existence of a real risk of imbalance or disruption, does not satisfy that condition and must be declared void for lack of a legal basis.

2. According to the first paragraph of Article 173 of the Treaty, only the infringement of essential procedural requirements permits a contested measure to be declared unlawful. An incorrect reference, in the preamble to a regulation adopted in accordance with the Management Committee procedure, to the Committee's opinion cannot be considered to constitute such an infringement where the Committee has not given an opinion although the matter was properly referred to it, and, according to the basic regulation governing the common organization of the market concerned, the Commission is thus entirely at liberty to adopt the proposed measures on its own responsibility.

REPORT FOR THE HEARING
delivered in Case 128/86 *

I — Facts and procedure

1. *Legislation*

1.1. *Act of Accession*

The mechanism for regulatory amounts is provided for in Article 123 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (Official Journal 15.11.1985, L 302, p. 23, hereinafter referred to as 'the Act of Accession'). Article 123 (1) provides that Spanish table wines, wines with an appellation as to origin and other Spanish viticultural products likely to create disturbances on the market, which are subject to reference price fixing under the common organization of the market, are subject to that mechanism on importation into the Community as constituted on 31 December 1985 (hereinafter referred to as 'the Community of Ten'). Article 123 (2) (a) provides that for table wines a regulatory amount is to be levied which is equal to the difference between the guide prices in Spain and in the Community of Ten but that its level may be adjusted according to the Management Committee procedure to take account of the situation of market prices as assessed according to the different categories of wines and on the basis of their quality. In that regard, a joint declaration concerning the application of the regulatory amount to table wines, which is annexed to the Act of Accession, states in addition that 'the adjustment of the regulatory amount intended to take account of the situation of market prices shall be carried out by taking into consideration the specific prices of certain types of product on the basis of their quality and their vatting, bottling and labelling, which should lead to a reduction of the regulatory amount on the basis of the highest price for these types of wine' (Official Journal 1985, L 302, p. 482). Furthermore, Article 123 (2) (b) provides that for wines with an appellation as to

* Language of the Case: Spanish.

origin and for the other products likely to create disturbances on the market, a regulatory amount may be fixed according to the Management Committee procedure and that this regulatory amount is to be derived from that applicable to table wines according to procedures to be determined.

According to the first sentence of Article 123 (3) 'the regulatory amount shall be fixed at a level which ensures conditions under which treatment is no less favourable than those in force under the arrangements prior to accession'. The second sentence of Article 123 (3) provides that 'to this end, this amount shall be calculated in such a way that the amount obtained by increasing the guide price in Spain for the product concerned by the regulatory amount and by the customs duty applicable to it does not exceed the reference price in force for the product during the wine-growing year concerned'. Article 123 (4) provides for the possibility of fixing a regulatory amount for exports from the Community of Ten to Spain.

1.2. *General implementing rules*

On the basis of Article 89 (1) of the Act of Accession, the Council adopted Regulation (EEC) No 480/86 of 25 February 1986 laying down general rules of application of the regulatory amounts applicable to trade in certain wine sector products between the Community of Ten and Spain (Official Journal 1986, L 54, p. 2). The fourth recital in the preamble to the regulation defines the purpose of the regulatory amounts as being 'to prevent disturbance on the market of the Community as constituted on 31 December 1985 without affecting the traditional pattern of trade in the abovementioned products'. Article 2 (1) of the regulation provides that for each type of table wine 'the regulatory amounts shall, for each wine year, be equal to the difference between the guide price set for the Community as constituted on 31 December 1985 and that set for Spain'. Article 2 (2) provides that the regulatory amount may be adjusted to take account of the price situation on the market in the Community of Ten and in Spain and, according to Article 2 (3), for certain table wines that adjustment is to be effected taking into consideration, in particular, their specific prices on the production market and the type of vatting, bottling and labelling used. Article 3 provides that a regulatory amount may be fixed for certain appellation of origin wines and for certain viticultural products covered by Article 5 if there is a risk of disturbance to the market in the Community of Ten. Article 6 provides that the regulatory amounts are to be adjusted taking into account, in particular, the trend and features of trade compared with the traditional pattern and the risk of disturbance and are not to exceed the level set by Article 123 (3) of the Act of Accession.

