OPINION OF ADVOCATE GENERAL LENZ
delivered on 27 October 1992 *

Mr President,
Members of the Court,

A — Introduction

1. The present direct action by a Spanish producer of sparkling wine is directed against a provision introduced in 1989 in the organization of the market in the wine sector, namely Article 6(5a)(b) of Regulation No 3309/85 [1] as amended by Regulation No 2045/89. [2] That provision lays down the conditions on which the term 'crémant' may be applied to quality sparkling wines psr, [3] a term which was not previously regulated in the Community wine law. On the basis of the second subparagraph of Article 6(4) of Regulation No 3309/85, [4] according to which

references to bottle-fermentation by the 'traditional' method or 'classical' method may be used only if the product:

'(a) was made by sparkling by a second alcoholic fermentation in the bottle;

(b) stayed without interruption in contact with the lees for at least nine months in the same undertaking from the time when the cuvée was constituted;

(c) was separated from the lees by disgorging',

the contested provision reads:

'In the case of quality sparkling wines psr which fulfil the conditions laid down in the second subparagraph of paragraph 4

* Original language: German.

1 — Council Regulation of 18 November 1985 laying down general rules for the description and presentation of sparkling wines and aerated sparkling wines, OJ 1985 L 320, p. 9.

2 — Council Regulation of 19 June 1989 amending Regulation (EEC) No 3309/85 laying down general rules for the description and presentation of sparkling wines and aerated sparkling wines, OJ 1989 L 202, p. 12.

3 — See the definition of that term in the fourth paragraph of Article 1 of Regulation No 823/87 (OJ 1987 L 84, p. 59).

4 — The first subparagraph was also amended by Regulation No 2045/89.

(b) the term "crémant" shall be reserved for quality sparkling wines psr made in France or Luxembourg:

— to which this term has been applied, in combination with the name of the specified region, by the Member State in which the wine was made, and

— which were produced in accordance with special rules laid down for their manufacture by the abovementioned Member States.

However, for five wine-growing years the term "crémant", in French or in translation, may be used to describe a sparkling wine which was traditionally thus described on 1 September 1989.'

2. The applicant challenges that provision because it restricts the sale of its production. As a producer of quality sparkling wines psr which bear the name 'cava' (which since 1986 in Spain and now expressly in Community law is to be used to designate a specified region [5]) it has long used the term 'Gran Cremant' for part of its production. Since 1924 it is the subject of a Spanish trade mark which the applicant holds. I shall return to details of the applicant's situation in my Opinion.

3. The applicant considers that there is no justification from now on for restricting the term 'crémant', other than during the transitional period provided for in the last subparagraph of the contested provision, to quality sparkling wines psr produced in France and Luxembourg. In addition it considers that there is no sufficient statement of reasons for the provision.

4. It claims (the precise wording of the claim may be seen in the Report for the Hearing) that the provision should be declared void and the Council ordered to pay the costs.

5. The Council raised an objection of inadmissibility which, pursuant to the Order of the Court of 5 December 1990, will be decided upon in the final judgment.

6. The Council and the Commission, which has intervened in the proceedings in support of the Council, have contended that the action should be dismissed primarily as inadmissible and alternatively as unfounded and that the applicant should be ordered to pay the costs.

5 — See the fourth indent of the second subparagraph of Article 15(3) of Regulation No 823/87 (OJ 1987 L 84, p. 59) as amended by Regulation No 2043/89 (OJ 1989 L 202, p. 1).

7. After completion of the written procedure Regulation No 3309/85, in which the contested provision was inserted, was replaced by Regulation No 2333/92 [6] which adopted the provision word for word in Article 6(6).

B — Analysis

I — *Preliminary observation*

8. Before discussing the individual pleas of the applicant and defence I should briefly like to make it clear that the adoption of Regulation No 2333/92 should not influence the treatment of the present action. In particular it does not remove the interest in bringing an action; it also does not settle the main issue, which could remove the cause of action.

9. In that respect it may be observed that interest in bringing an action in the case of an application for annulment does not require that the applicant derives advantages from the direct, logically compelling, consequences of the declaration of annulment. On the contrary it is sufficient that the applicant's legal position improves if the defendant fulfils his obligations under Article 176 of the Treaty. [7]

10. According to that provision, if the contested provision were declared void, the Council would have to adjust the new Article 6(6) to the requirements arising from the judgment of the Court. In that respect I refer to the observations made in the *Asteris* judgment. [8] In that judgment the Court had to consider the question whether the Commission had complied in accordance with Article 176 of the EEC Treaty with a judgment in which the Court had declared void a Commission regulation on coefficients for production aids in the tomato sector for a particular marketing year. It was *inter alia* uncertain because the Commission had not amended the parallel regulation for the subsequent marketing years (from 1 July 1984), which had been adopted during the proceedings and revealed the same defect as the contested regulation, in accordance with the Court's annulment of 19 September 1985.

6 — Council Regulation of 13 July 1992 laying down general rules for the description and presentation of sparkling wines and aerated sparkling wines, OJ 1992 L 231, p. 9.

7 — See the judgment in Case 76/79 *Könecke* v *Commission* [1980] ECR 665, paragraphs 8 and 9; in particular the Opinion of Advocate General Reischl in that case, at pp. 687-689.

8 — Joined Cases 97, 193, 99 and 215/86 *Asteris* v *Commission* [1988] ECR 2181.

The Court stated (paragraphs 27 to 31 of the judgment):

'In order to comply with the judgment and to implement it fully, the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure.

However, although a finding of illegality in the grounds of a judgment annulling a measure primarily requires the institution which adopted the measure to eliminate that illegality in the measure intended to replace the annulled measure, it may also, in so far as it relates to a provision with specific scope in a given area, give rise to other consequences for that institution.

