hops was observed by the producer groups established within its territory, in the event of the grant of aids for conversion to other varieties and for reorganization of hop gardens, has failed to fulfil its obligations under the EEC Treaty;

2. Orders the defendant to pay the costs.

Mertens de Wilmars Pescatore O'Keeffe

Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 19 April 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 10 MARCH 1983

My Lords,

This is an action brought by the Commission under Article 169 of the EEC Treaty for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under the Treaty in that it has not ensured that recognized producer groups respect the limitation imposed on the planting of hops by Article 4 of Council Regulation No 2253/77 of 11 October 1977 (Official Journal L 261, 14. 10. 1977, p. 1). In the opinion of the Commission this provision, on its true construction, prohibits any increase in the area under cultivation of hops and applies to all the hop gardens owned by the members of a recognized producer group receiving aid, even if the aid is granted in respect of the conversion or reorganization of the hop gardens owned by only some members. When implementing the regulation in 1978, particularly by a ruling on

5 December 1978, the Bavarian Ministry of Agriculture took the view that the prohibition applies to the area covered by the conversion or reorganization plan, and the subject matter of a grant of aid, and not to the entire area cultivated by the members of the producer group. In consequence there would be nothing to prevent the owners of hop gardens not covered by the plan from increasing the area under hops. The Commission took the matter up with the German Government, which indicated its agreement with the Bavarian Government's interpretation of the regulation and contended that the prohibition in Article 4 of Regulation No 2253/77 applied only to those members of a producer group who had participated in the plan. This led to the commencement of the present proceedings.

On 17 May 1977 the Council adopted Regulation No 1170/77 (Official Journal L 137, 3. 6. 1977, p. 7), amending Council Regulation No 1696/71 of 26 July 1971 (Official Journal L 175, 4. 8. 1971, p. 1, English Special Edition 1971 (II), p. 634) which set up a common organization of the market in hops. The amendments were prompted by a change in the situation of the market in hops, characterized by an imbalance in supply and demand and a slump in prices. In order to stabilize the situation it was thought necessary to prohibit any increase in the area under cultivation and improve the quality of hops. Article 7 of the regulation amended Article 9 of Regulation No 1696/71 to read, so far as is relevant, as follows:

"1. Any increase in the area under hops shall be prohibited from 1 July 1977 until 31 December 1979. For the purposes of this paragraph, Member States may consider a recognized producer group as a single producer.

...

3. Member States may grant to recognized producer groups aid not exceeding 1 800 units of account per hectare for conversion to other varieties and the reorganization of hop gardens as referred to in Article 7 (1)(b), provided that such operations are carried out before 1 July 1979 and entail a reduction of at least 40% in the area concerned."

The Council was empowered to extend the period of application of these measures but that has not been done. Article 7 (1) (b) of Regulation No 1696/71, as amended, specifies one of the purposes for which a producer group, recognized under the Regulation, may be formed: namely for adapting the production of its members "jointly to the requirements of the market and improving the product by converting to other varieties and by reorganizing hop gardens". Such a group must be recognized by a Member State and Article 7 (3) sets out the criteria of recognition. One of these is that the producer group must have "the legal personality or sufficient legal capacity to be subject, under the provisions of national legislation, to rights and obligations".

Pausing there, the intention of the amendment, in my opinion, was to prohibit producers (including a recognized producer group) from increasing the area under hops and to encourage a reduction in that area by

making available to recognized producer groups an aid for the conversion and reorganization of hop gardens. The reference in Article 9 (3) of Regulation No 1696/71, as amended by Regulation No 1170/77, to "the area concerned" points to the area under conversion or reorganization, not the entire area cultivated by the members of the producer group. This interpretation is consistent with the preamble to Regulation No 1170/77 which provides that "whereas, however, the granting of this aid should be subject to a substantial reduction in the area converted". It is also borne out by reference to the French text which provides more clearly in Article 9 (3) "pour autant que des opérations entraînent une réduction d'au moins 40% de la superficie sur laquelle elles sont effectuées".

General rules for the application of Article 9 of Regulation No 1696/71, as amended, were adopted by the Council in Regulation No 2253/77. Article 1 of the latter prohibited until 31 December 1979 the registration of areas planted with hops unless they were registered by 30 June 1977 (and worked by the persons specified) unless such areas replaced and were no larger than other areas registered by the latter date. So far as is relevant, Articles 3 and 4, which implemented Article 9 (3), provided as follows:

Article 3 (1):

"The aid for conversion to other varieties and for reorganization of hop gardens provided for in Article 9 (3) of Regulation (EEC) No 1696/71 shall be granted to producer groups recognized under Article 7 of that same regulation on presentation to the authorities appointed by the Member States of a plan for conversion to other varieties and for the reorganization of hop gardens which entails at least a 40% reduction in the total area registered as at 30 June 1977 to which the plan applies."

