JUDGMENT OF THE COURT (THIRD CHAMBER)
5 MAY 1983 [1]

Administration des Impôts v Guy Soler (reference for a preliminary ruling from the Cour de cassation, Paris)

(New wine still in fermentation — Definition)

Case 80/82

Agriculture — Common organization of markets — Wine — Wine separated from its lees — Concept

(Regulation (EEC) No 816/70 of the Council, Annex II, paragraph 8, replaced by Regulation (EEC) No 337/79, Annex II, paragraph 9)

A wine containing a percentage of lees which is much smaller than the average percentage of lees obtained when the wine is first racked may be regarded as separated from its lees within the meaning of paragraph 8 of Annex II to Regulation No 816/70 on the common organization of the market in wine. It is for the national court to assess the percentage in question by reference to the traditional methods of production of the wine concerned.

In Case 80/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour de Cassation [Court of Cassation], Paris, for a preliminary ruling in the action pending before that court between

ADMINISTRATION DES IMPÔTS [Revenue Administration], civil party,

and

GUY SOLER

1 — Language of the Case: French.

on the interpretation of the term "new wine still in fermentation" in Annex II to 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 (Official Journal, English Special Edition 1970 (I), p. 234),

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Lord Mackenzie Stuart and Y. Galmot, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. The accused in the main proceedings is charged with the offence of having been in possession for the purpose of sale as wine of a product not complying with the lawful definition of that beverage. The offence is provided for in Article 4 of the French Law of 1 August 1905 for the suppression of fraud in the sale of goods and of adulteration of foodstuffs and agricultural products.

According to the Ministère Public, the prosecutor, the wine had the features of a "new wine still in fermentation" and was therefore not fit for consumption.

2. The term "new wine still in fermentation" is defined in Annex II to Regulation (EEC) No 816/70 of the Council as "wine in which alcoholic fermentation is not yet complete and which is not yet separated from its lees". (See also paragraph 9 of Annex II to Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine.) That definition is adopted in Article 2 (2) of Decree No 72-309 of the French Republic of 21 April 1972.

By virtue of Article 27 (2) of Regulation No 816/70 (Article 48 (2) of Regulation

No 337/79) "new wine still in fermentation" is not among those of the products falling within heading 22.05 of the Common Customs Tariff which may be offered or disposed of for direct human consumption within the Community.

3. As a result an order was made for the taking of expert evidence. That evidence was to the effect that the wine "had been separated from its lees since the percentage discovered was quite normal . . .". On the basis of that opinion the Tribunal Correctionnel [Criminal Court] acquitted the accused and gave judgment against the civil parties, namely the Fédération Nationale des Producteurs de Vins de Table [National Federation of Table Wine Producers] and, in respect of the tax offences, the Administration des Impôts.

Upon appeal by the civil parties to the Cour d'Appel [Court of Appeal] Montpellier, that judgment was confirmed on the ground that according to the experts the percentage of lees, which was between 0.35% and 0.40%, was negligible and therefore the wine in question could be regarded as having been separated from its lees.

4. The French Cour de Cassation, to which appeal was made against that judgment, found:

"Whereas in paragraph 8 of Annex II to Regulation (EEC) No 816/70 of the Council and paragraph 9 of Annex II to Council Regulation (EEC) No 337/79, wine 'in which alcoholic fermentation is not yet complete and which is not yet separated from its lees' is defined as "new wine still in fermentation"; Whereas in the light of those provisions, it is necessary, pursuant to Article 177 of the EEC Treaty, to request the Court of Justice of the European Communities for a preliminary ruling on the question whether the national court is empowered to regard as separated from its lees a wine which contains a percentage of lees of between 0.35% and 0.40% on the ground that according to expert evidence such a percentage is negligible."

By judgment of 4 January 1982 it stayed the proceedings and asked the Court of Justice to give a preliminary ruling on the above question.

5. The judgment making the reference was received at the Court Registry on 1 March 1982.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the accused in the main proceedings, Mr Soler, represented by Jean Imbach of the Strasbourg Bar, the French Government, represented by Jean-Claude Prevel, Secretary General to the Inter-Ministerial Committee for Questions of European Economic Cooperation and by the Commission of the European Communities, represented by Jean-Claude Séché, Legal Adviser.