In cases such as this one, where the effect of the annulled regulation is limited to a clearly defined period (namely the 1983/84 marketing year), the institution which adopted the measure is first of all under an obligation to ensure that new legislation adopted following the judgment annulling the previous measure and governing the marketing years subsequent to that judgment contains no provisions having the same effect as the provisions held to be illegal.

However, by virtue of the retroactive effect of judgments by which measures are annulled, the finding of illegality takes effect from the date on which the annulled measure entered into force. It follows that in the present case the institution concerned is also under an obligation to eliminate from the regulations already adopted when the annulling judgment was delivered and governing marketing years after 1983/84 any provisions with the same effect as the provision held to be illegal.

Consequently, the finding that the coefficients to be applied to the amount of aid for Greek producers were illegally fixed is binding with respect not only to the 1983/84 marketing year, covered by the annulled regulation, but also to all subsequent marketing years.'

11. Those observations apply all the more in the present case. Article 6(6) of Regulation No 2333/92 is only the result of a codification of Regulation No 3309/85 which the Community legislature considers necessary for practical reasons. [9] In contrast to the provision in respect of the subsequent period which was necessary in the *Asteris* case

9 — See the first recital in the preamble to Regulation No 2333/92.

because the provision applying to the previous marketing year had duly expired, it may be said here that the new provision is an expression of the original intention to introduce the contested rule for an unlimited period. In other words it extends the life of the old provision and in that respect has more than just the 'same content' as the old provision for the purposes of the *Asteris* judgment.

12. It follows that the adoption of Regulation No 2333/92 has neither extinguished the interest in bringing an action nor settled the main issue.

II — *Observations on admissibility*

13. *1. (a)* The objections which the Council makes as to admissibility relate primarily to the requirement in the second paragraph of Article 173 that the contested measure must be a 'decision'. It is true that in its arguments in relation thereto the Council also observes that the applicant is affected by the measure only in its capacity as a producer who uses the term 'crémant' just like every other producer who is in the same position. As appears from a comparison of that argument with the case-law cited by the Council [10] that can be regarded as an observation not only on the question of the legal nature of the contested measure but also on the question whether it is of individual concern to the applicant. Furthermore, and I shall immediately discuss that briefly, both questions are intimately related so that the Court should consider the latter condition of a right of action of its own motion (Article 92(2) of the Rules of Procedure) if it does not regard the action as inadmissible already on other grounds.

14. In the following I shall give my views on both questions and also on the question whether it is of direct concern to the applicant, which only the Commission disputes.

15. *(b)* The scope of this analysis will include an examination of the legal nature and effects of the contested measure which presupposes that its precise content is clear.

16. In that respect it may be observed that in the operative part of its application the applicant challenges the whole Article 6(5a)(b) of Regulation No 3309/85. On the other hand

10 — See Joined Cases 250/86 and 11/87 *RAR* v *Council and Commission* [1989] ECR 2045 (cf. headnote and paragraph 11 of the full judgment).

it is apparent from its observations that it is not challenging all the parts of that provision but only certain aspects. As it recently stated at the hearing, it is concerned with the restriction contained in the introductory sentence of the provision according to which the term 'crémant' is reserved for quality sparkling wines made in France or Luxembourg even if it satisfies the other requirements in relation to quality and the observance of a particular production process. As far as concerns the substantive grounds of complaint (infringement of Community law, misuse of power), the applicant is of the opinion that in view of the aim of the measure and those other conditions for the use of the term the Council was not entitled to impose such a geographical restriction. Even the applicant's observations in relation to disregard of essential procedural requirements do not go further for it complains that the Council has not provided a sufficient statement of reasons for the geographical restriction.

17. Since the condition objected to can be removed from the contested provision without robbing it altogether of its substance [11] the Court can, if it upholds the applicant's claims, restrict the declaration of annulment to that condition. [12] It would also have to do that in this case in order not to exceed the scope placed on the action by the pleas put forward. [13]

18. In those circumstances it is the geographical restriction, that is to say, the special prohibition placed on producers outside France and Luxembourg, which must be the subject of the following examination.

19. *2. (a)* First, as regards the legal nature of the contested measure, there can be no doubt that, if the applicant's position is disregarded, it is *not* a *decision* but a measure of a legislative nature. The test for distinguishing between those two kinds of legal acts is that a decision is binding only on those 'to whom it is addressed' whereas a legislative act (in the present case it can, as a subdivision of that category, only be a measure in the nature of a regulation) has general application. [14]

11 — Only the transitional system of the final subparagraph would, partially, cease to be justified.

12 — See Case 37/71 *Jamet* v *Commission* [1972] ECR 483, paragraphs 9 to 11.

13 — See paragraph 12 of the case cited in the previous footnote as well as, for examples of the practice of the Court, Case 192/83 *Greece* v *Commission* [1985] ECR 2791 and Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299.

14 — Consistent case-law on the distinction between a regulation and a decision: see for example Case 26/86 *Deutz und Geldermann* v *Commission* [1987] ECR 941, paragraph 7; Joined Cases 97, 193, 199 and 215/86 [1988] ECR 2181, paragraph 13; the terms used, which refer generally to measures of a 'legislative nature', derive from the Order of 13 July 1988 in Case 160/88 R *Fédération Européenne de la Santé Animale and Others* v *Commission* [1988] ECR 4121, paragraph 27.

