.S. 140 [hereinafter cited as ECSC Treaty], was signed on April 18, 1951 and came into force on July 20, 1952. The ECSC treaty established four major institutions: a High Authority, a Special Council of Ministers, a Common Assembly, and a Court of Justice. *Id.* art. 7.

On March 25, 1957, the EEC Treaty and the Treaty establishing the European Atomic Energy Commission, March 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 169, were signed. They came into force on January 1, 1958 and provided for a single Assembly and Court of Justice for the EEC, European Coal and Steel Community (ECSC), and the European Atomic Energy Commission (Euratom). The process of rationalization was advanced in 1967 when a single Commission of

criminate against imports from other member states. Article 177 of the Treaty empowers a national court to refer questions to the European Court of Justice[4] (Court) in cases before it that implicate the Treaty.[5] Article 169 of the Treaty gives the Commission of the European Communities[6] (Commission) the authority to issue reasoned opinions concerning the construction of the Treaty and the compliance of member states with its requirements.[7] If a member state which is the subject of one of these opinions declines to follow its recommendations, the

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the European Communities was created to carry out the functions of the Commissions of the EEC and Euratom and the High Authority of the ECSC. *See infra* note 7.

4. The Court of Justice has its origin in the ECSC Court. ECSC Treaty, *supra* note 3, art. 45, protocol on the Statute of the Court of Justice. The Court administers three bodies of Community law, those of the ECSC, Euratom, and the EEC. Convention Relating to Certain Institutions Common to the European Communities, Mar. 25, 1957, § 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II); *see* SWEET & MAXWELL'S, *supra* note 2, at 230. The jurisdiction of the Court is defined in articles 169-83 of the EEC Treaty, *supra* note 1. For present purposes, only article 169, *infra* note 7, and article 177, *infra* note 5, are relevant. *See also* The Court of Justice of the European Communities, EEC Periodical 4/1983.

5. The Court finds its jurisdiction to hear matters implicating Community law which arise in the course of litigation in the national courts in article 177 of the EEC Treaty.

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
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> (a) the interpretation of this Treaty;
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> (b) the validity and interpretation of acts of the institutions of the Community;
>
> (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
>
> Where any such question is raised in a case pending before court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to render judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter to the Court of Justice.

EEC Treaty, *supra* note 1, art. 177.

6. The Commission of the European Communities replaced the EEC Commission, the Euratom Commission, and the High Authority of the Coal and Steel Community on July 1, 1967. It was created by the Treaty establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II); *see* SWEET & MAXWELL'S, *supra* note 2, at 233, and exercises the powers and competences of those former authorities.

7. Article 169 of the EEC Treaty provides the Commission with a mechanism by which to carry out its authority.

> If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the mat-

Commission may seek a ruling on the matter from the Court.[8]

An examination of the decisions of the Court construing article 95 reveals a dichotomy. The Court frequently applies an exception[9] to article 95's broad prohibition to cases reaching it by way of a private suit pursuant to article 177, but never in cases initiated by the Commission under article 169. Consequently, the tax systems addressed in article 177 cases have generally been found to be valid.[10] These cases do not construe articles 169 and 177; rather they all address article 95. Articles 169 and 177 simply define the procedural posture of the cases. As a result, there is an inconsistent body of case law construing this very important article.

This is particularly problematic for private parties such as importers seeking to judge the price at which they will sell their imported products.[11] There exists too great an element of uncertainty as to which products and classes of products are similar or in competition with one another so that they should

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ter after giving the State concerned the opportunity to submit its observation.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

EEC Treaty, *supra* note 1, art. 169.

8. *Id.*

9. The Court has allowed taxes which coincidentally fell more heavily on imports than on domestic products where eligibility for the tax advantage is (1) based upon objective criteria; (2) promotes economic policy objectives which are compatible with the EEC Treaty; and (3) are not such that imports cannot possibly fulfill their requirements. However, the importing state may require that the imports fulfill every one of the criteria for eligibility. *See infra* notes 119-22, 128-30, 262-77 and accompanying text.

10. *See* Schneider-Import GmbH & Co. KG v. Hauptzollamt Mainz, 1980 E. Comm. Ct. J. Rep. 3469, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8700; Rumhaus Hansen GmbH & Co. v. Hauptzollamt Flensburg, 1981 E. Comm. Ct. J. Rep. 1165, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754; SpA Vinal v. SpA Orbat, 1981 E. Comm. Ct. J. Rep. 77, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724; Chemial Farmaceutici SpA v. DAF SpA, 1981 E. Comm. Ct. J. Rep. 1, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723; Hauptzollamt Flensburg v. Hermann C. Andresen GmbH & Co. KG, 1981 E. Comm. Ct. J. Rep. 2835, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8777. *But see* Hans Just I/S v. Danish Ministry for Fiscal Affairs, 1980 E. Comm. Ct. J. Rep. 501, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8650.

11. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 79, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8727; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 13, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8715.

bear the same tax burden.[12] Because of the inconsistent application of the exception to article 95's prohibitions, the rationales underlying cases decided via the article 169 route are of little use to counsel and their clients in an article 177 proceeding.[13] Therefore, no member state has successfully raised the exception in defense of a challenged tax system.[14]

This Note examines the Court's current construction of article 95. This construction involves a fairly strict and straightforward application of article 95's broad prohibition upon discriminatory internal taxation by one member state against imports from another member state.[15] The basis for this construction is found in a group of cases collectively known as the Alcohol Cases[16] and their progeny.[17] However,

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12. For a discussion of comparability of the tax burdens, see *infra* notes 55-60 and accompanying text.

13. In many of the cases reaching the Court by the article 169 route, the national governments argued that there had been no protective effect from the challenged tax scheme. These arguments were rejected by the Court because it feared that to do so would crystalize preexisting patterns of discrimination. Commission of the European Communities v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, 368, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7666; Commission of the European Communities v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, 407, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7682. However, when the plaintiffs in *Vinal*, 1981 E. Comm. Ct. J. Rep. 77, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724 and *Chemial*, 1981 E. Comm. Ct. J. Rep. 1, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, complained of a tax scheme which had demonstrably had the effect of keeping out all competing imports, the Court allowed it to stand.

14. *See, e.g.*, Commission of the European Communities v. Italian Republic, 1983 E. Comm. Ct. J. Rep. 601, 618-21, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928, at 8827; Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 362-63, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7663-64; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 402-03, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7680; Commission of the European Communities v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. 447, 465-66, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7696.

15. *See infra* notes 60-75 and accompanying text.

16. Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, 1983 E. Comm. Ct. J. Rep. 2265, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943; Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, 1980 E. Comm. Ct. J. Rep. 417, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651; Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649; *see also* A.J. EASSON, TAX LAW AND POLICY IN THE EEC 28 (1980).

17. *See* Commission v. Italian Republic, 1983 E. Comm. Ct. J. Rep. 601, [1981-

the Court has also created an exception to this broad prohibition. The member state will be allowed to provide tax advantages to certain classes of products or producers. However, the criteria for eligibility for the advantage must be based upon objective criteria,[18] promote economic policy goals compatible with those of the Treaty,[19] and must not be devised so that imports can not possibly meet them.[20] The exception is consistent with the policies of article 95.[21] However, an inconsistency is revealed by an examination of the facts of the exception cases. The Court is generally unwilling to strike down policy based rules of the member states when the question is presented in the context of a private suit.[22] The Court almost invariably strikes down these provisions when presented in a suit brought by the Commission against the member state.[23] This Note will define this exception in the context of cases reaching the Court by both procedural routes.[24]

I. *ARTICLE 95*

A. *The Purpose of Article 95*

The chief economic purpose of the EEC is to achieve a common market by removing and preventing impediments to free trade.[25] Article 95 supplements the provisions of the Treaty on the abolition of customs duties and charges having

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83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 1, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631.

18. H. Hansen jun. & O.C. Balle GmbH & Co. v. Hauptzollamt Flensburg, 1978 E. Comm. Ct. J. Rep. 1787, [1978-79 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8511; *see infra* notes 85-90 and accompanying text.

19. *Vinal*, 1981 E. Comm. Ct. J. Rep. 77, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724; *Chemial*, 1981 E. Comm. Ct. J. Rep. 1, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723; *Hansen & Balle*, 1978 E. Comm. Ct. J. Rep. 1787, [1978-79 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8511; *see infra* notes 85-90 and accompanying text.

20. *See infra* notes 128-30 and accompanying text.

21. *See infra* notes 25-30 and accompanying text.

22. *See infra* notes 103-33 and accompanying text.

23. *See infra* notes 134-276 and accompanying text.

24. *See infra* notes 76-83 and accompanying text.

25. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7661-62; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E.

equivalent effect.[26] The aim of article 95 is to "ensure the free movement of goods between the Member States under normal conditions of competition by eliminating all forms of protection that result from the application of internal taxation which discriminates against products from other Member States."[27] Article 95 is "intended to fill in any breaches which a fiscal measure might open up" in the prohibition laid down by the provisions relating to the free movement of goods.[28]

Thus, in order to ensure equality of competition,[29] article

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Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7693.

26. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7661-62; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7693; A.J. EASSON, *supra* note 16, at 6-7. "[A]ny pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier . . . constitutes a charge having an equivalent effect to a customs duty. . . ." *Id.* (citation omitted).

27. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7661; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

28. A.J. EASSON, *supra* note 16, at 5; *see also* Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 1, 12-13, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631, at 7468. Speaking in the context of an article 95(1) "similar products" case the Court said:

> [t]he first paragraph of Article 95—the purpose of which is ensure that the Treaty provisions relating to the abolition of customs duties and charges having equivalent effect cannot be evaded or rendered nugatory by the introduction of internal taxation discriminating against imported products in comparison with domestic products—implements a fundamental principle of the Common Market.