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

By order of 2 February 1983 made pursuant to Article 95 (1) and (2) of the Rules of Procedure the Court referred the case to the Third Chamber.

II — Written observations submitted to the Court

A — *Mr Soler*, the accused in the main proceedings, observes that any table wine fit for consumption may start to ferment afresh and this causes a deposit of fine lees to settle at the bottom of the vats.

The definition given in Regulation No 816/70 does not mention fortuitous re-fermentation of a wine and thus does not exclude the presence of fine lees which may still form.

He says that the lees are separated from the wine by racking, an operation which leaves the lees at the bottom of the container. The interpretation of the administration on the contrary amounts to saying that, if unforeseen re-fermentation, however negligible, takes place after the separation of the wine from the lees, the product which was a wine would no longer be so and would have become again a "new wine in fermentation".

It would then be a wine which could no longer be consumed in its existing state and could not be the subject of trade, including intra-Community trade.

It is therefore for the oenological experts of the country of origin to determine the importance of the percentage of lees which there may be.

That has been confirmed by a judgment of the French Court of Cassation of 11 January 1982 to the effect that it is exclusively for the court of trial, and it alone, to determine on the basis of the experts' reports whether a product fits the Community definition.

The accused therefore proposes that the Court should answer the question as follows:

"The separation of the wine from its lees means the operation of racking, which is carried out only when fermentation is complete and the product may then be described as wine.

The fine lees which may appear after fermentation cannot deprive the product of its classification as wine, whatever the amount of fine lees which may be subsequently detected.

It is not for the Community court to rule on the significance of a percentage of fine lees which, moreover, the expert has deduced to be negligible, and the percentage of lees may be taken into account only in relation to ascertaining whether the wine has been separated from its lees after fermentation or whether on the other hand such separation by racking has not yet been carried out, in which case the only description to which the product is entitled is that provided in paragraph 8 of Annex II."

B — The *French Government* states first of all that a regional director of the Comptoir Agricole Français (of which Mr Soler is a director) declared that 1 545 hectolitres of red wine had been sent from Corsica to Sète by sea in order to free the wine cellars of the Comptoir Agricole Français at Borgho and thus enable it to continue buying grapes of the current vintage. He admitted that upon their arrival in Sète two out of five vats in the ship were in fermentation.

The expert's opinion is that the wine in question had undergone partial alcoholic fermentation but that it was separated from its lees. According to that report the samples analysed had a potential alcoholic strength of 3°73 and 3°75 respectively. However, oenologists consider that a wine has not finished fermenting so long as its potential alcohol content is not less than 0.5°. Moreover, in stating that the wine had undergone partial alcoholic fermentation the experts themselves recognized that it had not finished fermenting.

The French Government would thus like to say that according to its definition "new wine still in fermentation" displays two concurrent characteristics:

The product has not finished fermenting;

It is not yet separated from its lees.

In the opinion of the French Government that definition is sufficiently clear for it to be said that a wine in fermentation at the time of inspection and containing 0.35% of lees may not be regarded as coming within the category of table wines.

C — The *Commission* observes in this respect that the product in question may be subject to the prohibition of offer or disposal for direct human consumption within the Community only if the two conditions of the definition are satisfied. According to the Commission the first condition, namely that the wine must still be in fermentation, was regarded as fulfilled by the Cour de Cassation. The only question is therefore whether the second condition with regard to the separation of the wine from its lees was also satisfied.

As to the second condition it is impossible for wine to be completely separated from its lees. That is demonstrated when a bottle of old wine is decanted. If the percentage is "negligible" it is therefore possible to accept that separation has taken place.

To determine whether or not a percentage is "negligible" it is nevertheless necessary to determine the percentage which is normally in a wine which has not yet been separated from its lees. The only workable method in that respect is to compare the quantity of lees (0.35%-0.40% in this case) with the amount left when racking has taken place. Wine which has not yet been subject to racking must be regarded as not separated from its lees.

The Commission cites a report prepared by Professor Cantarelli from which it appears that wine which is not racked may contain a percentage of lees varying between 0.5% and 6%, the average being about 4%. That wide margin is due mainly to biological factors such as variety of vine, state of maturity and climate.