20. In order to draw the distinction it is necessary to appraise the nature of the contested measure and in particular the legal effects which it is intended to produce or actually produces. [15] In that respect it must be decided whether the prohibition which the provision imposes on producers outside France and Luxembourg applies to 'objectively determined situations' and entails 'legal effects for a category of persons considered generally and in the abstract'. [16] In that connection I do not consider that the wording of the provision as an abstract general rule is conclusive. [17] On the other hand it is clear from the definition laid down by the Court that a measure is of a legislative nature if the category of persons affected by it was fixed at the time the measure was adopted. [18] In the present case there is indeed no such 'numerus clausus' of those affected. The contested prohibition affected not only those who ('traditionally') used the term 'crémant' when the provision was adopted but also potential users, that is to say, traders who, if the rule had not been introduced, might later have joined the circle of such traders.

21. Although the *Deutz und Geldermann* case, on which it was sought to rely in the written procedure, may have been different in that respect, [19] it is quite clear in the present case that the contested measure is in the nature of a regulation.

22. *(b)* What is the result of this general definition of the measure?

23. Three different conclusions are conceivable:

— The application is without more ado to be rejected as inadmissible.

— It must be considered whether although the measure is *generally* in the nature of a regulation, nevertheless *vis-à-vis the applicant* it proves to be a decision.

15 — See paragraph 7 of the judgment in *Deutz und Geldermann* (previous footnote).

16 — See paragraph 15 of the judgment in the *Asteris* case (footnote 8).

17 — See Joined Cases 16 and 16/72 *Confédération Nationale des Producteurs de Fruits et Légumes* v *Council* [1962] ECR 471, at p. 479 (the end of the first paragraph of Section 3).

18 — Joined Cases 41 to 44/70 *International Fruit Company* v *Commission* [1971] ECR 411, paragraphs 16 to 22.

19 — See the pertinent examination of the claim which Advocate General Mischo made in his Opinion at pp. 945, 946). From that point of view it would be relevant for the 'numerus clausus' clause whether, as the applicant thinks, the contested condition applied only to producers who had traditionally used the term 'méthode champenoise'.
See in that respect von Winterfeld's criticism in Möglichkeiten der Verbesserung des individuellen Rechtsschutzes im europäischen Gemeinschaftsrecht, *Neue Juristische Wochenschrift* 1989, p. 1409. It is, however, in no way established that meeting that criterion is *sufficient* to classify a measure as a decision; see the extensive observations of Advocate General Tesauro in his Opinion of 26 September 1989 in *Usines Coopératives de Déshydratation du Vexin* v *Commission* [1989] ECR 3811, at pp. 3819, 3821. See also my observations below on the question whether it is of individual concern to the applicant (paragraph 40 et seq.).

— It must be determined, without dwelling any longer on the characteristics of a 'decision', whether the measure is of individual concern to the applicant.

24. In my opinion in view of the position reached in the case-law the last-named alternative should be adopted.

25. In that connection attention should first be drawn to the fundamental difference between the first-mentioned solution on the one hand and the latter two on the other. The first solution may result in the applicant's being denied legal protection, although his legal position in relation to the contested rule corresponds to that of a person to whom a decision is addressed (he is distinguished 'individually just as in the case of the person addressed' [20]). That restriction on legal protection would follow if that solution were adopted simply because *other* persons contemplated by the rule have no such particular position (that is to say, they are affected only in their 'objective capacity' as traders in the particular sector concerned 'in just the same way as any other producer or trader in the same position' [21]).

26. In the two last solutions the legal protection is based solely on the individual position of the applicant. That is right, in my opinion. From two points of view that approach corresponds to the aim of the second paragraph of Article 173. First, in so far as the right of action of an individual is *based* on that provision it is a guarantee of the legal protection of the *individual*. For that reason the second paragraph of Article 173 gives a right of action for annulment of decisions which are of individual (and direct) concern to the applicant without it being possible to object that they are not addressed to him. It is difficult to understand why in the case of a challenge to a measure which vis-à-vis persons other than the applicant produces the effects of a legislative measure another criterion should be adopted and that factor held against the applicant. That observation seems to me all the more important since many Community rules on closer examination reveal themselves to be very complex and have quite different effects vis-à-vis the different groups of persons affected.

27. Secondly, in so far as the second paragraph of Article 173 *limits* the right of action of the individual by the requirement of a decision, it must be observed that that criterion relates to the substance. As is already apparent from the wording of the provision, the Community legislature cannot exclude the right of action simply by adopting the form of a regulation. [22] If, however, in relation to the applicant a measure appears as a

20 — See the line of cases on the term 'of individual concern' (initially in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107).

21 — See the judgment in *Deutz und Geldermann*, paragraph 12.

22 — Established case-law: see for example Case 101/76 *Koninklijke Scholten Honig* v *Council and Commission* [1977] ECR 797, paragraph 6.

decision addressed to a person, is it from his point of view really more than a question of form whether the measure was adopted as a regulation in order to take account of all (i.e. including other) classes of persons concerned?

28. The most recent development in the case-law is in line with those observations.

29. It is true that the Court observed very early that

'if a measure entitled by its author a regulation contains provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons, it must be admitted, without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation, that in any case those provisions do not have the character of a regulation and may therefore be impugned by those persons under the terms of the second paragraph of Article 173.' [23]

30. It was at first, however, uncertain how the Court would decide the case where one and the same provision affected some persons covered by it as the addressees of a decision whereas others were caught only by its legislative effects. [24]

31. In the field of anti-dumping law the Court has clarified the position in its judgments in *Allied Corporation I* [25] and *II* [26] as well as most recently in *Extramet*. [27] In the last-mentioned judgment it summarized the position as follows:

'although in the light of the criteria set out in the second paragraph of Article 173 of the Treaty regulations imposing anti-dumping duties are in fact, as regards their nature and their scope, of a legislative character, their provisions may none the less be of individual concern to certain traders (...)'.

