bourg in the 1976 and 1977 financial years in respect of private-storage aid for table wines;

2. Orders the parties to bear their own costs.

Mackenzie Stuart Koopmans Bahlmann

Pescatore O'Keeffe Bosco Due

Delivered in open court in Luxembourg on 12 July 1984.

For the Registrar

H. A. Rühl

Principal Administrator

A. J. Mackenzie Stuart

President

OPINION OF MR ADVOCATE GENERAL DARMON DELIVERED ON 12 APRIL 1984 [1]

Mr President,
Members of the Court,

1. On 14 January 1983, the Commission of the European Communities adopted two decisions relating to the clearance of the accounts submitted by the Grand Duchy of Luxembourg in respect of expenditure for the 1976 and 1977 financial years financed by the European Guidance and Guarantee Fund (EAGGF).

By those two decisions [2], the Commission refused to allow expenditure declared in respect of private-storage aid for table wine to the amount of:

(a) LFR 9 639 938 for the 1976 financial year;

(b) LFR 5 149 799 for the 1977 financial year.

The Grand Duchy of Luxembourg accepts that those decisions are well founded to the extent that they refused to allow sums of LFR 937 837 in respect

1 — Translated from the French.

2 — Decision 83/38/EEC (Official Journal L 38 of 10 February 1983, p. 32) as regards the 1976 financial year and Decision 83/49/EEC (Official Journal L 40 of 12 February 1983, p. 57) as regards the 1977 financial year.

of 1976 and LFR 496 591 in respect of 1977 on the ground that the storage contracts concerned had retroactive effect [1] but asks the Court in this application to declare void the Commission's refusal to charge to the EAGGF sums of:

(a) LFR 8 702 101 for the 1976 financial year,

(b) LFR 4 653 208 for the 1977 financial year,

making a total of LFR 13 355 309.

Those sums represent the amount of aid granted in respect of table wine for which storage contracts were concluded and which, at the time, was declared to be table wine, although, after the expiry of the storage period, an undetermined proportion of it obtained the *Marque nationale du vin luxembourgeois,* that is to say, was recognized as quality wine produced in specified regions (quality wines psr) within the meaning of Council Regulation No 817/70 of 28 April 1970 [2].

2. The Community rules for the wine sector are laid down in a number of provisions, of which the following are of particular relevance to this application:

Council Regulation No 816/70 of 28 April 1970 [3] contains further provisions on the common organization of the market in wine. It takes account, in particular, of the "need to stabilize markets and ensure a fair standard of living for the agricultural community concerned" and makes arrangements so that "intervention measures may be taken in the form of aid for private storage ... of table wines". Article 6 (1) of the regulation provides as follows:

"As soon as private-storage aid measures take effect the intervention agencies designated by Member States shall conclude, with producers who apply for them, storage contracts in respect of the wines affected by these measures."

The detailed rules applying to such intervention measures were laid down by Regulation No 1437/70 of the Commission and subsequently by Commission Regulation No 2015/76 [1].

The first subparagraph of Article 3 (1) of Regulation No 1437/70 provides that "Intervention agencies shall conclude contracts only for table wines". The second paragraph of Article 1 of Regulation No 2015/76 provides that storage contracts may be concluded, not only for table wines, but also for "grape musts and concentrated grape musts".

Several of the provisions of Regulation No 2015/76 were amended by Commission Regulation No 2206/77 of 5 October 1977 [4], which, among other things, recasts Article 6. The new Article 6 (7) reads as follows:

"A table wine which has been the subject of a storage contract may not subsequently be recognized as a quality wine psr".

The third recital in the preamble to Regulation No 2206/77 states:

"Whereas, so as to avoid abuses, it should be *stipulated* ["confirmer"-

1 — Article 8 (1) of Regulation (EEC) No 1437/70 of the Commission of 20 July 1970 on storage contracts for table wine (Official Journal, English Special Edition 1970 (II), p. 469) and Article 8 of Commission Regulation (EEC) No 2015/76 of 13 August 1976 on storage contracts fot table wine, grape must and concentrated grape must (Official Journal L 221 of 14 August 1976, p. 20).

2 — Regulation (EEC) No 817/70 of the Council of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions (Official Journal, English Special Edition 1970, (I), p. 252).

3 — Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970, (I), p. 234).

4 — Official Journal L 255 of 6 October 1977, p. 13.