Id. It is the author's belief that this reasoning is applicable to the entire article and not just paragraph one.

29. August Stier v. Hauptzollamt Hamburg-Ericus, 1968 E. Comm. Ct. J. Rep. 235, [1967-70 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8070; A.J. EASSON, *supra* note 17, at 1; *see* Opinion of Advocate-General Gand, 1968 E. Comm. Ct. J. Rep. 165, [1967-70 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8064, at 7992.

> The purpose of this provision is to ensure equality of competition and it is valid only within this limit but if there are neither similar products nor products which may be substituted for them it is not possible to find in Article 95 any provision limiting the right of the importing state to impose taxation.

Id.

95 requires that one product not bear an unduly heavy tax burden in relation to another with which it competes.[30]

B. *The Structure of Article 95*

Article 95 consists of three paragraphs, although this Note addresses only the first two.[31] Article 95(1) forbids the imposition, directly or indirectly, of any internal taxation upon imports from other member states in excess of that imposed upon *similar domestic products*.[32] Consequently, the first determination to be made is whether the domestic and imported products are "similar" within the meaning of this paragraph. If they are similar, they must bear the same tax burden. Factors used in the comparison of the relative tax burdens include the tax rate, the method of assessment, and the base to which the tax is applied.[33] This paragraph is to be interpreted broadly so as to draw under its coverage all tax procedures and all similar products.[34]

In each of the Alcohol Cases,[35] the same language is employed in defining similar products within the meaning of article 95(1). "[I]t is necessary to consider as similar products [those] which 'have similar characteristics and meet the same

30. *See infra* notes 54-56 and accompanying text.

31. Article 95(3) requires the member states to repeal or amend any provisions of their domestic law which conflict with 95(1) or (2) no later than the beginning of the second stage. EEC Treaty, *supra* note 1, art. 95(3). The EEC Treaty provides for three transitional stages of four years each. *Id.* arts. 8(1)-(2). Thus, the second stage began on January 1, 1962, four years after the Treaty came into force. A.J. EASSON, *supra* note 16, at 53, n.78.

32. For the provisions of article 95(1) of the EEC Treaty, see *supra* note 1. *See also supra* note 29.

33. A.J. EASSON, *supra* note 16, at 29-30.

34. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 359, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7661; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 399, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 462, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

35. Commission v. United Kingdom II, 1983 E. Comm. Ct. J. Rep. 2265, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943; Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649; Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. 417, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651.

needs from the point of view of consumers.' "[36] Therefore, the scope of article 95(1) is determined not by the strictly identical nature of the products but by their having similar and comparable uses as perceived by the consumer.[37]

Article 95(2) forbids the imposition of any internal taxation upon imports from other member states which affords *indirect protection to other domestic products*.[38] This paragraph operates as something of a catch-all. It is intended to prohibit all forms of indirect tax protection of domestic products which, although not similar to imported products, are nonetheless in "partial, indirect, or potential competition"[39] with them. In keeping with the broader scope of this paragraph and due to the difficulty of making sufficiently precise comparisons between the products in question,[40] the inquiry focuses on "the protective nature of the system of internal taxation."[41] As with

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36. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 359-60, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7661; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 400, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 462-63, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694. (all quoting Rewe-Zentrale des Lebensmittel-Grosshandels GmbH v. Hauptzollamt Landau/Pfalz, 1976 E. Comm. Ct. J. Rep. 181, 194, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8343, at 7238.

37. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 360, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7661; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 400, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 462-63, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

38. EEC Treaty, *supra* note 1, art. 95(1).

39. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 360, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7661; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 400, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 463, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

40. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 360, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7661; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 400, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 463, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

41. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 360, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 400, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E.

article 95(1),[42] a dual analysis must be made under article 95(2). Are the two products in actual or potential competition with one another? If so, does the tax system afford indirect protection to the domestic products?[43]

To implicate article 95(2), it is sufficient that one of the economic uses of the imported product puts it in competition with a domestic product.[44] Present competition is not the test. The Court has said that the possibility of competition in the future may implicate article 95(2).[45] What is more, in determining the existence of a competitive relationship under article 95(2), it is "necessary to consider not only the present state of the market but also the possibilities for development within the context of free movement of goods at the Community level and the further potential for the substitution of products for one another which may be revealed by intensification of trade."[46] Thus, for instance, the fact that in the United Kingdom, beer and wine were virtually never sold in the same outlets, or consumed in the same places or by the same people did not preclude a finding that they were in competition within the

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Comm. Ct. J. Rep. at 463, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

42. *See supra* notes 31-34 and accompanying text.

43. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 432-33, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7724.

44. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 360, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7661; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 400, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 463, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694; *see also* Firma Fink-Frucht GmbH v. Hauptzollamt Munchen-Landsbergerstrasse, 1968 E. Comm. Ct. J. Rep. 223, 232, [1967-70 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8069, at 8039. Thus, for instance, petroleum could be a product in competition with both coal and iron ore. It competes with coal as a fuel and with iron ore as a feedstock for plastics.

45. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 432, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7724.

46. *Id.* This great faith on the part of the Court that consumers would take up drinking the drinks of their neighbors if only the distorting effects of fiscal measures were removed is not supported by experience. *See Gentlemen's War—A Survey of the World's Trade in Distilled Spirits*, The Economist, Dec. 22, 1984-Jan. 4, 1985, survey insert. This survey found that "drinking remains embedded in the heart of people's social traditions, and most people, most of the time, remain conservative. They still drink the local hooches, most of which, inevitably, are unexportable . . . . Local spirits retain their dominance in most markets." *Id.* survey insert at 6; *see infra* note 283 and accompanying text.

meaning of article 95(2).[47] Nor is it necessary that the plaintiff show the protective effect statistically;[48] it is enough to show that a "given tax mechanism is likely, in view of its inherent characteristics, to bring about the protective effect."[49]

Finally, given the broad sweep of article 95(2),[50] the Court often does not constrain itself to making a finding of similarity under article 95(1). For instance, in the Alcohol Cases,[51] the Court concluded that some of the products in issue were similar and that

> [e]ven in cases in which it is impossible to recognize a sufficient degree of similarity between the products concerned, there are nevertheless, in the case of all spirits, common characteristics which are sufficiently pronounced to accept that in all cases there is at least partial or potential competition. . . . It appears from the foregoing that Article 95, *taken as a whole*, may apply without distinction to *all the products* concerned.[52]

Such a broad reading of article 95(2) is necessary in order to give effect to the purpose of article 95.[53]

C. *Comparability of the Tax Burden*

The plain meaning of the prohibitions in article 95 is that

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47. *See* infra notes 285-87 and accompanying text.

48. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 433, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7724.

49. *Id.*

50. EEC Treaty, *supra* note 1, art. 95(2). For the provisions of article 95(2), see *supra* note 1.

51. Commission v. United Kingdom II, 1983 E. Comm. Ct. J. Rep. 2265, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943; Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649; Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. 417, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651; *see also* A.J. EASSON, *supra* note 16, at 28.

52. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 362, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7663; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 402, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7679; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 465, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7695. (emphasis added).

53. *See supra* notes 25-28 and accompanying text.

imported products should not bear a heavier tax burden than similar or competing domestic products.[54] "[T]he effective burden is arrived at by applying the tax rate, expressed as a percentage or as a sum of money, to the relevant tax base, expressed in terms of value, volume, quantity, or other characteristic (e.g. alcoholic strength) of the products."[55] For example, a member state may produce large quantities of various grades of beet sugar but no cane sugar, and import various grades of sugar made from both basic materials. The offending tax scheme could tax both at the same rate per economic unit. A tax of ten percent on the sales price of each would appear to be equal. If, however, the predominantly domestic beet sugar were taxed based on its warehouse price in one hundred pound bags while the imported cane sugar was taxed based upon the retail store price in one pound boxes, the burden on the latter would be far greater. The same tax rate applied to different tax bases results in discrimination against the imports.[56]

On the other hand, it is sometimes permissible to attach a higher tax to an import than to a similar or competing domestic product. Article 97 allows member states to fix average compensatory tax rates, provided the import does not end up in a worse position than the domestic product.[57] An example is found in a turnover equalization tax.[58] France might tax the making of wine in small increments at the grape stage, then each year as the bottles lie in the chateau's cellar, again at the

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54. *See supra* notes 29-30 and accompanying text.

55. A.J. EASSON, *supra* note 16, at 21.

56. If a sales tax of 10% were applied, there would be a discriminatory effect under these circumstances. A five pound bag which sold at retail for $2.00 would carry $.20 in tax, or $.04 per pound. A hundred pound bag selling at wholesale price of $20.00 would carry $2.00 in tax, or $.02 per pound. Thus, the domestic sugar would have a 100% tax advantage over the import.

57. Article 97 of the Treaty pertains to cumulative turnover taxes.

> Member States which levy a turnover tax calculated by a cumulative multi-stage system may, in the case of internal charges imposed by them on imported products or of repayments allowed by them on exported products, establish average rates for products or groups of products, provided that there is no infringement of the principles laid down in Articles 95 and 96.
>
> Where the average rates established by a Member State do not conform with these principles, the Commission shall issue appropriate directives or decisions to the State concerned.

EEC Treaty, *supra* note 1, art. 97.