23 — Joined Cases 16 and 17/62 *Producteurs de Fruits et Légumes* v *Council* [1962] ECR 471, at p. 479.

24 — See the discussion by Advocate General Jacobs in his Opinion of 21 March 1991 in Case 358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501 at p. 2507, paragraphs 40 to 48.

25 — Joined Cases 239/82 and 275/82 *Allied Corporation* v *Commission* [1984] ECR 1005, paragraph 11.

26 — Case 53/83 *Allied Corporation* v *Council* [1985] ECR 1621, paragraph 4.

27 — (Footnote 24) paragraph 13 et seq.

32. The Court continued:

'It follows that measures imposing anti-dumping duties may, without losing their character as regulations, be of individual concern in certain circumstances to certain traders who therefore have standing to bring an action for their annulment.'

33. If for the time being we leave aside the question whether those principles can be applied in the sphere of the common agricultural policy, that clarification is doubly useful with regard to the choice between the three abovementioned alternatives. First, it is laid down as a matter of principle that an action may not be rejected as inadmissible solely on the ground of the legislative nature which a provision may have in general, if the applicant shows that it is of individual concern to him. Secondly, that case-law contains an option of a technical nature in that it prefers the concept of a genuine regulation which, however, may prove to be of individual concern to certain persons it contemplates, as opposed to the model of a legal act with a dual nature (that of a regulation for some, a decision for others). Although that solution departs somewhat further from the wording of the second paragraph of Article 173, it has the advantage of clarity and abstract logic. [28]

34. The two solutions should nevertheless not lead to different results, for a measure which is of individual concern to one person and therefore affects him as the addressee of a decision is necessarily, from the point of view of the dual nature model, a decision in relation to him. [29] Furthermore the Court has shown that in practice it considers both characteristics according to the same criteria. [30]

35. We now come to the question whether those principles from the anti-dumping case-law may be transferred to the field of the common agricultural policy. In view of the previous [31] observations which do not specially relate to the anti-dumping sector that question can be answered only in the affirmative. For the sake of precision however it may be mentioned that the principles laid down by the Court in the anti-dumping sector reveal no connection with the undisputed particular features of that sector. That applies first in view of the fact that anti-dumping measures may not be adopted otherwise than by means of a regulation. [32] In the first place, I see no distinction between the case in which the adoption of a regulation is laid down by law and that in which the object and substance of the measure offers the choice of that legal form, as so often happens

28 — See the observations of Advocate General Jacobs in his Opinion in the *Extramet* case (above, footnote 24), paragraph 42.

29 — The *Producteurs de Fruits et Légumes* judgment (footnote 23, above), section 3 at p. 479, was clearly to that effect.

30 — Compare the line of reasoning followed in the judgment in *Deutz und Geldermann* (footnote 14, above) and the statements to the same effect on the distinction between regulations and decisions (Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409 at p. 415, first paragraph) and on the requirement of 'individual concern' (*RAR* — footnote 10, above — paragraph 14 and the Order in Joined Cases C-232/91 and C-233/91 *Petridi* [1991] ECR I-5351, paragraph 11).

31 — Above, paragraphs 25 to 27.

32 — See Article 13(1) of Regulation No 2423/88, OJ 1988 L 209, p. 1.

in the field of common agricultural policy. Secondly, a provision which prescribes the form of a regulation for a measure may merely be based on considerations of practicality. Advocate General Gulmann had to consider such a measure in his Opinion in the *Buckl* case, [33] in which he rightly observed that in view of the case-law of the Court it would 'not be right to reject the application on that ground'. [34] [35]

36. As regards next the particular feature of anti-dumping measures that from the point of view of the manufacturers and exporters affected they may be of the same nature as individual decisions, it suffices to say that the *Extramet* judgment concerns an action brought by an importer. That particular feature, however, does not apply to such traders, which is why the Court allows their actions only after careful consideration of the particular case, [36] but generally dismisses them as inadmissible, especially in the case of independent importers. [37]

37. For all those reasons I am of the opinion that the general classification of the contested provision as a measure in the nature of a regulation is not sufficient for the action to be dismissed as inadmissible. On the contrary, it must be considered whether the applicant is individually concerned by it.

38. *(c)* To answer that question it is necessary first to consider the fact that among the traders who are affected by the contested prohibition a category must be identified to which a fixed number of persons belongs and which cannot be enlarged after adoption of the measure. That category is referred to in the final subparagraph of the relevant provision: producers of sparkling wine who on 1 September 1989 when Regulation No 2045/89 entered into force had traditionally described their products in that way, a category that includes the applicant.

39. In view of the interpretation of the second paragraph of Article 173 [38] proposed here one of the applicant's main arguments

33 — Opinion of 8 July 1992 in Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, I-6074.

34 — i.e. because the contested measure could only be adopted in the form of a regulation.

35 — That case was an action for annulment which Advocate General Gulmann nevertheless considered on the basis of the criterion that the third paragraph of Article 175 of the Treaty must in principle be interpreted in harmony with the second paragraph of Article 173 (paragraph 19 at the foot of the Opinion).

36 — See the observations in the Opinion of Advocate General Jacobs, ibid. paragraphs 23 to 29 as well as the judgments in Joined Cases C-133/87 and C-150/87 *Nashua* v *Commission* [1990] ECR I-719 and Case C-156/87 *Gestetner* v *Commission* [1990] ECR I-781.

37 — Case 307/81 *Alusuisse* v *Council and Commission* [1982] ECR 3463; Joined Cases 239 and 275/82 *Allied Corporation* v *Commission* [1984] ECR 1005; Orders in Case 279/86 *Sermes* v *Commission* [1987] ECR 3109 and in Case 301/86 *Frimodt Pedersen* v *Commission* [1987] ECR 3123 and in Case 205/87 *Nuova Ceam* v *Commission* [1987] ECR 4427.