1.3. *The contested regulations*

Pursuant to Article 11 of Council Regulation No 480/86, on 28 February 1986 the Commission adopted Regulation No 648/86 fixing the regulatory amounts for 1985/86 for imports of certain viticultural products from Spain into the Community of Ten. On 3 April 1986 it amended that regulation by Regulation No 969/86 in order to correct certain clerical errors concerning the regulatory amounts in question.

2. *Procedure*

The application submitted by the Kingdom of Spain was lodged at the Court Registry on 26 May 1986.

An application for the adoption of interim measures in which the applicant sought the suspension of the operation of Regulations Nos 648 and 969/86 was dismissed by order of the President of the Court of 9 July 1986.

The written procedure followed the usual course. However, by letter of 29 September 1986 the Kingdom of Spain waived its right to reply and asked, pursuant to the second subparagraph of Article 55 (1) of the Rules of Procedure, that the case be given priority over others for the purpose of fixing the date for the oral procedure. The President of the Court rejected that request by decision of 3 October 1986.

On 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.

However, by letter of 17 December 1986 the Court requested the Commission to reply in writing to a number of questions concerning the calculation of the regulatory amounts in question. The Commission replied to those questions by letter of 9 February 1987.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(1) Declare Commission Regulations Nos 648 and 969/86 void in their entirety;

(2) Order the defendant to pay the costs.

The *defendant* claims that the Court should:

(1) Dismiss the application as unfounded;

(2) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

Summary of the submissions put forward

The applicant briefly sets out the facts, particularly as regards the situation prior to the accession of Spain and the negotiations concerning the system of regulatory amounts, and alleges in the first place an infringement of essential procedural requirements. To begin with, the Commission stated in the preambles to the two contested regulations that the measures adopted are 'in accordance with the opinion of the Management Committee for Wine', whereas no such opinion was given. Secondly, Regulation No 648/86 fixes a regulatory amount for wines with an appellation as to origin without indicating in any way the existence of a risk of disturbances on the market.

Next, the applicant advances the following three submissions: in the first place, the Commission fixed — in general terms — excessively high regulatory amounts, contrary to Article 123 (3) of the Act of Accession and Article 6 (2) of Council Regulation No 480/86. Secondly, the Commission did not provide for a specific regulatory amount for superior quality wines, contrary to Article 123 (2) (a) of the Act of Accession, Article 2 (3) of Council Regulation No 480/86 and the Joint Declaration annexed to the Act of Accession. In the applicant's view, the Commission should have established a basic regulatory amount for each category or type of wine with a view to fixing subsequently, within each category, other regulatory amounts adjusted on the basis of the quality, the price and the vatting, bottling and labelling of the specific product. Thirdly, a regulatory amount was fixed for

wines with an appellation as to origin although it had not been established that there was a risk of disturbances on the market, contrary to Article 123 (2) (b) of the Act of Accession and Article 3 of Council Regulation No 480/86.

1. *Background*

The *applicant* explains in particular that, prior to accession, imports of Spanish wine into the Community were subject to Common Customs Tariff duties and to payment of a countervailing charge whenever the free-at-frontier offer price of imported wines, increased by the amount of customs duties, was lower than the reference price. However, the Spanish Government was granted exemption from the countervailing charge under the agreement concluded with the Community on 5 November 1970 which guaranteed that import prices would not be lower than the Community reference prices, less the customs duties actually levied. That agreement also provided that Spanish wine exported to the Community would be subject to the issue of an export licence and to the payment of duty at variable rates.

Furthermore, the applicant explains that from the outset of the negotiations concerning accession Spain rejected the establishment of a system of accession compensatory amounts on the ground that the wine market is characterized by too many different varieties and by too much instability to be regulated by a system based on amounts fixed independently of the real price and the specific nature of the products. At the 29th session of the Conference on 28 and 29 March 1985, the Community proposed a system of regulatory amounts to be fixed each year for each category of wine. Spain rejected that system on the ground that it was too similar to a system of accession compensatory amounts. However, Spain finally agreed to the introduction of a system of regulatory amounts tempered by the adoption of a ceiling, by the possibility of adjusting the regulatory amount applicable to table wines in accordance with market prices and by the exclusion in principle of wines with an appellation as to origin from the scope of that system.