58. *Id.*

sale from the chateau to a negotiant, and lastly upon the sale to the wine shop owner. Germany, on the other hand, might tax it only at the last two stages, but more heavily at each stage. France could apply a turnover equalization tax to imports of German wine so that they would carry an equal tax burden.[59]

II. *THE ELEMENTS OF AN ARTICLE 95 ACTION*

A. *Internal Taxation*

Both paragraphs one and two of article 95[60] forbid discriminatory internal taxation. Consequently, it is necessary to define internal taxation within the meaning of that article. The definition or label applied by the member state is not important; rather, the basic characteristics of the measure must be examined.[61]

Financial exactions of any sort are treated as taxes for the purposes of article 95.[62] In *Simmenthal S.p.A. v. Italian Minister for Finance*,[63] the Court stated that

> pecuniary charges levied on the occasion of veterinary and public health inspections either at the frontier on imported goods alone or on the occasion of internal inspections of both imported and domestic products constitute taxes . . . and are therefore prohibited or internal taxation coming within the rule on nondiscrimination laid down by Article 95 of the Treaty.[64]

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59. *Id.*

60. *Id.* art. 95.

61. A.J. EASSON, *supra* note 16, at 17-18.

62. *Id.*

63. 1976 E. Comm. Ct. J. Rep. 1871, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8388.

64. *Id.* at 1888, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8388, at 7978. The Court made reference in *Simmenthal* to article 9 of the Treaty which establishes the customs union, one of the foundations of the Community.

> 1. The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition as between Member States of customs duties on imports or exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countrires.
>
> 2. The provisions of Chapter 1, Section 1, and of Chapter 2 of this Title shall apply to products originating in Member States and to products which come from third countries and which in free circulation in Member States.

EEC Treaty, *supra* note 1, art. 9.

There is also an interesting comparison to be seen between the rationale of the Court in *Simmenthal* and that of the United States Supreme Court in Brown v. Mary-

There, tax charged at the frontier was held to be an internal tax.[65] In another case, a levy on the sale of reprographic machines, both domestically manufactured and imported, was imposed by France.[66] The sums raised were allocated entirely to a special account called the National Book Fund.[67] The Fund, inter alia, subsidized "the publication of quality works and the purchase of both French and foreign books by libraries and the

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land, 25 U.S. (12 Wheat.) 419 (1827). In *Brown*, the Supreme Court construed the following constitutional language: "No state shall . . . lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection laws . . . ." U.S. CONST. art. I, § 10, cl. 2. The Court found that the words of limitation ending that clause went to show the full extent of the meaning of the word taxation.

> The tax or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

25 U.S. at 438.

65. *Simmenthal*, 1976 E. Comm. Ct. J. Rep. at 1889-90, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8388, at 7978-79.

66. Commission of the European Communities v. French Republic, 1981 E. Comm. Ct. J. Rep. 283, 298-99, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8733, at 8810. However, it should be noted that only one percent of the relevant products were made in France. *Id.* For this reason, the Commission sought to characterize the charge as being equivalent to a customs duty and thus forbidden under articles 9, 12 and 13. *Id.* at 300, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8733, at 8811. For the provisions of article 9, see *supra* note 64. *But see* Commission of the European Communities v. Kingdom of Denmark, 1983 E. Comm. Ct. J. Rep. —, 3 COMMON MKT. REP. (CCH) ¶ 14,024. Denmark imposed the cost of health related inspections upon undertakings selling groundnuts, which were entirely imported. The Kingdom of Denmark argued that the decision of the Court in Commission v. French Republic, 1981 E. Comm. Ct. J. Rep. 283, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8733,

> does not prohibit the Member States from subjecting imported products to an internal tax when there are no identical or similar national products or other products which require protection. In such a case, the duty is imposed "in good faith" because the chosen method of payment would have been the same had Denmark produced ground nuts. . . . The Court of Justice [responded that it] has consistently held that any pecuniary charge, whatever its designation or mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having an effect equivalent to a customs duty within the meaning of Articles 9, 12, 13, and 16 of the Treaty.

3 COMMON MKT. REP. (CCH) ¶ 14,024, at 14,391.

67. Commission v. French Republic, 1981 E. Comm. Ct. J. Rep. at 299, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8733, at 8811.

translation of foreign works into French."[68] The levy was held to be an internal tax within the meaning of article 95.[69]

B. *Directly or Indirectly on Products*

The Court found an internal tax indirectly imposed on a product where West Germany imposed a road use tax of four pfennigs per metric ton per kilometer for the transport of gravel.[70] The gravel, when sold, bore the added charge.[71] Given that a levy upon an item is going to affect its behavior in the field of competition, what tax is not at least indirectly a tax imposed on the product?[72] This element is perhaps most quickly and easily explained by reference to the famous logic of Chief Justice Marshall in *Brown v. Maryland*.[73] "All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . So a tax on the occupation of an importer is, in like manner, a tax in importation."[74] Similarly, the Court found a discriminatory tax imposed by Ireland where that country gave domestic "producers of spirits, beer, and made wine . . . [a] deferment of payment . . . [of taxes] of between four and six weeks . . . whereas, in the case of the same products from other Member States, the duty . . . [was] payable either at the date of importation or of delivery from the customs warehouse."[75]

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68. *Id.*

69. *Id.* at 302, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8733, at 8812.

70. Firma Schottle & Sohne OHG v. Finanzamt Freudenstadt, 1977 E. Comm. Ct. J. Rep. 247, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8394. A pfennig is one hundredth of a mark. At the time of publication, the current exchange rate put the value of one pfennig at U.S. $.0034.

71. *Schottle & Sohne*, 1977 E. Comm. Ct. J. Rep. at 251, [1977-78 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8394, at 7122-23.

72. *See* Commission of the European Communities v. Italian Republic, 1965 E. Comm. Ct. J. Rep. 857, 866, [1961-66 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8038, at 7542. In that decision, the Court defined the meaning of direct and indirect taxation: "As used in Article 96, the expression 'directly' must be understood to refer to taxation imposed on the finished product, whilst the expression 'indirectly' refers to taxation imposed during the various stages of production on the raw materials or semi-finished products used in the manufacture of the product." *Id.* at 866, [1961-66 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8038, at 7542.

73. 25 U.S. (12 Wheat.) 419 (1827).

74. *Id.* at 444.

75. Commission of the European Communities v. Ireland, 1980 E. Comm. Ct. J. Rep. 481, 490, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8652, at 7733. It is interesting to note that until November 1, 1984 the United Kingdom

III. *THE PROCEDURAL ROUTES TO THE COURT*

The parties in article 95 cases reaching the Court by the article 177 route[76] are generally a private business, often an importer, and a member state's revenue agency.[77] The private party will carry an item into the member state and a tax is assessed on the item, either at the frontier or later. Once the tax is paid, the importer seeks a refund in the national courts. The importer disputes the tax in light of the taxes imposed on similar or competing domestic products.[78] The national court refers the question of the legality of the tax in light of article 95 to the Court.[79] As a consequence of this procedural route, the

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effectively subsidized importers by not collecting import duties for up to eleven weeks after the goods had been landed. After that date, importers will be required to pay taxes due as the goods arrive in the country. *Cash In Hand*, The Economist, Aug. 25-31, 1984, at 49-50.

76. EEC Treaty, *supra* note 1, art. 177. For the provisions of article 177, see *supra* note 5.

77. *Andresen*, 1981 E. Comm. Ct. J. Rep. at 2836, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8777, at 7257; *Rumhaus Hansen* 1981 E. Comm. Ct. J. Rep. at 1177-78, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 8998-99; *Hans Just*, 1980 E. Comm. Ct. J. Rep. at 516, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8650, at 7709-10. In this regard, *Vinal*, 1981 E. Comm. Ct. J. Rep. 77, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724 and *Chemial*, 1981 E. Comm. Ct. J. Rep. 1, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, are out of the ordinary in more than just their results. It should be noted that in article 169 cases, the named parties are always the Commission and a member state or its revenue agency. In article 177 cases, the named parties are generally a revenue agency and a private party. In *Chemial* and *Vinal*, both named parties are private undertakings. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 90, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8727; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 10, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8715. In fact, the Italian government asked the Court to decline jurisdiction, asking if this was "not really a fictious dispute and whether the procedure under article 177 has not been employed in this case to impeach the Italian State in the absence of any actual dispute giving rise to questions of Community law as between the parties." *Vinal*, 1981 E. Comm. Ct. J. Rep. at 91, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8727; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 10, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8715.

78. *Andresen*, 1981 E. Comm. Ct. J. Rep. at 2847, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8777, at 7257; *Rumhaus Hansen*, 1981 E. Comm. Ct. J. Rep. at 1178, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 8998-99; *Hans Just*, 1980 E. Comm. Ct. J. Rep. at 516, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 7709-10.

79. *Andresen*, 1981 E. Comm. Ct. J. Rep. at 2847, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8777, at 7257; *Rumhaus Hansen*, 1981 E. Comm. Ct. J. Rep. at 1178, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 8998-99; *Hans Just*, 1980 E. Comm. Ct. J. Rep. at 516, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 7709-10.

Court is determining the fairness of the application of a particular section of a member state's tax code[80] to a specific quantity of an item of identifiable grade and characteristics.[81] The result is a narrow, fact specific analysis.

In an article 95 action reaching the Court through an article 169 proceeding, the reasoned opinions issued by the Commission frequently deal with an entire product line, both domestic and imported.[82] Thus, these cases result in decisions construing very broad questions. The earlier example of beet and cane sugar is illustrative here.[83] Is there discrimination in favor of a domestic product if a certain grade of beet sugar, which is both imported and domestic, is favored by the tax scheme, while none of the entirely imported cane sugar is favored?