38 — See paragraph 22 et seq., in particular paragraph 34, above.

may be understood and summarized as meaning that by reason of belonging to that closed category it is to be regarded as individually affected. As, however, the *Deutz und Geldermann* case shows, having regard to the connection between the characteristics 'decision' and 'of individual concern', that is not sufficient to support a right of action in a particular case. [39] There must be a specific connection between the applicant's situation (in the broadest sense) and the contested measure.

40. As Advocate General Tesauro [40] has stated, according to the traditional case-law a causal connection between both factors was required. In that connection it may be remembered that the present action extends only to the geographical restriction of which the applicant complains. It is therefore necessary to show that it is precisely the situation of persons affected by that characteristic who had used the term 'crémant' for their sparkling wine on 1 September 1989 which the legislature had in mind in adopting the provision. The only evidence for such a connection could be the final subparagraph of the provision, which, however, affects not only that position but also that of producers who as a result of other features of the provision will be prevented from using the term 'crémant', namely as a result of the requirements of the quality of the product and the production process.

41. The conditions laid down in the traditional case-law determining whether an applicant is individually affected are therefore not fulfilled.

42. However, I shall now have to discuss the legal development which occurred after the *Deutz und Geldermann* judgment in order to determine whether the applicant can be regarded as individually affected for other reasons.

43. The *Sofrimport* judgment [41] introduces a new factor in that connection: for there to be a special relationship between the measure and the applicant's situation, it suffices if the applicant is protected in that situation by particular clauses in the contested provision. [42] That condition, however, is also not satisfied here.

44. A further category of cases in which the applicant may be regarded as individually affected may have been opened by the *Extramet* judgment. [43] In that case an importer independent of the manufacturer

39 — See the Opinion of Advocate General Mischo, ibid. (footnote 19), p. 947 et seq.

40 — Opinion in Case 244/88 (footnote 19, above), at p. 3821 et seq.

41 — Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477.

42 — A similar consideration applies, in addition to that relating to the causal connection, in actions by third undertakings in relation to the competition rules: see my Opinion of 17 September 1992 in Case C-313/90 *CIRFS and Another* v *Commission* [1993] ECR I-1125, I-1148, paragraphs 83 to 86 and 88 to 90.

43 — Footnote 27, above.

had challenged an anti-dumping regulation which applied to a certain raw material (calcium metal). The Court stated (paragraph 17 of the judgment):

'The applicant has established the existence of a set of factors constituting such a situation which is peculiar to the applicant and which differentiates it, as regards the measure in question, from all other traders. The applicant is the largest importer of the product forming the subject-matter of the anti-dumping measure and, at the same time, the end-user of the product. In addition, its business activities depend to a very large extent on those imports and are seriously affected by the contested regulation in view of the limited number of manufacturers of the product concerned and of the difficulties which it encounters in obtaining supplies from the sole Community producer, which, moreover, is its main competitor for the processed product.'

45. It is clear that that statement is not primarily concerned with the question whether certain persons who from the outset, in particular according to the substance of the provision, represent a closed category of persons affected, have a particular relationship to the measure in view of their situation. On the contrary, those criteria relate to the definition of the 'category', which as a rule can embrace only one person, or at least very few persons.

46. The first question which arises in that connection is whether the principles thus laid down can be transferred to cases of the present kind. As in the case of the question already considered in relation to the interpretation of the second paragraph of Article 173, [44] it is necessary here to determine as a preliminary whether those principles depend on the particular features of the anti-dumping sector. The answer to that is not obvious. It is true that paragraph 16 of the judgment refers to the case of an 'action for annulment of an anti-dumping regulation' but the following considerations are not thereby expressly restricted to that case.

47. Other evidence of the scope of the judgment could be provided by the nature of the criteria. In that respect it may be observed that they refer essentially to the applicant's position on the Community market and the seriousness of the consequences which the contested measure has for its business. A special feature may be observed vis-à-vis the traditional case-law: the *Extramet* judgment is distinguished by the fact that on account of the requisite special relationship between the applicant's situation and the contested measure, for the first time the *economic effects* are the *sole* criterion.

48. The nature of that criterion so defined does not necessarily lead us to the conclusion that it could apply only in anti-dumping law. Why should there not be cases in other spheres in which a measure has effects for a

44 — Paragraph 35 et seq., above.

trader which are to be distinguished from those for other persons contemplated to such an extent that he is in the position of a person to whom a measure is addressed?

49. Although that means that the purely formal classification of the case in anti-dumping law did not determine the *ratio decidendi* of the judgment, objections to its application to other cases might arise from another special feature. The effects considered in the said judgment consisted in a direct intervention in the competitive position of the applicant undertaking (in relation to Péchiney) just like the effects which State aid produces vis-à-vis an undertaking which is competing with the undertaking receiving the aid. That observation in any event justifies talking of an *actual extension* of the *Extramet* principles if they were to be applied to a case which is obviously of a different nature.

50. There is, however, no such extension in the present case because it is very similar in that respect to *Extramet*. It may be observed that in competition among the producers of sparkling wine the term 'crémant' obviously serves to attribute to the particular product qualities which distinguish it from the general category of sparkling wines. That could, however, be regarded by the Community legislature as a source of difficulties. On the one hand, the term does not show clearly the characteristics to which it refers, so that it could be used for sparkling wines of very different qualities, which apparently is what happened in the past. Secondly, there were regulations relating to its use in only one of the Member States, the French Republic, where 'crémant de ...' (followed by the name of the region) might be applied only to the sparkling wines of the Loire, Burgundy and Alsace regions.

