the legal effects which it produces and not on the procedures for its adoption.

3. Article 215 of the Treaty does not prevent a person from asking the Court to declare the Community liable for damage even where it cannot yet be precisely assessed, provided that it is imminent and foreseeable with sufficient certainty.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT delivered on 11 December 1984 *

Mr President,
Members of the Court,

1. Introduction

1.1. *The principal facts*

The applicant, Binderer GmbH, imports and markets in the Federal Republic of Germany wines from other Member States and from non-member countries. For a considerable time it has specialized in importing wines from Hungary and Yugoslavia and handles *inter alia* 65% of Germany's imports of Hungarian wine. The issue in these proceedings is whether it is lawful for the applicant to describe the quality of such wines by using the terms 'spätgelesen' and 'ausgelesen', being literal translations of the corresponding Hungarian and Yugoslavian expressions, and whether the provisions adopted by the Commission prohibiting the use of those terms are lawful. Although the terms 'Spätlese' and 'Auslese' are also applied to Austrian and Swiss wines (and then exclusively in German), they are mainly used in the Federal Republic of Germany itself. Whereas between 1981 and 1983 the applicant's annual imports of wine bearing one of the above descriptions amounted to betweeen approximately 16 000 and 29 000 hectolitres (the latter figure being for 1982 alone), over the same period production of such wine in the Federal Republic of Germany fluctuated between 796 000 hectolitres (in 1982) and around 890 000 hectolitres in the case of 'Spätlese' and between some 98 000 and 151 000 hectolitres in the case of 'Auslese' (Commission's reply of 26 October 1984 to a question put by myself in the course of the oral procedure). The total market share held by imported Hungarian and Yugoslavian 'Spätlese' and 'Auslese' wines during that period was equivalent to approximately 1.5 to 4% of German production. As far as the Commission's competition policy is concerned, a market share of that order is negligible, can have no appreciable effect on competition and therefore cannot warrant action on the part of the Commission with its associated costs for the Commission itself and for the undertakings concerned.

* Translated from the Dutch.

1.2 *The applicable Community rules*

The following provisions of regulations are relevant to this case.

According to the second recital in the preamble to *Council Regulation (EEC) No 355/79 of 5 February 1979* (Official Journal 1979 L 54, p. 99) laying down general rules for the description and presentation of wines and grape musts, 'the purpose of any description and presentation should be to supply potential buyers and public bodies responsible for organizing and supervising the marketing of the products concerned with information which is sufficiently clear and accurate to enable them to form an opinion of the products'. In that connection Article 30 (5) of the regulation providews, with regard to the labelling of wines (on which Articles 27 to 34 set out detailed rules), that: 'Special conditions may be laid down as regards inspection to ensure compliance with the provisions governing the description on the labelling of imported products, with particular reference to the geographical origin, references to superior quality, the vine variety and the bottler'. Article 30 (7) stipulates that: 'In the description of imported products on the labelling, the information specified in Articles 27, 28 and 29 shall be given in one or more of the official languages of the Community.' Moreover, the second subparagraph of Article 30 (7) provides that *inter alia* references to superior quality, as referred to in Article 28 (2) (c), must be given in one of the official languages of the third country of origin, but may also be given in an official language of the Community. The third subparagraph of Article 30 (7) provides (and this is important for these proceedings) that the use of certain terms resulting from the translation of the information referred to in the second subparagraph of Article 30 (7) may be governed by implementing rules. Finally, Article 43 (1) of the regulation lays down the important general principle that: 'The description and presentation of the products referred to in Article 1 (3), including any form of advertising, must not be liable to cause confusion as to the nature, origin and composition of the product; this shall apply to the information referred to in Articles 2, 12, 27, 28 and 29.' The information which is relevant to the present case is covered by Article 28 (2) (c) (details 'regarding superior quality') and Article 28 (2) (p) (information concerning 'the natural or technical conditions governing the production of the wine'). In my opinion, the misleading advertising campaign conducted by one of the applicant's smaller competitors could have been challenged directly by the competent national authorities and interested parties under Article 43 by means of individual actions.