In this case the percentage of 0.35%-0.40% of lees is below the minimum of 0.5% liquid lees obtained when wine is first racked; this constitutes grounds for justifying the experts' description of that percentage.

Even if the percentage of 0.35-0.40 were expressed in dry (and not liquid) matter the percentage of liquid lees would increase to 0.70%-0.80% which would still be very much less than the average of 4%.

Moreover, the wines in question were still young and therefore in view of the material in suspension which they contained could have given rise to a fresh formation of lees when fermentation recommenced. Partial fermentation was found upon the reception of the cargo after the transhipment which followed the transport by sea. The experts moreover stated that it was possible that the wines were not still fermenting when they left the port of embarkation.

In conclusion the Commission considers that it is for the court of trial to determine in each particular case whether the separation of the lees has in fact been carried out in proper conditions. In that respect with the help of expert evidence it may base its determination on a number of

presumptions related to the circumstances of the case and in particular to whether the wine has been racked a first time and to the percentage of lees found in the wine in question in relation to the percentage which the wine might have, in view of its origin, before it is separated from its lees.

In the absence of the latter information and taking account of an average of 4%, a percentage of 0.36%-0.40% found by the experts may, because it is neglible, give rise to a presumption on which the court of trial may reasonably rely in order to consider the wine as having been separated from its lees.

The Commission accordingly proposes that the Court should answer the question as follows:

"Wine which contains a percentage of lees of between 0.35% and 0.40% may be regarded as separated from its lees within the meaning of paragraph 8 of Annex II to Regulation No 816/70 (paragraph 9 of Annex II to Regulation No 337) on the common organization of the market in wine.

The position would not be different unless it was shown that such percentage is the same as that contained in the wine in question at the outset."

III — Answers to questions put by the Court

A — In answer to questions put by the Court the *French Government* stated that although racking does not allow complete separation of the wine from its lees there is virtually complete separation with filtration or a centrifugal process. In that respect account must be taken of the needs of consumers who look for a wine free from cloudiness. After the wine is first racked 1% to 3% of lees remains present (as against 2% to 4% before racking and 1% to 2% after repetition of this operation).

Furthermore, the percentage of lees in wine cannot be expressed as a fixed figure in so far as the lees vary in volume according to the various environmental factors.

B — In answer to the questions put by the Court the *Commission* states *inter alia:*

The main alcoholic fermentation which converts grape must into wine gives rise to a substantial quantity of lees.

Fermentation of table wine may arise when it contains sugar and in that event it is always accompanied by the formation of lees.

Even without fermentation lees may still form in table wine.

The Community regulations require that wine should be separated from its lees because fermentation of table wine can never be excluded and in the absence of this requirement the distinction between new wine in fermentation and table wine could not be made.

The finding made by the national court in a particular case that there is partial fermentation in a wine which may be offered for human consumption is not sufficient in itself to permit the conclusion that the wine in question "has not been separated from its lees".

There are three methods for determining the quantity of lees in wine and each method gives different results.

IV — Oral procedure

At the sitting on 25 March 1983, oral argument was presented and questions put by the Court were answered by Jean Imbach, of the Strasbourg bar, for Mr Soler, the accused in the main proceedings, and by J.-C. Séché, acting as Agent, assisted by Mr Chiappone, an expert, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 21 April 1983.

Decision

1 By judgment of 4 January 1982, which was received at the Court on 1 March 1982, the French Cour de Cassation [Court of Cassation] referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of the expression "new wine still in fermentation" as defined in paragraph 8 of Annex II to 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 (Official Journal, English Special Edition 1970 (I), p. 234) which has since been replaced by paragraph 9 of Annex II to Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine (Official Journal 1979, L 54, p. 1).

2 That question was raised in criminal proceedings initiated for possession for the purpose of sale as wine of a product displaying the features of a "new wine still in fermentation". By virtue of Article 27 (2) of Regulation No 816/70 (replaced by Article 48 (2) of Regulation No 337/79) "new wine still in fermentation" is not included amongst the products which may be offered or disposed of for direct human consumption within the Community.