IV. *THE ARTICLE 177 CASES*

A common thread is found running through cases reaching the Court via article 177. The Court generally favors the national governments in suits by importers alleging discriminatory tax schemes.[84] This exception to article 95's broad prohibition of discriminatory taxation is enunciated in *Hansen &*

80. *Andresen*, 1891 E. Comm. Ct. J. Rep. at 2837, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8777, at 7257 (articles 58, 78, 79, 84 and 151(1) of the German Law on the Spirits Monopoly); *Rumhaus Hansen*, 1981 E. Comm. Ct. J. Rep. at 1167, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 8998-99 (same); *Hans Just*, 1980 E. Comm. Ct. J. Rep. at 515, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8650, at 7709-10 (Danish Consolidated Law No. 151 of April 4, 1978); *Vinal*, 1981 E. Comm. Ct. J. Rep. at 89-90, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8727 (Decree-Law No. 1200 of October 6, 1948, as amended by Decree-Law No. 836 of September 16, 1955, and Article 3 of Law No. 506 of August 18, 1978); *Chemial*, 1981 E. Comm. Ct. J. Rep. at 10, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8715 (same).

81. *Rewe-Zentrale*, 1976 E. Comm. Ct. J. Rep. at 183, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8733, at 7231 (16,000 liters of Vermouth); *Schneider-Import*, 1980 E. Comm. Ct. J. Rep. at 3471, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8700, at 8370 (23,118 liters of Remy Martin VSOP).

82. Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 471, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7698-99. In this case, the Court considered the relationship between a single type of alcoholic drink and all other alcoholic drinks. "It is therefore necessary to appraise the existence of either a relationship of similarity or competition between a single product and an indeterminate number of products some of which are identified by the law whereas others are not specified." *Id.*

83. *See* text accompanying notes 55-56.

84. *See infra* notes 103-33 and accompanying text.

Balle[85] where the Court stated:

> At the present stage of its development . . . Community law does not prohibit the Member States from granting tax advantages, in the form of exemption from or reduction of duties . . . to certain classes of producers. Indeed, tax advantages of this kind may serve legitimate economic or social purposes, such as the use of certain raw materials by the distilling industry, the continued production of particular spirits of high quality, or the continuance of certain classes of undertakings, such as agricultural distilleries.[86]

A further statement of the *Hansen & Balle* exception is found in two cases decided the same day, *S.p.A. Vinal v. S.p.A. Orbat*[87] and *Chemial Farmaceutici S.p.A. v. DAF S.p.A.*[88] In both of these cases, the Court stated:

> in its present stage of development Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law if it pursues economic policy objectives which are themselves compatible with the requirements of the Treaty.[89]

An examination of recent cases reaching the Court via the article 177 route reveals that this definition of the exception has been further refined. This refinement was made in a series of cases involving the Hansen group of importers.[90]

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85. 1978 E. Comm. Ct. J. Rep. 1787, [1978-79 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8511.

86. *Id.* at 1806-07, [1978-79 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8511, at 7249.

87. *Vinal*, 1981 E. Comm. Ct. J. Rep. 77, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724.

88. *Chemial*, 1981 E. Comm. Ct. J. Rep. 1, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723.

89. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 93, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8717; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 15, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8729.

90. *See infra* notes 123-33 and accompanying text.

A. *The Individual Cases*

1. *Hans Just v. Danish Ministry for Fiscal Affairs*

The plaintiff in *Hans Just*[91] was an importer of spirits into Denmark.[92] In June 1978, it imported a small quantity of aquavit and larger quantities of other spirits.[93] These were taxed at differing rates.[94] Hans Just protested the tax differential, but paid anyway. It then brought suit seeking a refund from the Danish Ministry for Fiscal Affairs.[95] The national court referred to the Court, inter alia, the question of whether it was contrary to the Treaty to distinguish aquavit from other spirits, bearing in mind that "the two categories are distinguished through a definition based on content in raw materials and extracts, and on strength and characteristics of taste."[96]

The Court answered this question by reference to its decision that same day in *Commission v. Kingdom of Denmark*.[97] "A tax system which consists in conferring a tax advantage on a single product which represents the major proportion of domestic production to the exclusion of all other similar or competing imported products is incompatible with Community law."[98] However, the validity of this holding is in question, at least in article 177 cases, in light of the Court's rationale in the exception cases.[99]

The plaintiff in *Hans Just* had the good fortune to be before the Court at the same time and on facts similar to those addressed in *Commission v. Kingdom of Denmark*.[100] Both cases addressed the legality of article 2 of Coordinated Law No. 151

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91. 1980 E. Comm. Ct. J. Rep. 501, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8650.

92. *Id.* at 516, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8650, at 7710.

93. *Id.*

94. *See infra* notes 181-84 and accompanying text.

95. *Hans Just*, 1980 E. Comm. Ct. J. Rep. at 516, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8650, at 7710.

96. *Id.*

97. 1980 E. Comm. Ct. J. Rep. 447 [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649.

98. *Hans Just*, 1980 E. Comm. Ct. J. Rep. at 519, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8650, at 7711.

99. *See infra* notes 116-18 and accompanying text.

100. 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649.

of April 4, 1978 in light of article 95.[101] Since the Court refused the Danish Government's request to apply the exception to article 95's broad prohibition in *Commission v. Kingdom of Denmark*,[102] it was virtually impossible for the Court to apply the exception in *Hans Just*. Consequently, *Hans Just* is something of an anomaly among the article 177 cases because the plaintiff prevailed.

2. *Chemial Farmaceutici v. DAF* and *Vinal v. Orbat*

Chemial[103] and *Vinal*[104] are essentially interchangeable. They arise out of similar facts[105] and ask the Court to answer the same question concerning the same law.[106] In both cases, an Italian consumer bought denatured synthetic ehtyl alcohol from an Italian imported.[107] A special revenue charge of 12,000 Italian lira per hectoliter of synthetic alcohol was added to the sales price of each product.[108] On the other hand, denatured ethyl alcohol fermented from agricultural products bore a special charge of only 1,000 Italian lira.[109] All synthetic alcohol sold in Italy was imported, whereas the fermented alcohol came exclusively from domestic production.[110]

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101. *Id.* at 467, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7696; *Hans Just*, 1980 E. Comm. Ct. J. Rep. at 515, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8650, at 7709.

102. 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7696.

103. 1981 E. Comm. Ct. J. Rep. 1, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723.

104. 1981 E. Comm. Ct. J. Rep. 77, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724.

105. *Id.* at 90, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8727; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 11, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8715.

106. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 89-90, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8727; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 10, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8715.

107. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 90, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8727; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 10, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8715.

108. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 90, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8727; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 11, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8715.

109. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 90, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8727; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 11, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8715.

110. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 90, [1979-81 Transfer Binder] COMMON

The consumers, supported by the Commission,[111] argued that the two kinds of alcohol were chemically identical and fully interchangeable in their uses.[112] They were thus not only similar, but functionally identical; they could be called upon to meet exactly the same needs.[113] The consumers further argued that in the absence of any Italian production of synthetic alcohol, the tax system had the practical effect of preventing all imports of synthetic alcohol from other member states.[114] Thus, national production of fermented alcohol was directly favored.[115]

The argument of the importers, supported by the Italian government,[116] although radical, was accepted by the Court. They pointed out that "Italy . . . [had] a considerable production of ethylene, a petroleum derivative which is used in the manufacture of synthetic alcohol. It is accordingly impossible to accept that there . . . [was] discrimination against imported synthetic alcohol when there is *at least a potential* for production of the same product in Italy."[117] The radical sweep of this rationale is most evident when one notes that Italian reserves of petroleum, the basic raw material for synthetic alcohol, are negligible.[118]

MKT. REP. (CCH) ¶ 8724, at 8727; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 12, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8716.

111. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 92, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8728; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 14, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8717.

112. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 92, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8728; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 15, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8717.

113. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 92, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8728; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 14, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8717.

114. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 92, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8728; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 15, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8717.

115. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 92, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8728; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 14, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8717.

116. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 92-93, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8728; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 14, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8717.

117. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 92, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8728. (emphasis added).

118. *See* Commission of the European Communities, *Review of Member States' Energy Policies*, COM(84) 88 Final Table 1, at 130 (1984). Italy had domestic consump-

The difficulty with this rationale is that there are virtually no products made in any of the member states where there is not at least the potential for the domestic production of the same product. Every one of the member states possesses at least the potential for the production of all but a relatively few industrial products. In an age of easy transportation of bulk raw materials, the limiting factor preventing production of many industrial products is financial. In other words, England could discriminate against wine since it could import tons of grapes, giving it the potential for the production of wine.

The Court restated its language from *Hansen & Balle*[119] upholding "tax arrangements which differentiate between certain products on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed."[120] Here, the nature of the raw materials was dispositive. The tax scheme also encouraged the use of abundant agricultural products and discouraged the use of imported oil.[121] Thus, it also pursued economic policy objectives which are compatible with the requirements of the Treaty.[122]

3. The *Hansen* Cases

The contributions to the jurisprudence of article 95 made by the Hansen group of importers are extensive. For example, Rumhaus Hansen GmbH & Co. brought suit, in 1981, to obtain a refund of monopoly equalization taxes[123] paid on rum imported into the Federal Republic of Germany from

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tion of 83,570,000 tons of oil in 1982 and domestic production of only 1,790,000. Italy imported 87,300,000 tons of oil in 1982. *Id.; see also* L. GRAYSON, NATIONAL OIL COMPANIES 125, 128-29 (1981).

119. 1978 E. Comm. Ct. J. Rep. at 1806-07, [1978-79 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8562, at 7249.

120. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 93, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8729; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 15, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8717.

121. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 94, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8729; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 15, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8717.

122. *Vinal*, 1981 E. Comm. Ct. J. Rep. at 94, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724, at 8729; *Chemial*, 1981 E. Comm. Ct. J. Rep. at 15, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723, at 8717.

