OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 11 December 1985 *

Mr President,
Members of the Court,

1. By order of 30 August 1984 the Fourth Criminal Senate of the Bayerisches Oberstes Landesgericht [Bavarian Supreme Regional Court] requested the Court to give a preliminary ruling on the interpretation of the first sentence of the first subparagraph of Article 36 (1) 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).

Title IV of that regulation, which includes the provision referred to by the national court, lays down rules concerning certain oenological processes. In particular, Articles 32 and 33 specify the methods by which, and the limits within which, the natural alcoholic strength by volume of grapes and other products suitable for yielding table wine may be increased. Article 34 lays down detailed rules in respect of acidification and deacidification. Finally, Article 36 provides that 'none of [those] processes . . . shall be authorized unless carried out as a single operation at the time when the fresh grapes, grape must, grape must in fermentation or new wine still in fermentation are being turned into wine suitable for yielding table wine or into table wine, and in the wine-growing zone where the fresh grapes used have been harvested . . .'. The second paragraph of Article 36 (1) adds that 'each of [those] processes must be notified to the competent authorities'. In the Federal Republic of Germany, the infringement of those provisions is punished under Paragraph 67 (1) (i) of the Weingesetz [Wine Law], in the version in force since 27 August 1982, by a term of imprisonment not exceeding three years or by the imposition of a fine.

2. Mr Hans Röser, a German national, owns a number of wine cellars in Kitzingen which, for the purposes of Article 32 of Regulation No 337/79, is situated in wine-growing zone A. In September 1982, he enriched in his wine cellars 1 659 litres of must in fermentation obtained from grapes harvested in Italy (wine-growing zone C II) and marketed it as 'Federweißer'. That beverage, which is sold in unsealed containers in the weeks following harvesting, is intended to be consumed immediately. If the process of fermentation were allowed to continue, the product would turn into wine and, if derived from certain vine varieties, into wine suitable for yielding table wine.

Mr Röser, who was charged with infringing those provisions, argued before the Amtsgericht [Local Court], Würzburg, that Article 36 should be interpreted literally. In his view, it applies only if the basic or intermediate products, or both, are turned into table wine and not where, as in the case of 'Federweisser', the process is arrested at an earlier stage, depending on the commercial purpose for which the product is intended. The national court acquitted the defendant on 27 October 1983. It pointed out that it was unclear from the wording of Article 36 whether that provision applies only to the process of wine-making or also to the manufacture of a beverage which, owing to its nature, is intended for sale to the consumer as an intermediate product of wine-making.

* Translated from the Italian.

On hearing the appeal lodged by the public prosecutor's office, the Bayerisches Oberstes Landesgericht did not deny that the interpretation suggested by the defendant was plausible, but considered it preferable to adopt the opposite argument to the effect that Article 36 must be applied irrespective of the production stage, whether intermediate or final, with which the processing of the grapes ends. In its order, the court states that, since 'Federweißer', as grape must in fermentation, can subsequently be processed into wine suitable for yielding table wine, it is difficult to establish whether the product is to be classified as a commercial beverage or as a product which can subsequently be turned into wine. A restrictive interpretation of the rule seems to be excluded also by the aim which it pursues, namely to allow improved supervision in the zones in which the grapes are harvested and to ensure that production takes place as close as possible to the place of origin of the grapes.

The question, however, was left open. The Oberstes Landesgericht therefore stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling: 'Is the first sentence of Article 36 (1) of Council Regulation No 337/79 to be interpreted to the effect that the requirement that increases in natural alcoholic strength at the time when grape must in fermentation is being processed must take place in the wine-growing zone where the fresh grapes used have been harvested applies even where the must is not intended to be turned into wine suitable for yielding table wine or into table wine but is intended for sale, as "Federweißer", to the final consumer?'

3. The Commission of the European Communities acknowledges that the purpose of Article 36 is to permit effective supervision of enrichment processes, which may in principle be carried out only in the zone in which the grapes have been harvested. In fact, it recognizes that if that limitation did not also apply to intermediate products of wine making, it would be extremely easy to carry out fraudulent operations. If charged by an inspector with enriching the product, any wine grower could reply 'no offence has been committed, the product is "Federweißer" and is not intended for being turned into table wine'.

None the less, the Commission is convinced that the wording of Article 36 does not correspond to the aim which it pursues. There is an omission in the wording, that is to say the provision regulates cases where an increase in alcoholic strength takes place as part of the process of turning 'fresh grapes . . . into wine suitable for yielding table wine', but does not cover cases where processing is arrested at an intermediate stage in order to produce beverages of the 'Federweisser' type. If the problem were exclusively a matter of administrative law, it would be quite legitimate to resolve the contradiction by giving precedence to the objective pursued by the Community legislature. However, Article 36 is closely connected with the criminal laws of the Member States in so far as it identifies, or helps to identify, situations involving offences under those laws. Further, such laws are characterized by requirements of certainty which are such as to rule out the possibility of interpreting the Community rule *in extenso* or, even worse, in a manner that is contrary to its wording.