3 According to both Regulation No 816/70 of the Council and Regulation No 337/79, "new wine still in fermentation" is a wine "in which alcoholic fermentation is not yet complete and which is not yet separated from its lees". In the opinion of the Cour de Cassation, the sole question to be resolved is whether the wine in question may be regarded as "separated from its lees".

4 Seeking an interpretation of that definition, the Cour de Cassation has requested the Court of Justice to give a preliminary ruling on the question "whether the national court is empowered to regard as separated from its lees a wine which contains a percentage of lees of between 0.35% and 0.40% on the ground that according to expert evidence such a percentage is negligible."

5 That question seeks in substance to ascertain whether a wine containing a negligible percentage of lees may be regarded as separated from its lees within the meaning of paragraph 8 of Annex II to Regulation No 816/80 (replaced by paragraph 9 of Annex II to Regulation No 337/79) on the common organization of the market in wine.

6 It is clear from the observations submitted to the Court by the French Government, by the Commission and by the accused in the main proceedings that the quantity of lees which remains in the wine following "separation" depends on several factors and cannot be determined in an abstract manner. Thus the percentage of lees which remains present varies according to the method used for the purpose of separation (racking, a centrifugal process or filtration) and to the climate, variety of vine or state of maturity of the grape. Similarly, the percentage of lees may be expressed as liquid or dry matter. Thus the percentage of 0.35% to 0.40% referred to by the Cour de Cassation must be adjusted according to whether liquid lees or dry lees are concerned.

7 In spite of the difficulties which may be involved in establishing an exact percentage of lees remaining present in the wine after it has been separated from its lees, the fact none the less remains that a complete separation can never be achieved. That is demonstrated *inter alia* by the fact that a fresh formation of lees may take place at any time even in a wine suitable for consumption. Separation is carried out either as a result of re-fermentation of the wine, or even in the absence of fermentation.

8 Moreover, the results of a scientific study cited by the Commission show that the percentage of lees referred to by the Cour de Cassation in the present case is much smaller than the average percentage of lees obtained when wine is first racked and is smaller or virtually equal (according to whether liquid

or dry lees are concerned) to the minimum quantity obtained from the first racking.

9 Accordingly, the answer to the question submitted by the Cour de Cassation must be that a wine containing a percentage of lees which is much smaller than the average percentage of lees obtained when the wine is first racked may be regarded as separated from its lees within the meaning of paragraph 8 of Annex II to Regulation No 816/70 (replaced by paragraph 9 to Annex II to Regulation No 337/79) on the common organization of the market in wine. It is for the national court to assess the percentage in question by reference to the traditional methods of production of the wine concerned.

Costs

10 The costs incurred by the Commission of the European Communities and the Government of the French Republic, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the French Cour de Cassation, by judgment of 4 January 1982, hereby rules:

A wine containing a percentage of lees which is much smaller than the average percentage of lees obtained when the wine is first racked may be regarded as separated from its lees within the meaning of paragraph 8 of Annex II to Regulation No 816/70 (replaced by paragraph 9 of Annex II to Regulation No 337/79) on the common organization of the market in

wine. It is for the regional court to assess the percentage in question by reference to the traditional methods of production of the wine concerned.

Everling Mackenzie Stuart Galmot

Delivered in open court in Luxembourg on 5 May 1983.

For the Registrar

H. A. Rühl

Principal Administrator

U. Everling

President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 21 APRIL 1983 [1]

Mr President,
Members of the Court,

1. The question submitted for a preliminary ruling

In the present case, the French Cour de Cassation [Court of Cassation] has requested the Court of Justice to give a preliminary ruling on the question:

"Whether the national court is empowered to regard as separated from its lees a wine which contains a percentage of lees of between 0.35% and 0.40% on the ground that according to expert evidence such a percentage is negligible."

2. The relevant provisions of Community law and the course of the national proceedings

The question arose because Soler was in possession, for the purpose of sale, of wine which, according to the French supervisory authorities, was unfit for human consumption since it was not table wine but a product which had to be regarded as "new wine still in fermentation". That product is defined in paragraph 8 of Annex II to Regulation

1 — Translated from the Dutch.