123. Where a member state grants a monopoly on a product, it will often charge a fee to the holder of the monopoly. *See, e.g., Hansen & Balle*, 1978 E. Comm. Ct. J. Rep. at 1801, [1978-79 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8562, at 8165. The member state may charge a tax on imports of products of the type covered by

Guadaloupe, an overseas department of France.[124]

The German court referred a question to the Court because, until then, the criteria for comparison of products under article 95 had all been based on the particular characteristics of the products in question and not on the conditions under which they were produced.[125] The German court feared that the rule of nondiscrimination in article 95 might be rendered nugatory if member states were allowed to define eligibility for tax advantages by a wide variety of natural, economic, and social factors.[126] The member state would be able to create a system of seemingly objective criteria which would, in reality, protect a class of domestic producers or products.[127]

The Court held that criteria for eligibility for tax advantages may be based upon conditions of production.[128] However, these conditions may not be such that imports could not possibly fulfill them.[129] If the domestic and imported products meet both the criterion of similarity which forms the basis of article 95(1) and the conditions laid down under the particular national tax legislation to qualify for the tax advantage in question, they must be taxed at the same rate.[130]

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the monopoly to the extent of the domestic monopoly fee. EEC Treaty, *supra* note 1, art. 37.

124. THE WORLD ALMANAC AND BOOK OF FACTS 497 (1984).

125. *Rumhaus Hansen*, 1981 E. Comm. Ct. J. Rep. at 1178, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 9006-07.

126. *Id.* at 1179, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 9007.

127. *Id.* at 1178-79, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 9008.

128. *Id.*

129. *Id.* at 1182, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 9009. In Aministrazionne Finanze dello Stato v. Essevi SpA and Carlo Salengo, 1981 E. Comm. Ct. J. Rep. 1413, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8759, the Court addressed the Italian tax regime for certain potable spirits. Imported cognac was taxed at a higher rate than was comparable domestic products made of wine or marc. *Id.* at 1426, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8759, at 9116. Tax benefits were denied to those products whose production could not be inspected by Italian inspectors and so they were taxed at a higher rate than those capable of being inspected in Italy. In striking down this tax scheme, the Court said that to "make the grant of a tax exemption or the benefit of a reduced rate of taxation conditional upon the possibility of inspecting production on the national territory constitutes . . . a condition which by definition can not be satisfied by similar products from other Member States." *Id.* at 1434, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8759, at 9120.

130. *Rumhaus Hansen*, 1981 E. Comm. Ct. J. Rep. at 1182, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754, at 9009.

A more recent contribution to the jurisprudence of article 95 by the Hansen companies came in 1983.[131] Hansen sought certain tax advantages although its imported products did not fulfill all the conditions imposed upon domestic products.[132] The Court held that imported products must fulfill all conditions and that these conditions may include the size, nature of the raw materials, socio-economic group of the manufacturers, and the requirement that the raw materials be entirely produced by the members of a cooperative.[133]

V. *THE ARTICLE 169 CASES*

A. *The Alcohol Cases*

The basis for the current construction of article 95[134] is found in four opinions handed down on February 27, 1980.[135] Of these, three were final decisions[136] and one an interlocutory order remanding the case for further findings of fact.[137] This latter case, *Commission v. United Kingdom*, was finally decided on July 12, 1983.[138]

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131. Hauptzollamt Flensburg v. Hansen GmbH & Co., 1983 E. Comm. Ct. J. Rep. 1271, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8935.

132. *Id.* at 1283, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8935, at 8908.

133. Hauptzollamt Flensburg v. Hansen GmbH & Co., 1983 E. Comm. Ct. J. Rep. at 1284-85, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8935, at 8910.

134. For the provisions of article 95, see *supra* note 1.

135. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649; Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. 417, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651.

136. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649.

137. Commission v. United Kingdom I, 1980 E. Comm. Ct.J. Rep. 417, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651.

138. Commission v. United Kingdom II, 1983 E. Comm. Ct. J. Rep. 2265, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943.

1. The Common Ground

The national governments of France, Italy, and Denmark presented essentially the same definitional arguments in response to the Commission's charges.[139] They asked the Court to define among spirits as a whole various categories of products on the basis of the raw materials used, their typical characteristics or the consumer habits and preference observed in the various member states.[140] By contrast, the Commission's position was that "all spirits, whatever the raw materials used for their manufacture, have similar properties and in essence meet the same needs of consumers."[141] It is interesting that the Commission also argued that "spirits as finished products represent, from the point of view of consumers, a single general market."[142] This argument reveals a fundamental definitional difficulty common to both the Court and the Commission; they appear to be unable to decide what weight should be given to consumer preferences.[143] Do such preferences indicate the presence of a properly functioning market or are they the re-

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139. Commission v. French Republic, 1980 E. Comm. Ct.J. Rep. at 361, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 401, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 464, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

140. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 361, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 401, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 464, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

141. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 360, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 400, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct.J. Rep. at 463, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

142. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 360, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 400, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 463, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694.

143. *See, e.g.*, Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 361, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct.J. Rep. at 4501, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678; Commission v. Kingdom of Denmark,

sult of distortion of the market through discriminatory fiscal measures?

The Court chose a middle ground from among the criteria suggested by the national governments and those suggested by the Commission.[144] First, it concluded that spirits "form an identifiable whole united by common characteristics,"[145] in that, "all contain, as a principal characteristic ingredient, alcohol suitable for human consumption at a relatively high degree of concentration."[146] However, within this whole individual products may have their own more or less pronounced characteristics stemming from the raw materials used, the manufacturing process, or the flavorings added. What is more, there are both "well defined products which are put to relatively specific uses [and] other products with less distinct characteristics and wider uses."[147] Thus, a distinction is made between spirits which owe their characteristics to their basic materials, such as single malt scotch, and neutral spirits, such as vodka which owe their individual characteristics to flavoring additives only. The Court concluded that it was "[a] characteristic of the three cases . . . that in each there are, in addition to well defined

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1980 E. Comm. Ct. J. Rep. at 464, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7695; *infra* notes 159-63, 240-43 and accompanying text.

144. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 361-62, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 401-02, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7679; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 464-65, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7695.

145. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 361, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 401, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7679; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 464, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7695.

146. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 361, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 401, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7679; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 464, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7695.

147. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 361-62, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 401-02, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7679; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 464-65, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7695.

spirits, one or several products with a broad range of uses."[148] The analysis of the entire tax structure and its effect upon all the products is cast in terms of article 95(2) as a result of this last finding.[149]

2. The Individual Cases

a. *Commission v. French Republic*

In *Commission v. French Republic*,[150] the Court addressed two general taxes applied to spirits by France. The first, a "purchase tax,"[151] was applied to all alcoholic beverages. The second, a "manufacturing tax,"[152] was applied to geneva[153] and other spirits made from cereals, but not to those made from wine or fruit.[154]

France employed a series of detailed arguments to show that neither article 95(1) nor (2) applied to these categories of products. First, it argued that consumers classified the products on the basis of the flavor, taste, aroma, and smell of the liquor.[155] These consumer-based classifications of the products are such, France contended, that the products are "neither similar nor even interchangeable or competing within article 95."[156] This basis was rejected by the Court as being

148. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 362, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 402, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7679; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 465, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7695.

149. *See infra* notes 199-204 and accompanying text.

150. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647.

151. *Id.* at 364, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7664.

152. *Id.*

153. Geneva is an alcoholic drink made in the Netherlands which is flavored with juniper berries. WEBSTER'S NEW COLLEGIATE DICTIONARY 474 (1981).

154. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 364-65, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7664-65.

155. *Id.* at 367, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7665.

156. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 367, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7665-66. France relied, in part, upon Hauptzollamt Bielefeld v. Offene Handelsgesellschaft in Firma H.C. Konig, 1974 E. Comm. Ct. J. Rep. 607, [1975 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8275, where the Court validated a distinction between spirits with "flavoring substances or distinctive properties of taste." *Id.* at 620, [1975 Transfer Binder]

insufficiently objective to support a discriminatory scheme.[157]

The second argument was that the tax scheme differentiated aperitifs[158] from digestives;[159] the former coincidentally being cereal based and the latter wine or fruit based.[160] Consequently, because they were consumed at different times and for different reasons, there is no, and could be no, competition between the products in the two categories. This distinction was denied by the Court on two bases. The first was that the French tax code did not, in so many words, differentiate aperitifs from digestives.[161] Of greater interest is the second reason; that such a distinction did "not take into account [the] many circumstances in which the products in question may be consumed before, during or after meals or even completely unrelated to such meals; it seems, moreover, that, according to consumer preferences the same beverage may be used indiscriminately as an 'aperitif' or 'digestive.' "[162] This reasoning by the Court is of interest because it contrasts with the Court's frequent rejection of attempts by defendants to employ consumer preference as a justification for their tax schemes.[163]

COMMON MKT. REP. (CCH) ¶ 8647, at 7111, and undenatured ethyl alcohol "devoid of all flavoring substances." *Id.* In Commission v. French Republic, the Court distinguished *Konig* as making "a general distinction between spirits . . . and pure ethyl alcohol . . . . This judgment therefore provides no indications as to the scope of any classifications within spirits as a whole." 1980 E. Comm. Ct. J. Rep. at 368, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7666.

157. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 369, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7666-67.

158. Aperitifs are an alcoholic drink taken, before a meal, to stimulate the appetite. A SUPPLEMENT TO THE OXFORD ENGLISH DICTIONARY 108 (1972).

159. Digestifs have the function of digesting food; engaging in or pertaining to digestion. 3 OXFORD ENGLISH DICTIONARY 351 (1933) "She will be obliged . . . to flop down somewhere on the boulevard and sip her digestif." A SUPPLEMENT TO THE OXFORD ENGLISH DICTIONARY 799 (1972).

160. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 367, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7666.

161. *Id.* at 367-69, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7666.

162. *Id.*

163. *See, e.g.*, Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 434, [1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7725.

> For the purpose of measuring the possible degree of substitution, it is impossible to restrict oneself to consumer habits in a Member State or in a given region. In fact, those habits, which are essentially variable in time and space, cannot be considered to be a fixed rule; the tax policy of a Member State must not therefore crystallize given consumer habits so as to consoli-

b. *Commission v. Italian Republic*

Commission v. Italian Republic[164] is similar to *Commission v. French Republic*.[165] The tax scheme favored spirits distilled from wine or marc[166] which are typically Italian products[167] over those obtained from cereals and sugar cane which were, essentially, imported products.[168]

The Italian government raised several arguments to show that the products in question were so "absolutely different"[169] as to be outside article 95(1). The products were treated as different by the Community's Common Customs Tariff.[170] In addition, they were made from different basic raw materials[171] and by different manufacturing processes[172] so that the typical characteristics of the products resulted from the combination of those two factors.[173] Consumer preferences were also called upon as a measure of distinction.[174]

Italy also argued that article 95(2) was inapplicable be-

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date an advantage acquired by national industries concerned to comply with them.

Id.

164. Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. 385, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648.

165. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. 347, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647.

166. Marc is the residue that remains after the pressure of grapes or other fruits. For instance, marc brandy is brandy distilled from marc. 6 OXFORD ENGLISH DICTIONARY 153 (1933).

167. Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 404, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7680.

168. *Id.*

169. *Id.* at 406, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7681.

170. *Id.*, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7682. The Common Customs Tariff of the EEC is created and governed by articles 18 through 29 of the EEC Treaty. Article 19 provides that the common customs tariff will be an arithmetical average of the existing rates of duty in certain specified areas. However, there are also maximum rates for various categories of products specified in paragraph 3 of article 19. These categories are detailed in Lists A to F, found in Annex I to the EEC Treaty. *See* EEC Treaty, *supra* note 1, annex I.

171. Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 406, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7681.

172. *Id.*

173. *Id.*

174. *Id.*, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7681-82. The government argued that "[e]xperience shows that the choice of consumers is always very specific, determined by taste, habits, and the true or presumed qualities of the products, including their characteristics as regards health." *Id.*

cause it "does not refer . . . to the difference between the taxation imposed on domestic products and imported products but to the protective nature of a given national tax system."[175] Italy felt that there was evidence of a nonprotective effect in the fact that while consumption of spirits obtained from wine and marc had grown only slightly, imports of whisky[176] into Italy had undergone a massive increase.[177] Unfortunately, the Court did not address Italy's specific definitional arguments under article 95(1).[178] Instead, it found that because the two groups of products formed "at least in certain circumstances, an alternative choice for consumers"[179] article 95(2) was implicated. Without mention of the evidence of a nonprotective effect advanced by Italy, the Court found that the system protected domestic products.[180]

c. *Commission v. Kingdom of Denmark*

Commission v. Kingdom of Denmark[181] is a particularly interesting case. It considers the issue of how great a percentage of a country's consumption of a product must be imported before

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175. *Id.* at 406-07, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7682.

176. "The Irish have kept the 'e' in the spelling of 'whiskey.' The Scots have not. Although U.S. Federal regulations have adopted 'whisky' for the generic use of the term, both spellings are acceptable in referring to U.S. products." Certain Spirits From Ireland, 46 Fed. Reg. 38,780 n.3 (1981).

177. Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 406-07, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7682.

178. Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 407-08, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7682.

> After considering all these factors, the Court takes the view that it is not necessary for the purposes of solving this dispute to give a ruling on the question of whether or not the spirituous beverages concerned are partly or wholly similar products within the meaning of the first paragraph of Article 95, since it is impossible reasonably to contest that they are without exception in competition, at least partially, with the domestic products to which the application refers and, moreover, the protective nature of the Italian tax system within the meaning of the second paragraph of Article 95 cannot be denied.

Id.

179. *Id.* at 408, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7682.

180. *Id.* at 409, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7683.

181. 1980 E. Comm. Ct. J. Rep. 447, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649.

article 95 is implicated.[182] Almost two-thirds of Denmark's annual consumption of spirits was in the form of aquavit and was taxed at a reduced rate.[183] However, of this favored two-thirds, approximately ten percent was imported.[184] Conversely, over one-third of annual consumption was of "other products," such as gin or whisky, and were taxed at a higher rate. Domestic products comprised about one-third and imports two-thirds of this less favored category.[185]

The Danish Government raised several arguments to show that the aquavit and the other products were not similar products within the meaning of article 95(1). First, market surveys showed that aquavit was "consumed principally at meals as an accompaniment to typical dishses, so that it cannot be considered as a product equivalent to other spirits."[186] It also pointed out that domestic and imported products both benefitted and suffered from the system.[187] The Danish Government argued that "[i]t thus appears that in the system of Danish law there is no relationship between the fact that goods cross a frontier and the application of a higher rate of tax."[188] The last article 95(1) argument employed was that the current excise duty was nothing more than a translation of an *ad valorem*[189] tax previously in effect.[190] Because aquavit was cheaper to make than, for instance, whisky, it was taxed at a

182. *See infra* notes 193-95 and accompanying text. Denmark applied an excise duty of Dkr. 167.50 per liter of pure alcohol to aquavit and schnapps and Dkr. 257.15 to "other products." In the reference year 1977, Denmark consumed 9,240,000 liters of pure alcohol. Five million, seven hundred and eighty seven thousand benefitted from the reduced rate; of which 5,728,000 was made in Denmark, 34,000 in West Germany, and 25,000 in "third countries." Of 3,452,000 liters of pure alcohol consumed in the form of "other products," 1,118,000 were domestic and 2,334,000 imported. Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 467-68, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7696-97.

183. Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 468, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7697.

184. *Id.* at 469, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7697.

185. *Id.*

186. *Id.*

187. *Id.*, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7698.

188. *Id.* at 469-70, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7698.

189. An *ad valorem* tax is one based on the value of the item subject to tax. D.J. GAFFNEY, D.H. SKADDEN & J.E. WHEELER, PRINCIPLES OF FEDERAL INCOME TAXATION 8-32 (1982). "Duties are either *ad valorem* or *specific*, the former when the duty is laid in the form of a percentage on the value of the property, the latter where it is im-

lower rate.[191]

Concerning article 95(2), the Danish Government asserted that aquavit's competition came from beer and not from other spirits.[192] It argued that a finding of a "marked cross elasticity"[193] between products is required before article 95(2) could be applied.[194] Otherwise, there would be no possibility of the tax system providing a protective effect for domestic products.[195]

The Court rejected all of these arguments. The *ad valorem* tax argument was found to be inapposite for two reasons. First, the challenged tax was found to be an excise tax, not an *ad valorem* tax.[196] "[E]very tax system must be appraised in light of Article 95 on its own merits and not in terms of a tax system which preceeded it or which might if necessary be substituted for it."[197] Second, many of the spirits subject to the higher rate of tax, such as gin or vodka, were just as cheap to make as aquavit.[198]

The Court found aquavit to be similar to some prod-

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posed as a fixed sum on each article of a class without regard to its value." BLACK'S LAW DICTIONARY 48 (5th ed. 1979).

190. Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 470-71, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7698.

191. *Id.*

192. *Id.* at 470, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7698.

193. A high cross elasticity of demand exists for "products regarded by consumers as such close substitutes that a slight relative price change in one will induce intolerable shifts of demand away from the other." 2 P. AREEDA & D. TURNER, ANTITRUST LAW 370-71 (1978). "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes . . ." Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

194. Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 470, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7698. The Court never addressed the Danish Government's argument that a showing of a marked cross elasticity should be required for an article 95(2) analysis.

195. *Id.*

196. *Id.* at 471, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7698.

197. *Id.* at 470-71, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7698.

198. *Id.* at 471, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7698.

ucts;[199] those which are "normally manufactured from neutral alcohol and owe their characteristic flavor to added flavoring extracts."[200] This finding brought the relative tax burdens on these spirits within the analysis under article 95(1).[201] In addition, aquavit is "in at least a partial substitution relationship with an indeterminate number of other types of spirit."[202]

As a result of the Court's finding of a broad substitutional relationship between aquavit and other spirits, an article 95(2) analysis was applied to determine whether there was a protective effect given to aquavit by the challenged tax system.[203] It is typical of the Alcohol Cases that although some products were found to be similar within the meaning of article 95(1), the only analysis applied by the Court was that used under article 95(2).[204]

3. *Commission v. United Kingdom*

The proceedings which resulted in the Court's decision against the United Kingdom[205] began almost exactly seven years earlier with a letter from the Commission to the British Government.[206] The Commission had taken the position that the differences in the rates of excise tax on still light wine and beer in the United Kingdom were contrary to article 95(2).[207] The United Kingdom disputed the existence of a significant re-

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199. *Id.*, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7699.

200. *Id.*

201. *Id.*; *see supra* text accompanying notes 31-34.

202. Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 472, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7699.

203. [E]ven if doubts remain as to the question of the extent to which the numerous alcoholic products classified by Danish legislation in the most heavily taxed tax category must be considered as products similar to acquavit within the meaning of the first paragraph of Article 95, it is impossible reasonably to contest that all those beverages are without exception in at least partial competition with the product benefitted by the Danish legislation.

Id. at 471-72, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7699.

204. *See supra* text accompanying notes 139-49.

205. Commission v. United Kingdom II, 1983 E. Comm. Ct. J. Rep. 2265, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943.

206. *Id.* at 2268, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 8987.

207. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 431, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7723.

lationship between the beer and wine markets.[208] It also doubted the Commission's findings concerning the level of taxation on retail prices.[209] The Court addressed these contentions serially in its decisions of February 27, 1980[210] and July 12, 1983.[211]

a. The Competition Issue: *Commission v. United Kingdom I*

It is essential to the finding of an article 95(2) violation that the tax system have a protective effect over domestic products.[212] Unlike an examination under article 95(1), it is not enough to show that there is a difference in the tax rates applied to the two products.[213] However, the protection provided by the system need not be direct.[214] Thus, the United Kingdom's argument that the Commission could not directly and statistically show the protective effect was rejected by the Court.[215] The United Kingdom failed to prevail with the argument that "the tax system complained of did not prevent an increase in imports of wine during the period under consideration, and the changes in the rates of duty have had no perceptible repercussions on the consumption figures."[216]

The United Kingdom put forward four distinctions to overcome the perceived general similarities between beer and wine.[217] The Government pointed to the differences in manufacturing processes, consumer habits, alcoholic content, and

208. Commission v. United Kingdom II, 1983 E. Comm. Ct. J. Rep. at 2268, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 8987.

209. *Id.*

210. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. 417, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651.

211. Commission v. United Kingdom II, 1983 E. Comm. Ct. J. Rep. 2265, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943.

212. *See supra* notes 42-43 and accompanying text.

213. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 433, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7724.

214. *Id.* "Furthermore, a Member State shall not impose on the products of other Member States any internal charges of such a nature as to afford *indirect protection* to other products." EEC Treaty, *supra* note 1, art. 95(2) (emphasis added).

215. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 433, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7724-25.

216. *Id.* at 437, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7726.

217. *Id.* at 434-35, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7725.

price structures.[218] The Court rejected out of hand the consumer preference criterion.[219] Of course, this argument has almost consistently failed for defendants, although the Court uses it for its own purposes.[220] In addition, the manufacturing processes of the two products are so different[221] that the Court found them to be inapplicable for determining the existence of a protective tax structure.[222]

The Court then found that the United Kingdom's tax system was protective but, since it was unable to determine the extent of the protective effect it remanded the case for further findings of fact.[223] Although unable to clearly find any protective effect and unable to find any objective criterion of similarity between beer and wine, it determined that the United King-

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218. *Id.*

219. *Id.* at 434, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7725.

220. Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 361, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7662; Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 401, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8648, at 7678-79; Commission v. Kingdom of Denmark, 1980 E. Comm. Ct. J. Rep. at 464, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8649, at 7694-95.

221. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 434-35, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7725.

> Wine is an agricultural product which is the outcome of intensive farming methods and is closely linked to the properties of the soil and climatic factors; for that reason its characteristics are extremely variable, whereas beer, which is produced from raw materials less susceptible to risks of that nature, is at the same time better suited to methods of industrial manufacture.

Id.

222. "The difference between the conditions of production leads, in the case of both products, to price structures which are so extremely different that in spite of the competitive relationship between the finished products it seems particularly difficult to make comparisons from the tax point of view." *Id.* at 435, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7725.

> 223. The Court considers that a comparison of the development of the two tax systems in question shows a protective trend as regards imports of wine in the United Kingdom. However, in view of the uncertainties remaining both as to the characteristics of the competitive relationship between wine and beer and as to the question of the appropriate tax ratio between the two products from the point of view of the whole of the Community, the Court considers that it is unable to give a ruling at this stage on the failure to fulfil its obligations under the Treaty for which the United Kingdom is criticized. It therefore requests the Commission and the United Kingdom to resume examination of the question at issue in light of the foregoing considerations.

Id.

dom had failed to prove its case.[224] This aspect of the case reveals the predisposition of the Court against the national governments in actions brought by the Commission.[225]

The Commission urged that the possible criteria of comparison to be employed were the tax applied per unit of alcoholic content by volume, and consumer price in bulk.[226] The British Government would have had the Court look at the incidence of tax on the usual retail unit of measure.[227] The Court concluded that the "only factor which may enable an appropriate and somewhat objective comparison"[228] between the two products "consists therefore in the appraisal of the incidence of the tax burden in relation to the alcoholic strength of the beverages in question."[229]

b. The Protective Effect and the Appropriate Tax Ratio: *Commission v. United Kingdom II*

When the United Kingdom case[230] reached the Court a second time, Italy proposed narrowing the definition of the injured product to "the most popular and cheapest wines."[231] The Court accepted this proposal as most closely defining the products in competition.[232] It is interesting that, although the Court had already determined the existence of a protective trend in *Commission v. United Kingdom I*,[233] it had not yet decided

224. *Id.*

225. *See infra* notes 230-33 and accompanying text.

226. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 435-36, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7726.

227. *Id.* at 436, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7726. Thus, the fact that a pint of beer and a glass of wine carry roughly the same amount of tax would mean that there is no discrimination.

228. *Id.* at 436-37, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7726.

229. *Id.* at 436, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7726.

230. Commission v. United Kingdom II, 1983 E. Comm. Ct. J. Rep. 2265, [1981-873 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943.

231. *Id.* at 2287, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 9000. Italy had been in the case as an interested party at least from the time of the 1980 decision. Commission v. United Kingdom I, 1980 E. Comm. Ct. J. Rep. at 422, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7718.

232. Commission v. United Kingdom II, 1983 E. Comm. Ct. J. Rep. at 2287, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 9000.

233. 1980 E. COMM. CT. J. REP. at 438, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8651, at 7727.

which products to compare.[234] It is difficult to understand how the Court was able to know that there was actual or potential competition between two products, as is required by the first stage of an article 95(2) analysis,[235] if it had not yet defined one of the products. The observer is left with the impression that the Commission actually failed to prove the first element of its case in *Commission v. United Kingdom I.*

The Commission, the United Kingdom, and Italy each suggested an appropriate tax ratio.[236] The Commission would have applied a 1:1 ratio by alcoholic strength.[237] For instance, if wine has three times the alcohol content of beer, the appropriate tax ratio between the two would be 3:1. The United Kingdom would have looked at the incidence of taxation on the prices net of tax of the two products.[238] Thus, if, before any taxes were added, a quart of wine cost two pounds and a quart of beer cost one pound, the appropriate tax ratio would 2:1. Italy would have had the Court favor wine as an agricultural product as opposed to beer, which is considered to be an industrial product.[239] Italy would alternatively have had the Court apply a criterion based on volume of average consumption.[240] Experience has shown that the consumption ratio between beer and wine is roughly 1.5:1;[241] thus the tax ratio should also be 1.5:1.[242] The Court vaguely concluded that

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234. *Id.*

235. *See supra* text accompanying notes 42-43.

236. *See infra* notes 237-42 and accompanying text.

237. Commission v. United Kingdom II, 1983 E. Comm. Ct. J. Rep. at 2288, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 9000. This ratio, and the arguments of the parties concerning it, reveal an essential flaw in the entire article 169 process. Since there was no consensus as to which products were in competition, it was impossible to arrive at an accurate ratio. The alcohol content of British beers was relatively constant at 3.5-3.6%. However, the alcohol content of wine varies greatly, from 9 to 12%. Thus, the possible ratios range from 1:2.5 to 1:3.42. *Id.* at 2271, 2287, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 8989, 9000.

238. Commission v. United Kingdom I, 1983 E. Comm. Ct. J. Rep. at 2288, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 9000.

239. *Id.* at 2288-89, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 9000.

240. *Id.* at 2289, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 9000.

241. *Id.*, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 9000-01.

242. *Id.*

> although none of the criteria for comparison [for] . . . determining the tax ratio between the two products . . . is capable of yielding reliable results on its own, . . . each of the three methods used, . . . assessment of the tax burden by reference to the volume, the alcoholic strength and the price of the products, can provide significant information for the assessment of the contested tax system.[243]

The Court finally reached the conclusion that the effect of the British tax system was to mark wine as a luxury, whereas in the rest of the Common Market it was an item of ordinary consumption.[244] There is, however, an inconsistency in this reasoning. The Court rejected a luxury status for wine which was based upon long standing popular preferences.[245] In part, this holding was grounded on the rule that national popular preferences may not form a basis for discrimination.[246] However, the Court cites as support another popular preference, that of the southern Europeans, which marks wine as an item of common usage.[247]

B. *Other Article 169 Cases*

1. *Commission v. Italian Republic*

Commission v. Italian Republic[248] is one of the rare article 95(1) cases.[249] The domestic and imported products were used oil which, after processing, became functionally interchangeable with new oil.[250] There was no doubt that at least certain of the imported and domestic products were similar, or

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243. *Id.*, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 9001.

244. *Id.* at 2292, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 9002.

245. *See* K.H. HAWKINS & C.L. PASS, THE BREWING INDUSTRY 16-17 (1979); A. NIEDERBACHER, WINE IN THE EUROPEAN COMMUNITY 30 (1982).

246. *See supra* notes 159-63 and accompanying text.

247. A. NIEDERBACHER, WINE IN THE EUROPEAN COMMUNITY 30 (1982); C.J. SMITH & R.Q. HANHAM, ALCOHOL ABUSE—GEOGRAPHICAL PERSPECTIVES 14-19 (1982).

248. 1980 E. Comm. Ct. J. Rep. 1, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631.

249. As noted, *supra* notes 206-11, the Court usually relies on the catch-all provision of article 95(2), even where it has made a finding of at least partial similarity of the products in question.

250. Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 9, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631, at 7466.

even identical.[251] However, the processing of the used oil was very expensive[252] so that a tax exemption was granted in order to encourage it.[253] This exemption was granted on the condition that the processing be "*carried out on the same premises* as those where the oils were first used"[254] so that the process may be supervised by the Italian Government.[255]

Italy attempted to use the exception developed in *Hansen & Balle*[256] to justify the tax system, arguing that it was based upon objective criteria and pursued the economic policy goals of the Treaty.[257] It defended the discrimination against imported, regenerated oil on two grounds. First, it argued that since there was no way to distinguish new oil from regenerated oil, there had to be on site inspection in order to prevent people from fraudulently claiming the tax advantage.[258] Second, the Italian Government argued that the high cost of regeneration justified the distinction.[259] The Court decided that the high cost of reprocessing was irrelevant,[260] and responded by putting the burden of proving eligibility for the exemption on the importer.[261]

2. *Commission v. Italian Republic*

Another recent case involving Italy and the Commission[262] shows the direct conflict between the broad prohibition as applied in the Alcohol Cases and the article 95 exception as

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251. *Id.*

252. *Id.* at 10, 14, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631, at 7467, 7469.

253. *Id.* at 14, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631, at 7469.

254. *Id.* at 3, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631, at 7463 (emphasis in original).

255. *Id.* at 10, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631, at 7467.

256. 1978 E. Comm. Ct. J. Rep. 1787, [1978-79 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8511.

257. Commission v. Italian Republic, 1980 E. Comm. Ct. J. Rep. at 12, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631, at 7468.

258. *Id.* at 14, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8631, at 7469.

259. *Id.*

260. *Id.*

261. *Id.*

262. Commission v. Italian Republic, 1983 E. Comm. Ct. J. Rep. 601, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928.

enunciated in *Hansen & Balle*,[263] *Vinal*,[264] and *Chemial*.[265] Italy taxed all spirits as nonessential luxuries.[266] However, gin and spirits which have a designation of origin or provenance regulated or protected by specific measures in the territory where they were produced were taxed at an even higher rate.[267] The difficulty with this scheme was that Italy had no rules governing origin or provenance of domestic spirits, so that only imported spirits bore the extra charge.[268] Italy relied on *Vinal* and the other exception cases[269] and argued that luxury goods were bought only by the economically better off so that the tax was socially fair and furthered the policy objectives of the Treaty.[270] The Court rejected the use of the exception, saying that the luxury goods criterion was insufficiently objective.[271] However, the right of the member states to tax luxury goods more heavily than those of ordinary consumption was upheld.[272] The difficulty here was that the definition of luxury effectively precluded any imports from qualifying for the reduced rate of tax.[273] Thus, the Italian tax scheme failed to meet the element of the exception enunciated in *Rumhaus Hansen GmbH & Co. v. Hauptzollamt Flensburg*;[274] that imports not be precluded from possibly fulfilling the requirements of a tax exemption.[275]

The Italian Government also attempted to use a nonpro-

263. 1978 E. Comm. Ct. J. Rep. 1787, [1978-79 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8511.

264. 1981 E. Comm. Ct. J. Rep. 77, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8724.

265. 1981 E. Comm. Ct. J. Rep. 1, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8723.

266. Commission v. Italian Republic, 1983 E. Comm. Ct. J. Rep. at 617, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928, at 8825.

267. *Id.*

268. *Id.*

269. *Id.* at 618-19, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928, at 8826.

270. *Id.*

271. *Id.* at 620-21, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928, at 8827.

272. *Id.* at 621, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928, at 8827.

273. *Id.*

274. 1981 E. Comm. Ct. J. Rep. 1165, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754.

275. *See supra* text accompanying notes 128-30.

tection argument, showing that sales of imported gin and spirits had far outstripped those of domestic products.[276] The Court rejected the nonprotection argument stating:

> there are . . . characteristics common to all those spirits which are sufficiently marked for it to be said that taxation must not have the effect of protecting domestic products. For that purpose it is necessary to take into consideration the potential market of the products in question in the absence of protectionist measures and to ignore comparisons of consumption and import figures.[277]

VI. *THE ALCOHOL CASES AND THE EXCEPTION CASES COMPARED*

A. *The Importance of the Alcohol Cases*

The Alcohol Cases form the current basis for the jurisprudence of article 95.[278] Their importance lies in the extent to which the Court shows itself willing to expand the category of "other products" in the context of article 95(2)[279] and to find evidence of indirect protection of these other products.[280] In all of these cases, a single category was created for all spirits, within which no distinct subcategories could be defined.[281] This single market approach assures that the first part of the dual analysis under article 95(2) is virtually automatically met.[282] The Court found a single market where there was at least *potential* competition between the products in question and where they could, *at least in certain circumstances*, form an alternative choice for consumers.[283] *Commission v. United Kingdom II*[284] shows the extent to which the Court will extend this potential competition approach in order to find a single market. Ninety percent of beer was sold in pubs or working men's

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276. Commission v. Italian Republic, 1983 E. Comm. Ct. J. Rep. at 620, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928, at 8826-27.

277. *Id.* at 621, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928, at 8887.

278. A.J. EASSON, *supra* note 16, at 29-43.

279. *See supra* notes 139-49, 178-80, 199-204 and accompanying text.

280. *See supra* notes 175-77, 214-16, 223-25 and accompanying text.

281. *See supra* notes 140-42 and accompanying text.

282. *See supra* notes 42-43 and accompanying text.

283. *See supra* notes 39, 44-49, 179 and accompanying text.

284. 1983 E. Comm. Ct. J. Rep. 2265, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943.

clubs.[285] Sixty-five percent of wine sold was consumed in the home, with the remaining thirty-five percent going to restaurants.[286] Actual competition between beer and wine was virtually nonexistent. In fact, the Court said the "present structure of the British market precludes any meaningful comparison of purchase prices either for typical wines *inter se* or between wine and beer."[287]

The Alcohol Cases also show the Court's readiness to find evidence of protection of domestic products. The national governments often presented evidence that the challenged tax scheme had not had any protective effect.[288] Thus, the second step of the dual analysis under article 95(2) was not met.[289] However, the Court rejected these contentions in every case, either implicitly[290] or explicitly.[291]

B. *The Common Ground in the Article 177 Cases*

The identifying feature of the article 177 cases is the creation of the exception to the single market approach which characterizes the Alcohol Cases.[292] However, in fashioning this exception the Court has rarely attempted to distinguish the article 169 cases. Instead, it has articulated the requirements for a valid exercise of the exception. The exception: (1) must be based upon objective criteria, such as the nature of the raw materials used or the production processes employed;[293] (2) must promote economic policy objectives which are compatible with the Treaty;[294] (3) must not be such that

285. *Id.* at 2272, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8943, at 8990.

286. *Id.*

287. *Id.*

288. *See supra* notes 176-77, 216, 276 and accompanying text; In Commission v. French Republic, 1980 E. Comm. Ct. J. Rep. at 368, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8647, at 7666, the French government argued that there had not been any protective effect where "the consumption of cognac increased only moderately in the period from 1963 to 1977 (from 33 361 hectolitres to 44 745 hectolitres), the consumption of whisky increased spectaculary during the same period (from 34 104 hectolitres to 117 379 hectoliters)." *Id.*

289. *See supra* notes 42-43 and accompanying text.

290. *See supra* note 178 and accompanying text.

291. *See supra* notes 215, 277 and accompanying text.

292. *See supra* notes 84-92, 103-33 and accompanying text.

293. *See supra* notes 119-201 and accompanying text.

294. *See supra* note 122 and accompanying text.

imports could not, by reason of natural or legal elements, possibly fulfill its requirements;[295] and (4) may require that the imports meet every one of its requirements in order to qualify.[296]

CONCLUSION

The effective result of the Court's decisions construing article 95 since 1980 has been to establish this as a two-tiered article. The dichotomy of results depending upon the procedural route by which the case reached the Court leaves the observer wondering just what is required by article 95. Are we to follow the article 169 cases and assume that even potential competition between products is sufficient to cast them as "other products" within the meaning of 95(2)? Should the defendant make an offer of empirical evidence of nonprotection, as was done in each of the Alcohol Cases, or will this be rejected as being the result of distortions due to a history of illegal fiscal measures? What, then, of the exception as enunciated in the article 95 cases reaching the Court via the article 177 route? Would the Court really accept as a party's argument the statement in *Vinal* and *Chemial* that where there is at least the potential for the production of the imported product in the member state in question there can be no protection?

The better course would be for the Court to take an opportunity to reconcile these two lines of cases. This could be achieved by applying the exception in article 169 cases or, at least, by presenting a detailed argument as to why the exception did not apply to those facts. A tentative move was made in this direction in *Commission v. Italian Republic*[297] where the Court rejected the application of the exception. In that case, the Court decided that luxury status, and thus susceptibility to higher taxes, may not be based solely upon the fact that a product has a designation of origin or provenance.[298] This criterion was held to be insufficiently objective to meet the first requirement of the exception.[299] Unfortunately, the Court ne-

295. *See supra* notes 128-30 and accompanying text.

296. *See supra* notes 262-77 and accompanying text.

297. 1983 E. Comm. Ct. J. Rep. 601, [1981-83 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8928.

298. *See supra* notes 271-78 and accompanying text.

299. *See supra* note 271 and accompanying text.

glected the opportunity to address the requirement enunciated in the *Rumhaus Hansen* case[300] that the criterion for eligibility for favorable tax treatment not be such that imports can not possibly fulfill them.[301] An application of the exception, as it emerges from an examination of the article 177 cases,[302] would insure that there is neither discrimination in favor of domestic products nor stifling of fiscal innovations designed to assist well defined groups of producers.

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300. 1981 E. Comm. Ct. J. Rep. 1165, [1979-81 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8754.

301. *See supra* notes 128-30 and accompanying text.

302. *See supra* notes 293-96 and accompanying text.