The *Commission* describes in the first place the transitional measures applicable in the wine sector, which were laid down by the Act of Accession, and it compares the rules applicable before and after accession. It explains, in particular, that, besides providing for the dismantling of customs barriers and the application of the supplementary mechanism to trade, the Act of Accession provides for two special transitional measures in the wine-growing sector, namely the fixing of prices (Article 122) and the mechanism of regulatory amounts (Article 123). Those measures should be considered in the context of all the measures applicable in that sector.

2. *Infringement of essential procedural requirements*

The *applicant* contends in the first place that the Commission stated in the preambles to the two contested regulations that the measures adopted are 'in accordance with the opinion of the Management Committee for Wine' whereas no such opinion was given. It explains that the duty to abide by the Management Committee procedure in adopting the detailed rules for implementing the mechanism of regulatory amounts is laid down in Article 11 of Council Regulation No 480/86. At its meetings in February and March 1986, the Management Committee for Wine was unable to give an opinion

owing to the absence of a sufficient majority.

The *Commission* acknowledges that the Management Committee did not in fact give an opinion and that it was therefore incorrect to state that it had given a favourable opinion. However, it considers that this cannot render the regulations in question unlawful. Article 67 of 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) authorizes the Commission to adopt proposals submitted to the Management Committee even where the Committee does not give an opinion.

The *applicant* contends in the second place that Commission Regulation No 648/86 must be declared void because it does not state the reasons on which it is based in so far as it gives no indication whatsoever that the importation of wines with an appellation as to origin to which it applies is likely to create disturbances on the market, within the meaning of Article 123 (2) (b) of the Act of Accession and Article 3 of Council Regulation No 480/86.

According to the *Commission,* it is clear from the established case-law of the Court that, with regard to measures having general application, the requirements of Article 190 are satisfied if the statement of reasons explains in essence the measures laid down, and a specific statement of reasons in support of all the details which might be contained in such a measure cannot be required, provided that such details fall within the general scheme of the measures as a whole. In that regard, the Commission refers in particular to the Court's judgment of 29 February 1984 in Case 37/83 *Rewe-Zentrale AG* v *Landwirtschaftskammer Rheinland* [1984] ECR 1229.

3. *Infringement of Article 123 (3) of the Act of Accession and Article of 6 (2) of Council Regulation No 480/86*

In the *applicant's* view, the Commission fixed the regulatory amounts without taking into account the ceiling established by Article 123 (3) of the Act of Accession, to which Article 6 (2) of Council Regulation No 480/86 also refers. The regulatory amounts imposed by the Commission have in certain cases led to the market price of wine being doubled and have made it impossible to export certain categories of wine.

The *Commission* points out in the first place that a comparison between, on the one hand, the reference prices established by Commission Regulation (EEC) No 1651/85 of 18 June 1985 fixing the reference price for the 1985/86 marketing year in the wine sector (Official Journal 1985, L 159, p. 31) and, on the other, the guide prices established by Council Regulation (EEC) No 462/86 of 25 February 1986 fixing for the 1985/86 marketing year the guide prices applicable in Spain for wine (Official Journal 1986, L 53, p. 17), shows that the guide prices increased by customs duty and by the regulatory amount do not exceed the reference prices. Accordingly, the ceiling set in Article 123 (3) of the Act of Accession has not been exceeded.

The Commission points out in the second place that the figures at its disposal show that Spanish wine exports to the Community of Ten have risen since the entry into force of the contested regulations.