51. In that situation the Community legislature's decision to regulate the use of the contested term and in particular to make it depend on certain qualities of the product has a dual effect upon competition: it strengthens the market position of the products entitled to use the term and weakens that of products which lose that right. Since the applicant is one of the producers whose products fall into the last-mentioned category, the contested measure alters to its disadvantage its relationship to the competing producers of France and Luxembourg who may use the term. In those circumstances the 'criterion of impact' used in paragraph 17 of the *Extramet* judgment should also apply in the present case.

52. It is therefore necessary to consider now whether as a result of the applicant's special market position and the effects of the contested measure on its undertaking the applicant is affected by it in the same way as an addressee.

53. As regards the first of those two criteria it is to be observed that for the sake of expediency the basis must be the market in quality sparkling wines psr which bear the term 'crémant'. The applicant does not deny the Community legislature's right to make the use of that term depend on the sparkling wines being of that quality. Furthermore, only those producers should be considered who were using the term on the adoption of the measure for only they may, like the applicant, lose the right or, on the contrary, retain the right to use the term.

54. There is no dispute that within the category of Community producers so defined the applicant has the largest production. The some 11 million bottles (0.75 l) of 'Gran Cremant' which it produces annually mainly for sale on the Spanish market [45] may be compared with the 12 million or so bottles produced in the three regions of Burgundy, Alsace and the Loire as 'crémant de ...' in 1988, the year the contested measure was adopted. According to the parties' statements they were the only French sparkling wines which might be marketed in France with the term 'crémant'. Although Law No 75/577 of 4 July 1975 [46] is confined to prohibiting the use of the term 'crémant' as a description of semi-sparkling, sparkling and other wines which have no right to a designation of origin, its purpose, as shown by the history of its adoption, was to reserve the term for sparkling wines which were produced by the traditional method ('méthode champenoise'). That production method was provided for in three different implementing decrees laying down the registered descriptions of origin 'crémant d'Alsace', 'de Bourgogne' or 'de Loire'.

55. There appear to be no relevant products worth mentioning of other Member States (apart from Spain and France).

56. Finally, it may be observed that between 1986 and 1989 more than two-thirds of all the Cava quality sparkling wines psr which bore the term 'Gran Cremant' were marketed by the applicant. [47]

57. I think those findings suffice to show that the applicant has a clearly distinguished position on the market in quality sparkling wines psr which bear the contested term.

58. As far as concerns the effects on the applicant's undertaking, such effects, as was

45 — See the particulars about the Spanish market in quality sparkling wines psr and the applicant's share thereof (annex 5 to the applicant's observations to the objection to admissibility, p. 4).

46 — *Journal Officiel de la République Française* of 5 July 1975, p. 6813.

47 — See annexes 4 and 6 to the applicant's defence to the Council's objection.

shown in the *Extramet* case, namely:

— that the applicant's economic activity largely depends on business transactions which were adversely affected by the contested measure and

— that that activity was 'severely affected' by the measure,

are to be discerned, if at all, only with difficulty. That applies to the second of the two criteria. Whereas in the case of anti-dumping duty the effects on an importer's business may be calculated very precisely (the duties depend on the import price and are intended to increase it) it is not possible to calculate to the same extent the effect of prohibiting the use of a term; that is all the more so since in the present case a transitional period is provided for in which the producers can prepare their customers by appropriate publicity for the forthcoming alterations. Nevertheless I take the view that having regard to the effects of the measure the applicant is sufficiently distinguished from the category of other producers who fall within the measure's scope for the measure to be regarded as of individual concern to the applicant.

59. In that respect we must first discuss the conditions on which Article 6(5a)(b) makes the use of the term 'crémant' depend as well as the significance which those conditions have for the applicant's product.

60. The said provision requires:

1. as regards the *quality of the product*, that it is a *quality sparkling wine psr*;

2. as regards the *production process*, that it satisfies *the conditions of the second subparagraph of Article 6(4)* of Regulation No 3309/85;

3. as regards *recognition of the product by the Member State of production*,

— that the Member State has assigned the term 'crémant' to the product in combination with the name of a particular region in which the wine was made (the first subsubparagraph of the provision);

— that the wines were produced in accordance with the special rules laid down for their manufacture by the Member State (second subsubparagraph of the provision);

4. as regards the *origin*, that the wines are made in *France or Luxembourg*.

61. It is not denied that the applicant's product satisfies the conditions under (1) and (2). It is also clear that in accordance with the condition at (3) above the national rules do not have to have been in force on the adoption of the provision: they may be adopted subsequently, as is shown in the case of Luxembourg where they were adopted only in 1991.

62. Apart from the condition at (4) the applicant's product satisfies all the requirements which the Community rule specifies before a product may use the designated term. In competition with producers who likewise satisfy the conditions of quality and in addition the contested geographical condition, it would have the special advantage that it had used the term for its product for a long time (at least more than 65 years). That circumstance is significant for the Spanish market, to which the main part of the applicant's sales go. As far as that market is concerned it must also be borne in mind that in using that term the applicant has since 1924 used a trade mark and thus ensured that the consumer is particularly aware of the relationship between that term and its product.

63. The loss which is now taking place of that means of marketing affects the applicant all the more in that the French manufacturers who satisfy the geographical condition are its main rivals in the market in quality sparkling wines psr which are produced according to the method referred to in the second subparagraph of Article 6(4) of Regulation No 3309/85.

64. For all those reasons I am led to the conclusion that the applicant is also distinguished from the category of traders affected by the effects which the measure has on its undertaking, and the measure is thus of individual concern to it.