"confirmed" is used in the French version] that a table wine which has been the subject of a storage contract may not be subsequently recognized as a quality wine psr."

The basis of this dispute is a disagreement between the Grand Duchy of Luxembourg and the Commission over the régime for quality wines and the interpretation of the relevant texts.

3. In the words of a memorandum drawn up on 3 March 1983 by the Luxembourg Ministry for Agriculture, Viticulture, Water Control and Forestry, under the Luxembourg system

"all wine is initially table wine and any wine may, following presentation to the *Commission de la Marque Nationale*", (provided that it satisfies certain requirements) "become a quality wine psr".

The position of the Grand Duchy of Luxembourg is as follows:

Neither the basic Regulation No 816/70 nor the implementing Regulations Nos 1437/70 and 2015/76 precluded a table wine in respect of which a storage contract had been concluded from being submitted for and obtaining the *Marque nationale* when that contract expired.

Such wine was only excluded by Regulation No 2206/77 of 5 October 1977, specifically by Article 6 (7), quoted above, which far from "confirming" the previous rules on the matter, in fact amended them.

The Grand Duchy of Luxembourg argues that storage contracts concluded when the former rules applied did not preclude aid being granted to producers whose wine obtained the Marque nationale after the end of the storage period; moreover, it points out that:

(a) the object of the system was safeguarded, since all wines in respect of which a storage contract was concluded were kept off the market during the storage period;

(b) the necessary measures have been taken by the Grand Duchy of Luxembourg, following the entry into force of Regulation No 2206/77, to ensure that table wines in respect of which storage contracts are concluded are classed once and for all as table wines and producers are precluded from submitting them thereafter with a view to their obtaining the *Marque nationale.*

4. The Commission disagrees completely with all those contentions.

In its view, the common organization of the markets in the wine sector rests on a basic distinction between

(a) table wines, on the one hand, and

(b) quality wines psr, both wines already recognized as such and potential quality wines psr, on the other.

A table wine remains table wine throughout its existence until it is consumed. In contrast, a wine which obtains the *Marque nationale* has never been a table wine. It may not be the subject of storage contracts, since they may be concluded only in respect of table wines.

This distinction underlies the Community rules and, in particular, the respective objectives of the following regulations:

(a) Regulation No 816/70, which laid down, for table wines only, a price and intervention system providing for support measures of an economic character, such as storage aid;

(b) Regulation No 817/70, on quality wines psr, which promotes a "policy of encouraging quality production" with a view to "the improvement of conditions on the market and, as a result, to an increase in outlets".

The provision in question was expressly embodied in a text for the first time (Regulation No 2206/77) but it did not create a new rule. The Commission maintains that it is a "provision of a declaratory nature" serving merely to clarify the rule which the Community legislature had already laid down in Regulation Nos 816/70 and 817/70.

Any other interpretation would divert those rules from their purpose, for the following reasons:

(a) The aim of private-storage aid for table wines is to prevent prices on the market in table wines from collapsing, in so far as the storage contracts in question enable the marketing of the wine to be deferred until a more propitious time: that operation serves a useful purpose only if the wine returned to the market is of the same category as that put into store, that is to say table wine.

(b) A given producer may not enjoy two advantages for a single wine, namely storage aid when the wine is considered to be table wine and a better selling price when it is marketed as quality wine; such a twofold advantage would call into question the equality of treatment of economic operators and, as a result, distort competition within the Common Market.

5. The Court therefore has to choose between two interpretations of the Community rules relating to the organization of the market in wine:

(a) the "evolutive" approach advocated by the Grand Duchy of Luxembourg, and

(b) the "either/or" approach advocated by the Commission.

May I say straightaway that, in my view, the Court should adopt the latter interpretation.

An express provision precluding a table wine which had been the subject of a storage contract from being subsequently recognized as a quality wine psr was not laid down until 5 October 1977 in Regulation No 2206/77.

However, even though no such provision was embodied in Regulation No 1437/70 or in Regulation No 2015/76 in its original version, it was implicit in the very nature of the common organization of the market in wine as laid down in Regulations Nos 816/70 and 817/70.

Where aid is granted under Community provisions, it should not be granted in such a manner that it creates advantages for economic operators in one Member State alone, on the pretext that national provisions embody differences which give rise to certain "particularities".