The second subparagraph of Article 2 (4) of *Commission Regulation (EEC No 997/81 of 26 March 1981* (Official Journal 1981 L 106, p. 1), laying down detailed rules for the description and presentation of wines and grape musts, provides as follows: 'On the labels of wines imported into the Community no expression concerning superior quality as referred to in the first subparagraph may be translated into German by any of the following terms: "Qualitätswein mit Prädikat", "Kabinett", "Spätlese", "Auslese", "Beerenauslese", "Trockenbeerenauslese".' Given that the Hungarian and Yugoslavian equivalents of the terms 'Spätlese' and 'Auslese' were recognized by the Community by virtue of Article 28 (2) (c) of Regulation No 355/79, that prohibition left open the possibility of using other translations.

Following the publication of Regulation No 997/81, the applicant therefore approached the competent authorities in the Federal Republic of Germany and the Commission with a proposal that the new rules be complied with by a literal rendering of the relevant Hungarian and Yugoslavian terms using the adjectives 'spätgelesen' and 'ausgelesen'. The Bavarian Ministry for Internal Affairs raised no objection to that solution and, in a fully reasoned reply of 14 August 1981 to a letter from several German trade organizations, the Commission expressly sanctioned it. [1] That induced the applicant to import the wines in question from Hungary and Yugoslavia and to market them in the Federal Republic of Germany with labels bearing the aforementioned terms.

There then followed *Commission Regulation (EEC) No 1224/83 of 6 May 1983* (Official Journal 1983 L 134, p. 1), which the applicant contests in these proceedings. The fifth recital in the preamble thereto reads as follows:

'Whereas, to prevent the consumer from being misled by the claims of superior quality made for certain wines imported into the Community and subject to less stringent labelling requirements, without thereby discriminating between such wines and those of Community origin in the matter of their description, the special climatic conditions in which the imported wines were produced should be taken into consideration and, consequently, the terms "spätgelesen" and "ausgelesen" should not be permitted to figure on the labelling of such imported wines, even if the terms in question are the translation of terms used in accordance with the provisions of the non-member country of origin'.

Accordingly, Article 1 (3) (g) of the regulation provides that the second subparagraph of Article 2 (4) of Regulation No 997/81 is replaced by the following:

'On the labels of imported wines no expression concerning superior quality as referred to in the first subparagraph may be translated into German by any of the following terms: "Qualitätswein mit Prädikat", "Kabinett", "Spätlese", "Auslese", "Beerenauslese", "Trockenbeerenauslese", "Eiswein", "spätgelesen", "ausgelesen".'

I have stressed the newly prohibited terms in the list; they include the terms 'spätgelesen' and 'ausgelesen' which the Commission authorized in 1981, stating its reasons for doing so. Article 1 (10) of Regulation No 1224/83 contains a transitional provision covering stocks of wine labelled in accordance with the provisions formerly in force. If the fifth recital in the preamble to the regulation is compared with the excerpt from the letter (which is reproduced as footnote 1), there is a clear conflict between the recital and the letter. It is therefore

1 — For the full text of the reply I would refer to Annex 5 to the application. The most important part of that reply reads as follows: 'The prohibition laid down in Article 2 (4) [of Regulation No 997/81] extends solely to those terms that are expressly mentioned therein. That follows, first, from the wording of the paragraph in question ("the following terms") and in addition from the eighth recital in the preamble to Regulation No 997/81, which envisages the prohibition of identical, not similar, German designations. Consequently, translation of the relevant Hungarian term by 'spätgelesen' is not contrary to the aforementioned provision. Furthermore, there is no danger of the consumer's being misled as to the origin or type of the wine, which would lead to the term "spätgelesen" being impermissible under Article 43 (1) of Council Regulation (EEC) No 355/79 ... Since Article 28 (1) (d) of Regulation No 355/79 provides that the third country of origin must be stated on the labelling, the consumer can distinguish between a Hungarian wine made from "spätgelesen" grapes and a German or Austrian "Spätlese".'