65. In those circumstances I do not think it necessary to discuss the applicant's argument in relation to the denial of legal protection and consider what significance it has that the applicant has no right of action before the national courts against the contested measures since the prohibition resulting from the geographical restriction does not require a national measure for its implementation.

66. *(d)* As regards the question whether it is of direct concern to the applicant, which the Commission denies, I can immediately follow on from what I have previously said. The Commission bases its view on the fact that there is nothing to show that Spain would have attributed to the applicant the use of the term on the conditions laid down in the first subsubparagraph of the relevant provision if the Community legislature had

not imposed the contested geographical restriction. The Commission thus turns the matter upside down. The applicant complains of the hardship caused by the prohibition, or more precisely the loss of the possibility of using the word 'crémant' to describe its products. That hardship arises without any action by the particular Member State and in particular does not depend on any discretion exercised by it.

67. The action is therefore admissible.

III — *The arguments on substance*

68. As I have already shown in my observations on admissibility the contested measure excludes some products (including those of the applicant) from the possibility of using the term 'crémant' simply because the place of production lies outside France and Luxembourg. Such different treatment infringes the prohibition of discrimination in Article 40(3) of the EEC Treaty if it is not justified on objective grounds. [48]

69. First, such justification might be found in the general scheme of Regulation No 3309/85 which contains the contested provision. The second, third, fourth and sixth recitals in the preamble to the regulation indicate that a distinction is made between mandatory and optional information in that scheme. Since pursuant to the second subparagraph of Article 15(4) of Regulation No 823/87 as amended by Regulation No 2043/89 as well as the wording and grounds of the contested provision the term 'crémant' is optional information, it must satisfy the principle summarized in the sixth recital to Regulation No 3309/85 as follows:

'The choice of optional information should ... be restricted to details which are not inaccurate or liable to create confusion in the minds of final consumers or others for whom the information is intended.'

70. The third recital to Regulation No 2045/89 indicates that the contested geographical restriction is an application of that principle:

'Those rules [in relation to the application of the name of a particular wine-growing area] also provide that the name of a specified region may be combined with details concerning the method of manufacture or the type of product; ... in order *to protect* such traditional descriptions which are used for other types of products *of specific origin*,

48 — See Case C-236/90 *Maier* v *Freistaat Bayern* [1992] ECR I-4483, paragraph 25.

the term "crémant" should be reserved for certain quality sparkling wines psr manufactured in France and Luxembourg.'

71. In the first place it is therefore necessary to consider whether the term 'crémant' refers to a specific origin with the result that its use on products produced outside France and Luxembourg could mislead the consumer.

72. In that connection it is necessary to have regard to the principles which the Court laid down in its judgment on 'Sekt' [49] on the question of appellations of origin in the wine sector. [50] Although that judgment concerns free movement of goods and not the common agricultural policy, the considerations mentioned there, contrary to the Council's view, could be applied to the present case since the protection of appellations of origin which the Court at the time considered from various aspects of Article 36 of the EEC Treaty is intended according to paragraph 7 of the judgment *inter alia* to protect the consumer from misleading information.

73. According to that judgment,

'as regards indications of origin ... the geographical area of origin of a product must confer on it a specific quality and specific characteristics of such a nature as to distinguish it from all other products.' [51]

74. According to paragraph 8 of the judgment the area of origin must show homogeneous natural features which distinguish it in contrast to adjacent areas. In the present case it is not denied that the two Member States France and Luxembourg have no common homogeneous area, nor does the French territory as a whole. In the same connection the Court further stated that the method of production used

'is not alone decisive, independently of the quality of the grape used, in determining [the] origin'

of certain products.

49 — Case 12/74 *Commission* v *Germany* [1975] ECR 181.

50 — Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1) does not apply, according to the second paragraph of Article 1(1), to wine products or alcoholic drinks.

51 — Paragraph 7 of the judgment.

75. The Court continued:

'Moreover, the method of production of a vine product constitutes a criterion which is all the less capable of being used by itself to identify origin as, to the extent to which it is not linked with the use of a specific type of grape, the method in question may be employed in other geographical areas.'

76. Against that background it may be observed that the wording of the provision itself contradicts the arguments of the Community institutions to the effect that the term 'crémant' refers to a particular origin. On the contrary, it refers to the method of production mentioned in Article 6(4) of Regulation No 3309/85, which the parties termed the 'traditional method' in accordance with that provision. According to the first subparagraph that term may be used only if it has been applied, *in combination with the name of the specified region*, by the Member State in which the wine was made.

77. It is therefore not surprising that the arguments which the Council and Commission put forward in support of the opposite view do not stand up to scrutiny.

78. We do not need to dwell long on the Commission's argument that 'crémant' is a French word. In the judgment in the 'Sekt' case the Court stated:

'An area of origin which is defined on the basis ... of ... a linguistic criterion cannot constitute a geographical area ... capable of justifying an indication of origin ...'.

79. In that connection it may also be observed that neither the etymological origin of the word nor its meaning in the French language refers to a particular origin of the product. As far as the first of those two points of view is concerned it seems that the term has its roots in dialect of the 'Champagne' area. It is, however, undeniable that it was immediately also used outside that area. Furthermore, it is clear that it is precisely the aim of the contested provision to regulate the term 'crémant' in order to make it possible for producers to upgrade their products where they produce outside Champagne and are thus precluded under the second subparagraph of Article 6(5) of Regulation No 3309/85 from using the term 'méthode champenoise'. As far as the second of those aspects is concerned, the word 'crémant' refers to the fact that the wine by reason of its low gas pressure sparkles in a particular fashion. That also has nothing to do with its origin, as all agree.