Accordingly, it is the wording which needs to be rectified. The Commission has taken stock of that necessity and has submitted to the Council a proposal to amend the rule so that it reads as follows: 'None of the processes mentioned in Articles 33 and 34 shall be authorized unless carried out as a single operation at the time when the fresh grapes, grape must, grape must in fermentation . . . are being turned into wine suitable

for yielding table wine or into table wine or into *another beverage intended for direct human consumption* . . ., in the wine-growing zone where the fresh grapes used have been harvested' (emphasis added). In future, therefore, there will no longer be any room for doubt. In view of the present state of the law, however, the Commission maintains that the question submitted by the German court can only be answered in the negative, that is to say the rule applies only to processing operations which are concerned with the production either of wine suitable for yielding table wine or of table wine.

4. The Commission's argument cannot be accepted. The premise on which it is based, namely that Article 36 is defective inasmuch as it makes no provision for processes resulting in the manufacture of a product other than wine suitable for yielding table wine, is, as I intend to show, erroneous. Clearly then, the consequence following from that premise, namely that substances suitable for yielding table wine may undergo unsupervised — albeit temporary — enrichment simply because they are intended for direct consumption as intermediate products, is unacceptable. Finally, the legislative amendment proposed by the Commission is contrary to the purpose for which the Community legislature allows the alcoholic strength to be increased, namely to ensure that the varieties of grapes classified in Regulation No 337/79 yield a quality wine, suitable for consumption as a table wine, and not just 'another drink' consumed on a seasonal basis.

However, it is necessary to proceed systematically and, in the first place, to clear up two misunderstandings. The first misunderstanding is patent. The fact that Article 36 is referred to in the criminal laws of a Member State is wholly irrelevant for the purposes of the interpretation sought from the Court. The Commission has evidently forgotten that 'Article 177, which is worded in general terms, draws no distinction according to the nature, criminal or otherwise, of the national proceedings within the framework of which the preliminary questions have been formulated. The effectiveness of Community law cannot vary according to the various branches of national law which it may affect' (judgment of 21 March 1972 in Case 82/71 *Pubblico Ministero* v *SAIL* [1972] ECR 119).

That brings me to the second misunderstanding. 'Federweißer', *as a commercial beverage similar to wine*, is not subject to the rules laid down by Regulation No 337/79 and is not included by that regulation amongst the products forming part of the common organization of the market in wine. However, 'Federweisser' does form part of that common organization of the market, *as grape must in fermentation*, provided that it is obtained from certain grapes suitable for yielding table wine. Article 48 (3) (b) of that regulation provides that '. . . grape must in fermentation . . . from vine varieties not included in the classification may be put into circulation only for the purposes of distillation or vinegar making. These products may also be used for consumption in the families of wine growers'.

5. Having clarified those points, I now turn to the question submitted by the national court. As I recalled in paragraph 2, the Oberstes Landesgericht wishes to ascertain whether, for the purposes of Article 36, the increase in the alcoholic strength of grape must in fermentation may take place only in the zone in which the grapes are harvested, even if such must is not intended to be turned into wine but is intended for sale in that state as 'Federweisser'.

In the first place I propose to consider the territorial or geographical aspect of the problem. In the light of the conditions and the limits laid down by Regulation No 337/79, it seems clear in my view that the increase in natural alcoholic strength may, *in itself*, take place only in the zones in which the grapes have been harvested. The reasoning behind that principle is self-evident. The Community legislature considered that 'in certain years it may be necessary to permit the enrichment of products suitable for yielding table wine; ... however, it is important, in the interests alike of the quality and of the market, that such enrichment be subject to certain conditions and limits and that it be applied only to produce of certain vine varieties and of a minimum potential natural alcoholic strength; [moreover], since production conditions vary considerably between one ... zone of the Community and another ..., it is essential that account be taken of such variations, in particular in respect of enrichment procedures' (see the 21st recital in the preamble). In other words, protection is afforded to grapes which, whilst being naturally suitable for yielding table wine, need 'a top-up of alcohol' in difficult years.

Article 32 accurately implements those proposals. It provides that the products referred to in the first subparagraph (fresh grapes, must and so on) may not be subjected to an increase in alcoholic strength unless their minimum natural alcoholic strength is of a certain level: 5% vol. in zone A (Federal Republic of Germany) and 8.5% vol. in zone C II (Italy). The third subparagraph adds that the increase in those minimum percentages may not exceed 3.5% in zone A and 2% in zone C. However, Article 33 (6) provides that '*in no case* shall the [enrichment] processes have the effect of raising to more than 11.5% vol. in ... zone A, ... the total alcoholic strength by volume' of the products in question (emphasis added). Hence it is clear that, in order to adhere to that maximum percentage, enrichment must take place exclusively in the zone in which the grapes are harvested. If, for instance, a German wine grower imported into Germany Italian grape must with a minimum alcoholic strength of 8.5% vol. and intended to enrich it in his wine cellars by the addition of must concentrate, it would be possible for him, on the basis of the percentage increases provided for zone A (3.5% vol.) to raise the alcoholic strength to 12% vol., thereby exceeding the maximum percentage permitted by Article 33 (6), which — as the Court is aware — is 11.5% vol. in the case of Germany.