entirely understandable that the applicant should now contest Article 1 (3) (g) of the regulation in view of the reasons given for its adoption. In its reply of 12 September 1984 to a question put by the Court, the Commission expressly acknowledges that it has changed its position from the view stated in 1981. As can be seen from the documents relating to the case and the arguments put forward by the applicant during the oral procedure, the latter reproaches the Commission primarily for using its power to issue regulations in order to resolve a specific problem (the Commission justifies its change of position by reference to certain advertisements which it considered improper). If that reproach is examined in the light of the third paragraph from the end of the Commission's reply to the question put by the court, it is clear, in my opinion, that it is not frivolous. In fact, it appears from that paragraph that a misleading advertisement issued by one of the applicant's smaller competitors was largely responsible for the Commission's retreat from its 1981 position ('The change in the Commission's view was influenced not least by the way in which the trade exploited the opportunity created by the note of 14 August 1981 for advertising purposes'; the Commission goes on to explain that statement in detail).

2. The applicant's principal claim

The applicant's principal claim is that Article 1 (3) (g) of Regulation No 1224/83 should be declared void in so far as it prohibits the use of the terms 'spätgelesen' and 'ausgelesen' in translating details regarding superior quality within the meaning of Article 28 (2) (c) of Regulation No 355/79.

There can be no doubt that, on the basis of the wording of Article 173 of the EEC Treaty and the relevant case-law of the Court, the applicant's principal claim must be held to be inadmissible. Admittedly, since the contested provision is directly applicable and requires no further action on the part of the Community or national authorities to implement it, it is of direct concern to the applicant. Moreover, in my view, it is completely clear from the concluding part of the Commission's letter of 12 September 1984 and from the explanations furnished thereon at the hearing that the relevant provision was introduced in particular ('nicht zuletzt' [not least]) as a result of advertising campaigns conducted by certain of the applicant's smaller competitors in order to promote imported wines of the type at issue in these proceedings. That is not sufficient, however, to make the application admissible, as is clear from *inter alia* the Court's judgment in Case 231/82 (*Spijker Kwasten BV* v *Commission*, [1983] ECR 2559). There a protective measure which purported to be of general application was likewise clearly adopted with reference to an individual case and indeed exclusively for that case. In her opinion, Mrs Advocate General Rozès took the view that in those circumstances the application was admissible; however, her Opinion was not followed by the Court (Third Chamber), which based its decision on the grounds (paragraph 8) that: 'The Court has already stated in its judgment of 15 July 1963 in Case 25/62 (*Plaumann* [1963] ECR 95) that persons other than those to whom a decision is addressed may claim to be individually concerned by that decision only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and if by virtue of those factors it distinguishes them individually just as in the case of the person addressed'. Paragraph 9 adds that: 'With regard to the importers of such products it is therefore a measure of general application covering situations which are determined objectively and it entails legal effects for categories of persons envisaged in a general and abstract manner. Thus the

contested decision is not of individual concern to the applicant.' Paragraph 10 of the judgment further expressly states that: 'That conclusion is not invalidated by the fact that the applicant, according to its statement which was not disputed by the Commission, is the only trader-importer established in the Benelux States regularly importing into the Netherlands brushes originating in the People's Republic of China and that it was one of its imports which led to the adoption of the contested decision.' Paragraph 10 also refers to the Court's judgment of 6 October 1982 in Case 307/81 (*Alusuisse*, [1982] ECR 3463), which, like the present case, concerned a regulation (and not, like *Spijker Kwasten*, a decision addressed to one or more Member States). As is pointed out in paragraph 10 of the judgment in *Spijker Kwasten*, it was stated in the judgment in *Alusuisse* that a 'measure does not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in relation to its purpose'.

I shall not conceal that on the basis of the wording of Article 173 I would have considered, in common with Mrs Advocate General Rozès in *Spijker Kwasten*, that it was possible to take a less restrictive view of the legal protection afforded to individuals by that article. Moreover, a refusal to admit the present application would deprive the applicant of all effective legal protection. Since according to its wording and tenor the provision in question does not have to be complied with until *after* importation, permission to import the wine concerned cannot be refused on the strength of the contested provision. The applicant cannot therefore challenge the legality of the provision in proceedings against a refusal to permit the importation of the wines. As has already been pointed out, the provision is directly applicable and does not require any legal measures to be adopted by the administration for its implementation. Moreover, it cannot form the basis for refusing to allow the importation of the wines, since it does not have to be complied with until *after* importation. An objection that the provision is illegal could therefore only be raised — with uncertain consequences — in criminal proceedings, which, by their nature, are possible only after the wine concerned has been put into circulation and hence after importation. The legal protection possible at that late stage cannot be viewed as a complete substitute for the right to challenge the regulation before the Court of Justice under Article 173. In any event, the observation made by the Court in paragraph 11 of its judgment in *Spijker Kwasten* — namely that its conclusion that the application was inadmissible was 'consistent with the scheme of remedies provided for by Community law since the importers in question have the right to challenge before the national courts the refusal on the part of the national authorities, based on the application of Community law, to grant an import licence' — is not applicable to this case.