80. Next it is necessary to deal with an argument upon which the Commission laid much

emphasis. The Commission is of the view that the term 'crémant' has gradually become in the consumer's mind a term referring to a particular geographical origin. To that extent regard should be had to certain permanent practices which had a long tradition and ought to be protected.

81. In that respect not only the Commission but also the Council rely on the special feature of the system introduced in France in 1975 according to which the term 'crémant' is attributed on the basis of provisions adopted for individual wine-growing areas. On the one hand those provisions delimit the particular wine-growing area and define the production process (corresponding to the provision in the second subparagraph of Article 6(4) of Regulation No 3309/85); secondly they attribute to products which satisfy the said requirements the controlled term 'crémant de ...' [followed by the name of the wine-growing area] .

82. Against that argument it may be observed that the said French provisions were not even intended to make an indication of origin out of a term referring to a method of production. On the evidence of the background to the adoption of Law 75/577 the said system was to be introduced first into Burgundy, Alsace and the Loire without, however, later being confined to those areas. Moreover, it was not even capable of producing such an effect since producers from other Member States, namely the applicant, lawfully continued to describe their products as 'crémant'. Finally the Council can also not rely on the fact that in the French provisions which were laid down before the adoption of the contested provision the term 'crémant' was necessarily combined with the three named areas of wine cultivation. The provision in question also allows producers from other areas of France as well as Luxembourg producers to use the term 'crémant' (on the conditions which are there set out).

83. In view of all that it follows that the term 'crémant', contrary to the third recital in Regulation No 2045/89 and contrary to the arguments put forward by the Community institutions, does not represent an indication of origin. Protection of the consumer against being misled in respect of the origin of the product thus does not justify the contested geographical limitation.

84. Contrary to the Commission's view, protection of the consumer against information which for linguistic reasons he cannot understand can also not be regarded as justification for the measure. As the applicant's example shows, the term 'crémant' has been used for a long time by Spanish producers for the purposes of the Spanish market in order to facilitate a distinction from other sparkling wines. What the term now implies on the basis of the contested provision can be clarified by the descriptions which can be used pursuant to the first subparagraph of Article 6(4) of Regulation No 3309/85 in combination with the term 'crémant'. Furthermore it is also not the aim of the mea-

sure to restrict the use of the last-mentioned term in Member States where possibly it is not understood (the provision in no way precludes the export of French and Luxembourg products to any other Member States) but to make it depend on conditions relating to the quality — and the origin — of the product.

85. In conclusion it is necessary to consider the arguments of the Community institutions in relation to the previous use of the terms 'cava' and 'Gran Cremant' in Spain. Those arguments could be understood as meaning that the Community legislature ought to have precluded especially Spanish producers from using the term. More precisely, the Community institutions consider that in France traditionally the term 'crémant' was used to distinguish sparkling wines produced by the traditional method from other sparkling wines, whereas in Spain the term 'cava' fulfilled that aim. In that respect the Council refers to the Spanish Regulations of 1972 [52] and 1986 [53] according to which the term 'cava' may be used only if the relevant product was made by the traditional method. The term 'crémant' was not in Spain traditionally related to the said requirements regarding the method of production. The Spanish producers, in particular the applicant, used the term 'Gran Cremant' (and not simply 'crémant') merely as a trade description to identify certain products within their range.

52 — Annex 4 to the defence.

53 — Annex 6 to the defence.

86. Against that it may be observed that protection of traditions as such is neither the declared aim of the measure nor a ground which can justify the differing treatment of traders.

87. It must be conceded to the Community institutions, however, that in view of the factual and legal circumstances to which the Community institutions have referred, the system adopted by the Council for the attribution of the term 'crémant' could cause certain difficulties.

88. The fact is that the term 'cava' according to the said 1972 and 1986 Regulations describes both the production method in question here and a particular wine-growing area, an area of considerable size. The latter seems to relate to the fact that the term 'cava' originally was only a general term for sparkling wine.

89. Those circumstances do not, however, justify the contested measure. The aim of correctly informing the consumer, which is the sole ground of justification which can be considered here, can be achieved without the contested exclusion of Spanish producers.

90. The first problem arising from those circumstances and connected with the originally very general nature of the term 'cava', namely that it cannot be associated with the term 'crémant' in the same way as the names of the French wine-growing areas, could be solved by a very simple special rule, which could provide that for descriptions of 'cava' sparkling wines only the names of small territorial units within the 'cava' area may be associated with the term 'crémant' (for example 'Cremant de Rioja').

91. The second problem for the Community legislature is whether a Spanish producer may use, in addition to the term 'crémant' used in that way, also the general description 'cava' and/or the trade description 'Gran Cremant' on the same label without creating the risk of misleading the consumer. In that respect it is sufficient to observe that even if the Council rightly feared that the consumer might be misled in that connection it was at the most entitled to provide for restrictions in respect of the use of the two terms. As regards the term 'cava' I take the view, moreover, that the consumer would in no way be misled by its use in addition to the description 'crémant de ...'.

92. For all those reasons I am of the opinion that the contested measure infringes the prohibition of discrimination in Article 40(3) of the EEC Treaty and must therefore be declared void without it being necessary to consider the other grounds of the action.

C — Conclusions

93. Since as I have explained I consider the action in this case to be admissible and well founded I propose that the Court:

— declare Article 6(5a)(b) of Regulation No 3309/85 as amended by Regulation No 2045/89 void in so far as it restricts the use of the term 'crémant' to sparkling wines produced in France and Luxembourg;

— order the Council to pay the costs of the proceedings pursuant to Article 69(2) of the Rules of Procedure, except for the costs of the Commission which the latter must bear itself pursuant to Article 69(4).