OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 20 OCTOBER 1981 [1]

Mr President,
Members of the Court,

I — The question referred to the Court on which a preliminary ruling must be given raises the issue as to whether national rules prescribing the minimum percentage of wine content and alcoholic strength which a product must have for it to be called "a wine-based aperitif" are compatible with the common organization of the market in wine.

"Vermouths, and other wines of fresh grapes flavoured with aromatic extracts" with an actual alcoholic strength of more or less than 22° appear in heading 22.06 of the Common Customs Tariff and as such do not come under the common organization of the market in wine.

Without going into technical detail it may be said that vermouths and wine-based aperitifs are made from mistelle, table wines (white or red) or liqueur wines, into which vegetable substances (quinquina or other substances), or various aromatic extracts, are infused and the degree of alcohol of which is increased by the addition of more alcohol. Once in a marketable state vermouths and aperitifs have an alcoholic strength of between 15° and 23°.

The wine used as the base for making these products may be used either in the state in which it comes from the grower, or after coupage, fortification by alcohol or the arrest of fermentation (the use of concentrated musts for sweetening purposes is permitted), which enables manufacturers to take into their stores wines of a relatively low alcoholic strength provided that they are fortified before preparation by means of other wines of sufficient strength or by adding alcohol.

The manufacture of products falling within heading 22.06 of the Common Customs Tariff therefore requires the addition of alcohol.

That technical requirement was taken into account in the common organization of the market in wine. Under Article 25 (1) of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine, the addition of alcohol to wines of fresh grapes is *prohibited* except for wines fortified for distillation and liqueur wines. Under Article 25 (2) the Council, acting on a proposal from the Commission, is to decide on derogations from that prohibition, in particular in respect of special uses or in respect of products intended for export.

Without prejudice to the results of a harmonization of the definitions of the products falling within heading 22.06 as regards the exact nature of the alcohol which may be added in their preparation, Regulation (EEC) No 1598/71 of the Council of 19 July 1971 added *inter alia* table wines intended for the preparation of drinks falling within heading 22.06. It thus supplemented the list of products falling within the wine sector to which the addition of alcohol is permitted but it stated that it must be ethyl alcohol of agricultural origin. That derogation has

1 — Translated from the French.

hitherto always been renewed, most recently by Council Regulation (EEC) No 3196/80 of 8 December 1980 "pending the adoption of provisions supplementing or harmonizing the definitions of ... products falling within heading 22.06 of the Common Customs Tariff".

It may therefore be said that, where it is always necessary to to use table wine as a base in order to manufacture vermouths or wine-based aperitifs, those products fall within the wine sector.

According to the definition contained in point 10 of Annex II to Regulation No 816/70, in force at the time of the events with which these proceedings are concerned, table wine, which falls within heading 22.05 of the Common Customs Tariff ("wine of fresh grapes ..."), must, amongst other things, following application, if any, of the processes permitted by Article 19 of the regulation to increase the natural alcoholic strength, have an actual alcoholic strength of *not less than* 8.5° and a total alcoholic strength not *exceeding* 15° (that upper limit may be raised to 17° in certain cases).

In laying down that standard the Community intended the "base" wine to have an alcohol/acidity balance meeting consumer requirements and a specific degree of quality to be guaranteed in production and processing.

II — The case before the Court concerns the manufacture in France between 1 July 1976 and 31 May 1978 of an aperitif, "Saint-Raphaël", white or red, of 16° per litre.

That product was manufactured in the following three stages:

1. Selection of a French ordinary wine (red or white) of more than 8.5° but less than 10°, and fortification of that wine by the addition of alcohol to obtain a wine of 15.1°;

2. Further addition of alcohol, sweetening and the addition of water to that fortified wine to obtain a sugar-base at 15°;

3. Final addition of alcohol, addition of colouring agents, aromatic extracts and spirits to that base to obtain the final spirituous liquor of 16° to 18°.

Article 5 of the French Decree of 31 January 1930 implementing the Law of 1 August 1905 on trade in liqueur wines, vermouths and wine-based aperitifs was in force long before the establishment of the common organization but still applied at the time of the events in question. That article in particular requires drinks which are held, transported or sold under the name "vermouth" or "wine-based aperitif" to contain at least 80 % of genuine ordinary wine of merchantable quality (or liqueur wine or grape must) and that wine to contain at least 10° of alcohol.