4. *Infringement of Article 123 (2) (a) of the Act of Accession, of Article 2 (3) of Council Regulation No 480/86 and of the joint declaration on the application of the regulatory amounts to table wines*

The *applicant* explains that the Commission fixed a single regulatory amount for table

wines and, consequently, did not make any adjustment for superior quality table wines. Article 123 (3) of the Act of Accession, Article 2 (3) of Council Regulation No 480/86 and the joint declaration on the application of the regulatory amount to table wines expressly provide that, in the case of superior quality table wines, the level of the regulatory amount must be lower than that applicable to traditional categories of table wines. That adjustment enables regulatory amounts to fulfil their true function, namely to offset the difference between the prices of Spanish wines and the prices of Community wines of the same type or category. In the applicant's view, the Commission should therefore have fixed a basic regulatory amount for each category or type of wine specified by the common organization of the market in wine, namely categories A I, A II, A III, R I, R II and R III, and should subsequently have fixed within each category different regulatory amounts on the basis of the quality, the price and the vatting, bottling and labelling of the specific product.

The applicant observes that the application to quality wines of a regulatory amount which is not adjusted to their selling prices also has the effect of raising those prices to a level above the reference prices, contrary to the first and second sentences of Article 123 (3) of the Act of Accession.

Finally, the applicant points out that the calculation of the regulatory amount in the case of categories R I and R II is unintelligible and that the amount does not correspond to the difference between the Community guide prices and Spanish guide prices for the wine-growing year in question. In that regard, therefore, the contested regulations do not satisfy the requirements of Article 123 of the Act of Accession.

The *Commission* considers that the regulatory amounts applicable to superior quality wines were adjusted by the application of a reduced regulatory amount to wines with an appellation of origin. The regulatory amount applicable to those wines is only 0.35 ECU/% vol/hl whilst it is 1.42 ECU/% vol/hl in the case of white table wines and 0.85 ECU/% vol/hl in the case of red and rosé table wines.

5. *Infringement of Article 123 (2) (b) of the Act of Accession and Article 3 of Council Regulation No 480/86*

The *applicant* contends that, according to Article 123 (2) (b) of the Act of Accession and Article 3 of Council Regulation No 480/86, the existence of a risk of disturbances on the market must be established before the regulatory amounts may be applied to wines with an appellation as to origin (and to the products covered by Article 5 of that regulation). In the applicant's view, the existence of such a risk of disturbances can be established only by analyzing the prices charged on the market and changes in the volume of trade. No such analysis could be carried out at the time when the contested regulations were drawn up and adopted. Accordingly, the fixing of a regulatory amount for wines with an appellation as to origin is contrary to the aforesaid provisions of the Act of Accession and of Council Regulation No 480/86.

The *Commission* maintains that the regulatory amount for wines with an appellation as to origin was fixed on the basis of the existence of a risk of disturbances.

6. *Answers to questions put by the Court*

By letter of 17 December 1986 the Court requested the Commission to reply to the following questions:

'(1) What are the factors likely to create disturbances on the market which were taken into consideration in fixing and calculating the regulatory amount applicable to wines with an appellation as to origin?

(2) How was the regulatory amount adjusted in the case of quality (table) wines and what are the factors which were taken into account in calculating the regulatory amount applicable to such wines?

(3) The Commission is requested to provide figures showing compliance with the ceiling referred to in Article 123 (3) of the Act of Accession in the case of the following wines:

(a) Categories A I, A II and A III, with an alcoholic strength of 9.5 and 12.5% vol, in receptacles containing more than 0.75 or less than 0.75 litres respectively;

(b) Categories R I, R II and R III, with an alcoholic strength of 9.5 and 12.5% vol, in receptacles containing more than 0.75 or less than 0.75 litres respectively;

(c) Wine with an appellation as to origin and an alcoholic strength of 9.5 and 12.5% vol.

(4) Why does the regulatory amount for categories R I and R II not correspond to the difference between the Community guide price as published for the 1985/86 wine-growing year (Regulation No 1507/85) and the Spanish guide price published for the same wine-growing year (Regulation No 462/86)?

By letter of 30 January 1987 the Commission replied as follows.

Answer to Question 1

In the Commission's opinion, the factors which can create disturbances on the wine market are price and the possibility of 'commercial substitution', both of which reflect the degree of competition and, consequently, the degree of disturbance.