The converse situation, that is to say where an Italian wine grower wished to increase the alcoholic strength of must imported from Germany, would lead to an even more disconcerting result. On the basis of the percentages laid down by Article 32 for Italy (5% vol. in respect of minimum alcoholic strength and 2% vol. in respect of the increase), the operation would serve no purpose since the must would not even attain the minimum alcoholic strength, which, for zone C II, is 8.5% vol.

Hence the finding on which I have based my argument, namely that enrichment is possible only in the zone in which the grapes have been harvested, stems primarily from a mathematical calculation rather than common sense. Nor is that finding invalidated by the objection that the aforesaid quantitative limits are inoperative where must in fermentation is not intended to be turned into table wine. Such an objection would disregard the difference between *the conditions governing enrichment* (which are laid down by Articles 32 and 33) and *the conditions for the grant of authorization* to carry out the operations designed to increase the alcoholic strength (which are instead laid down by Article 36). Even on

the assumption that authorization may be dispensed with in certain cases, anyone wishing to enrich the must obtained from certain vine varieties must in any event comply with the (quantitative and geographical) conditions laid down for that purpose by Articles 32 and 33.

6. That conclusion is decisive for the purposes of this case, although it is insufficient to dispel all uncertainty concerning the proper application of Article 36. I am referring to the alleged omission complained of by the Commission which lies at the root of the question submitted to the Court. If problems of a territorial nature are left aside, the question could read as follows: Is the first subparagraph of Article 36 (1) to be interpreted as meaning that the alcoholic strength of must in fermentation derived from the vine varieties referred to in Article 49 may be increased even if the must is not used for making wine suitable for yielding table wine? In more general terms, may the products which, according to Regulation No 337/79, are suitable for yielding table wine be enriched, in accordance with the detailed rules laid down by that regulation, even if they are intended for sale as beverages other than table wine? In my view, that question must be answered in the negative.

The reason is as follows: Article 46 lays down that 'only those oenological practices and processes referred to in this regulation ... shall be authorized for the products defined under points 1 to 5 ... of Annex II' (point 3 of which relates to must in fermentation). Any other operations are not permitted and the reason for that prohibition is simple. The same article provides that 'the practices and processes referred to in the first subparagraph may only be applied for the purpose of ensuring proper vinification and/or preservation of the products concerned'. However — and this is the point — what does *proper vinification* mean? Clearly, that concept has already been defined in relation to the processes referred to in Article 36 and consequently in relation to the enrichment of must in fermentation, and does not require further clarification. Vinification consists in turning fresh grapes, must and other vine products into wine suitable for consumption as table wine. Any other possible uses, whether intermediate or final, must therefore be excluded.

Hence the solution is obvious. It is clear from the provisions of Article 46 in conjunction with those of Article 36 that, in the case of products suitable for yielding table wine, an increase in alcoholic strength is possible only if it takes place under the conditions referred to in Articles 32 and 33 and may not be authorized unless it is carried out as a single operation for the purpose of ensuring proper vinification of the aforesaid products, that is to say ensuring that they are turned into wine suitable for yielding table wine.

That is undoubtedly a very severe conclusion, but it is also the only conclusion which is in keeping with both the wording of the rules in question and the objectives of the organization of the market in wine. Moreover, it has the advantage of being in conformity with the objectives of Council Regulation (EEC) No 338/79 of 5 February 1979 laying down special provisions relating to quality wines produced in specified regions (Official Journal 1979, L 54, p. 48). Article 10 of that regulation authorizes operations designed to enrich products suitable for yielding such wines only if they are carried out under the conditions laid down by Article 36 of Regulation No 337/79.

7. In the light of all the foregoing considerations, I suggest that the Court should answer the questions submitted by the Bayerisches Oberstes Landesgericht, by order of 30 August 1984 in criminal proceedings against Mr Hans Röser, in the following manner:

'The first sentence of the first subparagraph of Article 36 (1) of Council Regulation (EEC) No 337/79 must be interpreted as meaning that, in the case of products suitable for yielding table wine which are obtained from the vine varieties referred to in Article 49, an increase in natural alcoholic strength by volume may take place only under the conditions laid down by Articles 32 and 33 and may not be authorized unless it is carried out as a single operation at the time when the above-mentioned products are being turned into wine suitable for yielding table wine or into table wine, in the wine-growing zone where the fresh grapes used have been harvested.'