In the interests of legal protection I should, in the light of my last statement, be gratified if the Court were to declare the applicant's action to be admissible in view of that essential difference between this case and *Spijker Kwasten*. Unfortunately, however, I can find nothing in the Court's previous decisions to support the view that, in the absence of satisfactory national legal protection, a regulation which clearly purports to be of general application but

which was manifestly adopted for one or more known individual cases and in practice is of direct concern to one particular undertaking can be challenged before the Court. Consequently, I consider that no general significance can be attributed to paragraph 11 of the judgment in *Spijker Kwasten* which would limit the scope of the preceding paragraphs of that judgment. I conclude therefore that in the light of the Court's previous decisions the applicant's principal claim must be held to be inadmissible. The contested provision applies to all existing and future importers of the wines in question and gives rise to an obligation at the time when the goods are marketed. In the light of the aforesaid decisions of the Court, the applicant has not shown itself to be affected by reason of certain attributes peculiar to itself, nor can it plead circumstances in which it is differentiated and distinguished individually from all other existing or future importers who are envisaged in an abstract manner by the provision. Moreover, the fact that, when the contested provision was adopted, the applicant, unlike future importers, still had a stock of wine labelled in accordance with the previous Commission Regulation, No 997/81, cannot alter the conclusion that has been reached. Indeed, as I pointed out when reviewing the relevant provisions of Community law, Regulation No 1224/83 (correctly) embodies a transitional provision exempting existing stocks from the regulation. Thus, in that respect, this case is not comparable with Case 11/82 (*Piraiki-Patraiki and Others*), in which I expressed the view, on 14 October 1982 and 11 October 1984, that the applicants' actions were admissible.

Since I must therefore conclude that the applicant's principal claim must be held to be inadmissible in the light of the Court's previous decisions, I consider it unnecessary to examine the submissions made by the applicant in support of that claim in greater detail in the present proceedings. Those submissions might yet come up for consideration in the course of proceedings for a preliminary ruling; this would admittedly only be possible within the strict limits which I have outlined.

3. The applicant's alternative claim

The applicant's alternative claim is that the Court should 'declare that the European Communities are obliged to compensate the applicant for the damage caused by the fact that, as a result of Regulation (EEC) No 1224/83 of 6 May 1983, it will in the future no longer be able to employ the words "spätgelesen" and "ausgelesen" in translating details regarding superior quality within the meaning of Article 28 (2) (c) of Regulation No 355/79'.

In view of the fact that the Commission and the Federal Republic of Germany contest the admissibility of the applicant's alternative claim exclusively on substantive grounds, I consider that there is no point in undertaking a separate examination of the question whether this claim is admissible.

In paragraph 8 of its judgment of 2 March 1977 in Case 44/76 (*Milch-, Fett- und Eier-Kontor GmbH* v *Council and Commission*, [1977] ECR 393), the Court held that: 'Article 215 of the Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed'. Consequently, the first point to be established in this case is whether the damage is foreseeable with sufficient certainty. In that connection, it should be

pointed out first of all that in its observations of 6 October 1983 concerning the Commission's objection of inadmissibility the applicant (at p. 14) refers solely to 'damage which may ensue in the future' (as a result of the prohibition of the use of the terms 'spätgelesen' and 'ausgelesen' in translating the relevant Hungarian and Yugoslavian terms). At page 15 also reference is made solely to 'possible' damage. Neither did the questions put by the Court at the hearing result in the requisite certainty that the aforesaid requirement was satisfied.