When the regulatory amounts applicable to wines with an appellation as to origin were fixed, those two factors were taken into account in the following manner:

(a) as regards wines with an appellation as to origin which, owing to their specific characteristics, occupy a special place on the market, the regulatory amounts were fixed at zero. The wines concerned are dry liqueur wines with an appellation of origin (essentially Jerez-Xeres-Sherry, Manzanilla, Montilla-Moriles), which are unlikely to create disturbances on the market of the Community of Ten, which produces exclusively sweet liqueur wines. In addition, since the prices of Spanish liqueur wines are very high, no disturbances were likely.

(b) as regards the other wines with an appellation as to origin, the factor taken into account for the calculation of the regulatory amounts was the price. However, in view of the variation in price for a single wine with an appellation as to origin, and so as not to encumber the management of the system, a flat rate was adopted for all wines with an appellation as to origin.

Answer to Question 2

The adjustment of the regulatory amount for quality table wines was carried out on the basis of their bottling and labelling, thereby yielding an amount fixed at 50% of that applicable to equivalent unbottled table wines.

Although the term 'quality' attaches by definition to quality wines produced in specified regions, it is well known that certain table wines bottled and marketed in the production area are of a high quality owing to the particular care taken over them and to the specific conditions in which they are produced. Moreover, the cost of bottling wine and of transporting bottled wine represents a large part of the final value of the product.

Hence, when the idea of 'quality' was associated with those table wines bottled in the production area, a different regulatory amount was applied to them, which, in the circumstances, was reduced by 50% compared with the amount applicable to equivalent unbottled wines.

Answer to Question 3

The applicable ceiling is that referred to in Article 123 (3) of the Act of Accession.

Preliminary remark: the fixing of regulatory amounts for table wines of types A II, A III and R III is a purely academic exercise since Spain does not produce those types of wine.

Moreover, such an exercise is impossible since wines with an appellation as to origin are not subject to the fixing of a guide price.

Figures expressed in ECU/% vol/hl	A I 9.5% vol		A I 12.5% vol		R I, II 9.5% vol		R I, II 12.5% vol	
	0.75 l	0.75 l [1]	0.75 l	0.75 l [1]	0.75 l	0.75 l [1]	0.75 l	0.75 l [1]
1. Reference price — Non-member countries (ceiling)	8.68	4.23	7.61	4.23	8.93	4.48	7.86	4.48
2. Guide price of Spanish table wines	1.75	1.75	1.75	1.75	1.89	1.89	1.89	1.89
3. Regulatory amount	0.71	1.42	0.71	1.42	0.43	0.85	0.43	0.85
4. Customs duties	1.30	1.00	1.00	0.70	1.30	1.00	1.00	0.70
5. Result of the application of Regulation No 648/86	3.76	4.17	3.46	3.87	3.62	3.74	3.32	3.44
	1 5	1 5	1 5	1 5	1 5	1 5	1 5	1 5

1 Receptacles containing more than 0.75 litres are assimilated to bulk wines for these purposes.

Answer to Question 4

In the Community of Ten the ratio between guide prices for red wines (R I, R II) and guide prices for white wines (A I) is equal to 108%. That ratio is constantly maintained so that the measures adopted reflect that difference in the official prices.

As regards the official prices applicable in Spain, the ratio of 108% between red table wines and white table wines was established by the second indent of Article 122 (1) of the Act of Accession.

However, in view of the relative scarcity of red wine in Spain, the relationship between the price of red table wines and that of white table wines in Spain is approximately 150%.

Thus, in fixing the regulatory amounts applicable to red table wine, the Commission took account of the prices actually charged on the Spanish market instead of the guide price for the same wines, which was fixed with a view to maintaining the relationship between official prices within the Community.

In practice, the regulatory amount applicable to (bulk) red table wines is the result of the difference between the guide price in the Community of Ten and a notional guide price fixed for Spain at 2.57 ECU/% vol/hl. Accordingly, the regulatory amount is equal to 3.42 — 2.57 = 0.85 ECU/% vol/hl. The strict application of the difference between the relevant guide prices would lead to a regulatory amount equal to 3.42 — 1.89 = 1.53 ECU/% vol/hl, which is far too high having regard to the prices of Spanish red table wines actually charged on the market.

T. Koopmans
Judge-Rapporteur