The French regulations therefore restrict the use, in the manufacture of drinks sold under the name "aperitif", of constituents other than wine to 20 %, that is to say, to one fifth of the volume of those products, and, furthermore, the volume of alcohol obtained before any enrichment process from the natural fermentation of the grape juice contained in the other four fifths must be *at least* 10°.

Guy and Jacques Vedel and Henri Lejeune admit that they did not comply with the provisions of the French regulations. They contend in their defence, however, that those regulations may not be invoked against them in view of the fact that the wine which they used meets the minimum requirement set by the Community definition (actual alcoholic strength of 8.5°). They argue that the conditions laid down by the French regulations both in regard to alcoholic strength (10°) and the percentage (80 %) were superseded after the entry into force of Regulation No 816/70.

Therefore the Tribunal de Grande Instance, Montpellier, asks the Court in substance whether Article 5 of the French Decree of 31 January 1930 has become wholly inapplicable to national manufacturers of the aperitif St-Raphaël.

III — It is clear that the requirement that a specific proportion (80 %) of one of the basic constituents of a liquid mixture should have an alcoholic strength of at least 10° is more stringent than the condition requiring the whole of that constituent to have an alcoholic strength of at least 8.5°.

Furthermore, in order to obtain an alcoholic strength of 16° (or 23°, the maximum alcoholic strength permitted for aperitifs by the French regulations), the amount of alcohol to be added depends on whether the "wine" constituent itself is high or low in strength; conversely, the basic constituent whilst having an alcoholic strength of at least 8.5° may have a strength which is relatively lower according to the proportion of alcohol added. If compliance with the Community definition of table wine (8.5°) were sufficient, in order to achieve the strength required of wine by the French regulation (10°), account could be taken of the alcohol added to increase the strength of the wine used because, as far as the actual alcoholic strength by volume of a liquid is concerned, that produced by fermentation is no longer distinguishable from that resulting from enrichment.

The oenological practice of enriching wine may have important economic consequences and be significant from the point of view of health. All the Member States in which wine is produced have sought to enact legislation on this matter in keeping with their own climatic or regional characteristics.

The necessary corollary to the Community regulations permitting the addition of alcohol without stating its origin (vinous or diluted ethyl alcohol of agricultural origin) to table wines intended for the manufacture of aperitifs is that Member States retain the power to regulate the methods by which the alcohol is added. Otherwise alcohol might be added in proportions which are incompatible with the policy of promoting quality which is the purpose of the Community regulations.

Once the addition of alcohol is permitted it should not be allowed to encourage the production of mediocre "table" wines which are infected or made from prohibited vine varieties by giving them the additional outlet created by the manufacturer of vermouths and aperitifs. Similarly, the strength of wine to be used in the manufacture of aperitifs should not be fixed in such a manner as to create an additional inducement to use ethyl alcohol of agricultural origin.

National legislatures might therefore properly consider that the addition of an undue amount of alcohol deprives a product made from the fermentation of fresh grapes of its intimate character of natural wine.

With that idea in mind I see that since the occurrence of the events with which we are concerned a further step has been taken in the pursuit of quality because, since Council Regulation No 337/79 of 5 February 1979 entered into force on 2 April 1979 the name "table wine" has been restricted to wine which has, amongst other things, an actual alcoholic strength by volume of not less than 9° (instead of 8.5° as before), provided that the wine is made exclusively from grapes harvested in the wine-growing zones other than A and B, which applies to the wine used in this case (point 11 of Annex II in the version contained in Regulation No 337/79).

Consequently, when it is put to the specific use of making vermouths and aperitifs, table wine may be defined differently from table wine intended for direct human consumption because in the first case alcohol is necessarily added to it whilst in the second case that is not permitted.

I would point out that the requirement that the final mixture must contain 80 % wine arises if it is desired that the total alcoholic strength of the proportion of the final product prescribed by the national legislature should actually originate from the wine used and not from any diluted alcohol of agricultural origin.