Secondly, the Commission's representative expressly stated in reply to a question that I put at the hearing that a literal translation of the Hungarian and Yugoslavian expressions indicative of superior quality — which consisted each of two words — by 'späte Ernte' [late harvest] and 'ausgewählte Trauben' [selected grapes] or similar expressions consisting of two words would not conflict with the contested provision. I consider it essential that the Court's judgment should record that statement. Given that the applicant considers damage merely to be 'possible' and that alternative terms are, as we have seen, still available, I consider that the criterion laid down by the Court in Case 44/76 for the recognition of liability for future damage is not met, that criterion being that such damage must be 'foreseeable with sufficient certainty'.

Since, in my view, that in itself provides sufficient grounds for rejecting the alternative claim, I consider it unnecessary to undertake an exhaustive examination of the questions which arise with regard to the requirement that there must be a causal connection between the damage sustained and the contested measure and the requirement that the contested measure must have constituted a manifest infringement of a superior rule of law. Consequently, I shall confine myself to two brief remarks concerning those requirements. As regards the requirement that there must be a causal connection, the applicant has not refuted the inference which may be drawn from the data provided by the Commission that the fall in imports of the relevant Hungarian and Yugoslavian wines in 1983 and 1984 was due in particular to increased wine production and to market conditions in the Community. Furthermore, it appears from Annex 2 to the Commission's reply of 12 September 1984 to questions put by the Court that aggregate wine imports from Hungary and Yugoslavia had shown a tendency to decline since 1982 (that is to say, before the contested provision was adopted). Consequently, in the light of present knowledge, it is extremely doubtful whether the required causal connection exists. As regards the requirement that the contested measure must have constituted a manifest infringement of superior rules of law, the application merely refers, as regards the alternative claim, to the alleged failure to fulfil the expectations raised by the statement made in August 1981. However, since that statement merely constituted an interpretation of the law as it stood at that particular time, the Commission rightly argues that the statement did not preclude amendment of the provision in question, although I would observe that an expectation that that would not occur was undoubtedly raised.

4. Costs

Finally, the applicant asks that the Community be ordered to pay the costs. In this case I consider that request to be justified by virtue of the second subparagraph of Article 69 (3) of the Rules of Procedure. Although, in my view, the Commission should succeed in this case, I consider that it caused the opposite party to incur costs needlessly or vexatiously. By analogy with what the Court (Second Chamber) decided with regard to costs in its judgment of 21 June 1984 in Case 69/83 (*Lux* v *Court of Auditors*, [1984] ECR 2447), it can be stated that, by failing clearly and promptly to advise the interested parties of possible alternative translations, providing suchinformation only during the proceedings before the Court, the Commission contributed to a very large extent to the present dispute. There was all the more reason in this case why interested parties should have been given such information promptly, in view of the expectations aroused in them by the Commission in 1981. In my view, the wording of the second subparagraph of Article 69 (3) of the Court's Rules of Procedure gives rise to a more far-reaching consideration, namely that, regardless of whether or not the amending provision is lawful, it in any event caused the applicant to incur unnecessary costs. Indeed, as can be seen from the Commission's reply to a question put by the Court, there is no doubt that a misleading advertisement by one of the applicant's smaller competitors was a key factor behind the contested amending provision. However, the Commission could have left it directly to the authorities and injured parties in the Member State concerned to take action against that misleading advertisement on the basis of Article 43 of Council Regulation No 355/79, which would have spared the applicant costly and time-consuming proceedings. In view of the excessive workload borne by the Court at the present time, I consider that a more extensive application of the second subparagraph of Article 69 (3) of the Rules of Procedure in appropriate cases is greatly to be desired. As I have pointed out, however, an application *mutatis mutandis* of the Court's judgment in Case 69/83 may in any event suffice to justify recourse to that provision.

5. Conclusions

In the light of the foregoing considerations I propose that the Court should:

(1) Declare the applicant's principal claim to be inadmissible;

(2) Dismiss the applicant's alternative claim on the ground that the applicant has failed to adduce adequate evidence as to the fulfilment of imperative requirements;

(3) Nevertheless order the Commission, on the basis of the Rules of Procedure, to pay the costs, with the exception of those incurred by the Government of the Federal Republic of Germany, which must pay its own costs.