The Court has previously held that:

"The management of the common agricultural policy in conditions of equality between traders in the Member States requires that the national authorities of a Member State should not, by the expedient of a wide interpretation of a given provision, favour traders in that State to the detriment of those in other States where a stricter interpretation is applied" [1].

Therefore, the aim of safeguarding normal competition within the Common Market, without creating a preferential situation favouring Luxembourg producers, should lead the Court to

1 — Judgment of 7 February 1979 in Case 11/76 *Netherlands* v *Commission* [1979] ECR 248, at p. 279, paragraph 9 of the grounds for the decision.

adopt the Commission's interpretation and hence to dismiss the Grand Duchy of Luxembourg's principal claim.

6. The Grand Duchy of Luxembourg has submitted an application in the alternative for the grant of part of the storage aid requested.

It argues that most of the wine stored must have been disposed of as mere table wine and that it should therefore be granted a proportion — which can be assessed approximately from the statistics — of the sum sought in its principal claim. It maintains that it is a matter for the Commission to justify what amount of expenditure it is refusing to allow, since the refusal constitutes an objection which puts the burden of proof on the objector, particularly since the difficulty in producing evidence is attributable to the Community legislature, whose recording and accounting requirements have proved inadequate for the purpose of "tracing the ultimate destination of each wine stored".

Further in the alternative, it offers, under Article 42 (1) of the Rules of Procedure of the Court of Justice, to indicate evidence of how much of the table wine stored was subsequently marketed as table wine and was thus eligible for EAGGF aid.

7. The Commission, in its rejoinder, states that:

(a) Pursuant to Article 5 of the Treaty, Member States are to take all appropriate measures to ensure fulfilment of Community obligations.

(b) In this instance, the Grand Duchy of Luxembourg should have applied the provisions of Regulation No 1153/75 of the Commission of 30 April 1975 [1], which provides for an elaborate system whereby a wine can be traced from the production stage to its use.

(c) In any event, a Member State claiming Community finance ought to provide, not a mere statistical approximation, but evidence of the number of transactions to be financed and of their conformity with the Community rules; the Grand Duchy of Luxembourg did, in fact, furnish such evidence in connection with the clearance of accounts in respect of long-term storage contracts for the 1977/78 period.

(d) Lastly, the offer of evidence under Article 42 (1) of the Rules of Procedure comes at a late stage and is uncertain.

8. The Grand Duchy of Luxembourg seeks the sums in question as financing under the common agricultural policy.

Article 3 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy [2] provides that:

"Intervention intended to stabilize the agricultural markets, undertaken according to Community rules within the framework of the common organization of agriculutral markets" will be financed.

It is, therefore, clear that the Member State applying for finance must adduce evidence that the conditions for obtaining it are indeed satisfied; such evidence is subject to examination by the

1 — Regulation (EEC) No 1153/75 of the Commission of 30 April 1975 prescribing the form of the accompanying documents for wine products and specifying the obligations of wine producers and traders other than retailers (Official Journal, L 113 of 1 May 1975, p. 1).

2 — Official Journal, English Special Edition 1970 (I), p. 218.

Commission, which exercises that right, *inter alia*, under the clearance procedure provided for in Article 5 (1) (b) of the Regulation No 729/70.

An illustration of this obligation is afforded by Article 9 (2) of Regulation No 729/70, which states that:

"officials appointed by the Commission ... shall have access to the books and all other documents relating to expenditure financed by the Fund. They may in particular check:

...

(b) whether the requisite *supporting documents* exist and tally with the transactions financed by the Fund."

That amounts to saying that evidence that the expenditure incurred on storage aid was well founded must be provided, not by the Commission but by the applicant Member State.

In its reply, the Grand Duchy of Luxembourg offered to "establish what quantities of table wine stored were also marketed as such and are, in any event, eligible for EAGGF aid".

In a letter of 24 November 1983, the Court Registry asked the representative of the Grand Duchy of Luxembourg to furnish any documents that would support its contentions. On 19 January 1984, the latter certified "in writing that the Luxembourg Government has no documents" to forward to the Court.

At the hearing on 13 March 1984, the representative of the Grand Duchy of Luxembourg stated that he would not maintain the offer to adduce evidence, which, moreover, had been made entirely in the alternative; that was tantamount to withdrawing it.

Accordingly, I consider that, like the principal claim, the claim in the alternative cannot be upheld.

My opinion is, therefore, that the application before the Court should be rejected and the Grand Duchy of Luxembourg ordered to pay the costs.