Finally, it should be observed that to state that it is necessary but sufficient for table wine used in the manufacture of aperitifs to have, in the case of wine-growing areas other than zones A and B, an actual alcoholic strength by volume of 8.5° (9° at present) would amount on this particular point to giving in a preliminary ruling a Community definition of wine-based aperitifs.

During the hearing Counsel for Guy and Jacques Vedel and for Henry Lejeune, whilst accepting that there were no Community rules on the composition and manufacturing characteristics of "flavoured wines", stressed that the application of the French legislation to French products alone was likely to create unequal conditions of competition.

In view of the Court's judgment of 20 February 1979 in *Rewe-Zentrale* [1979] ECR 650 it would not in fact be possible to rely on Article 5 of the French Decree of 31 January 1930 to prevent the sale in France of drinks called "vermouths" or "wine-based aperitifs" from other Member States made from wine of a strength of at least 8.5°, that is to say satisfying the definition contained in point 10 of Annex II to Regulation No 816/70.

That risk of distortion is perhaps not so real as the manufacturers of St-Raphaël fear, given the fact that wine must still remain the "base" of the drinks in question and that, judging by what the Court was told at the hearing, the laws of the Member States from which most of them come are just as stringent as the French laws as regards the alcoholic strength required of that wine.

Yet the risk of those laws being evaded cannot be ruled out and the French authorities would not be able to detect such evasion, which they can do in the case of aperitifs manufactured in France.

However, that situation may not prevent the French legislation from being applied if, as I believe, the legislation is not, all things considered, incompatible with the Community regulations.

In the first place this "reverse discrimination" which the product manufactured by the accused parties encounters on the national market appears to me to be of the same kind as the disparities which, in its *Peureux* judgment of 13 March 1979 ([1979] ECR 897, at p. 913, paragraphs 32 to 34), the Court found to "result from special features of national laws which have not been harmonized in spheres for which the Member States are responsible" and held to be therefore justified.

In its judgment of 26 June 1980 *Gilli* ([1980] ECR 2071, at p. 2078, paragraph 5) the Court held that "in the absence of common rules relating to the production and marketing of the product in question (which was apple-vinegar containing acetic acid not derived from the acetic fermentation of wine) it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade", that is to say provided that they do not contravene Article 30 of the Treaty.

Secondly, this situation demonstrates the limits of the "Cassis de Dijon" case-law and only goes to show how urgent it is to enact Community rules in this field. The Commission is well aware of this. The explanatory memorandum accompanying its draft proposal for a regulation laying down general rules on the definition, description and presentation of spirituous beverages and of vermouths and other wines of fresh grapes flavoured with aromatic extracts states: "Mere application of the principles which are implicit in this ruling and which could remove certain selective criteria laid down in national legislation *would not however, be conducive to quality improvements under a policy designed to ensure adequate protection for consumers and fair competition between producers.* Quality standards are indeed needed in this sector and could benefit it perhaps more so, than any other, since it touches on the realms of public health and comprises products which are not indispensable to man.

It has thus become a matter of urgency, particularly since the above-mentioned judgment of the Court, to enact Community rules which take account wherever possible of the traditional practices followed by producers, amongst other criteria".

In the case of the special wines, vermouths and aperitifs, therefore, the debate between the Member States, although it began several years ago, has still not ended. Through these proceedings we have learned that the Commission saw "the urgent need to enact rules at Community level on, amongst other things, the composition

and manufacturing characteristics of spirits and flavoured wines, given the likelihood that the differences existing between the national provisions might impede free movement and create unequal conditions of competition". For that purpose officers of the Commission were (in November 1980) "in the course of drawing up two draft proposals on the definition, description and presentation of spirituous beverages on the one hand and vermouths and other wines of fresh grapes flavoured with aromatic extracts falling within heading 22.06 of the Common Customs Tariff on the other". The fact that those two draft proposals exist underlines the need to bring clarification to this area.

In my opinion, therefore, the Court should rule that:

A national provision requiring a drink sold under the name "wine-based aperitif" to contain at least 80 % genuine ordinary wine of merchantable quality and have an alcoholic strength of at least 10° is not contrary to Community law.