Article 4:

"For a period of three years following implementation of the plan to convert to other varieties or to reorganize hop gardens, a recognized producer group may not plant with hops an area greater than that resulting from the application of that plan."

By Article 7 of Regulation No 2253/77 Member States were required to take all necessary steps to supervise the reduction of areas referred to in Article 3 (1).

It is common ground that a conversion or reorganization plan presented by a producer group does not have to cover the whole area cultivated by it and that the 40% reduction only applies to that part of the whole area which is the subject of the plan. In practice, it seems, the plans actually presented by producer groups in Germany related to the areas cultivated by a minority of the members of the group.

The German Government contends that there is an essential link between Articles 3 and 4 of Regulation No 2253/77. The aid in Article 3 is for an area which is shown in a plan for conversion or reor-

ganization: 40% of the total area registered to which the plan applies must be taken out of production as a condition of the grant of the aid. The prohibition that an area greater than that "resulting from the application of that plan" may not be planted with hops, refers to the same area, the area covered by the plan. Therefore, the prohibition can apply only to the areas cultivated by those members of the group who have participated in it and benefited from the aid. It is said that, in its draft of Regulation No 2253/77, the Commission had proposed that the 40% reduction should apply to the total area cultivated by the producer group. In consequence, the last part of Article 3 (1), as originally worded, read: "... which entails at least a 40% reduction in the total area registered by all the associated producers as at 30 June 1977". Article 4 followed on from that. At the behest of the German Government, the wording of Article 3 (1) was changed so as to read: "... which entails at least a 40% reduction in the total area registered as at 30 June 1977 to which the plan applies". However, no amendment was made to Article 4. Counsel for the German Government submits that the failure to amend Article 4 in the light of the change in wording of Article 3 (1) is the cause of the present difficulties.

A scheme which provided for aid for a particular area, coupled with a reduction in the total area to which the aid related, and a prohibition for a period on replanting that specific area or its equivalent elsewhere would be intelligible and consistent. It is equally possible to envisage a scheme which made it a condition of aid for a particular area that the total area under cultivation should not be increased once a reduction to the particular area had been made, as otherwise the area taken out of production could be made up elsewhere.

Article 3 and the penultimate recital in the preamble to Regulation No 2253/77 (which refers to the need to avoid replanting of the areas grubbed up for three years) and the amendments to Article 9 of Regulation No 1696/71 which are made in Article 7 of Regulation No 1170/77 point to the former construction. They are, however, not conclusive as to the construction of Article 4 which must be seen as it stands in the scheme as a whole. Unless Article 4 does not make sense in the light of the amendment of the draft of Article 3, it would in my view be wrong to assume that there was an oversight in failing to amend Article 4 when Article 3 was changed. If there is any presumption at all, it should be that Article 4 was consciously and deliberately retained in its original form.

It seems clear that the reason for the amendment introduced by Regulation No 1170/77 was that there was "a radical change" in the hop-growing market. Too many hops were being grown; less were being used in the production of beer. The first way of dealing with the excess in Regulation No 2253/77, was to prohibit an increase in the area under cultivation until 31 December 1979. The second way of

dealing with the excess was to provide aid conditional upon a reduction in the area cultivated by those applying for the aid.

The aid was to be paid not on the submission of individual producers' proposals, but on the basis of a plan put forward by a producer group as defined, and having the purposes and functions referred to in Article 7 of Regulation No 1696/71 as amended by Article 5 of Regulation No 1170/77. The aid was to be paid to those recognized producer groups — and not, as with the aid provided for in Article 12 of Regulation No 1696/71 (as amended), to individual producers — though at the end of the day the aid paid to producer groups was to be apportioned by Article 6 (2) of Regulation No 2253/77 among the members, "taking into account their participation in the plan".

The prohibition in Article 4 is not expressed to be on individual producers but on producer groups which, it seems, do not as such normally produce hops and are not required to produce hops, but to exercise the functions of policy making and management referred to in Article 7 of Regulation No 1696/71 as amended.

Although a producer group, to be recognized, must have the legal personality or sufficient capacity under national legislation to be subject to rights and obligations, it seems to me that the ban in Article 4 on a producer group must be read as a ban on the members of the group. In the ordinary way that must mean all the members of the group. It seems to me that it has such meaning in Article 4. Moreover, such a construction is consistent with the structure as a whole. The group is a vehicle for the execution of the scheme. It puts forward the plan, receives the aid, decides how to distribute it and undertakes the obligations imposed. If it had been intended to limit the obligation to those members whose land was covered by the plan it could easily have said so. I would accordingly not construe "recognized producer group" in Article 4 as meaning only those members whose land is the subject matter of the plan.

If the ban is on all the members, the question remains whether it is (a) against planting "an area covered by the plan which is still under cultivation of hops after the conversion or reorganization has been carried out and after at least 40% has been grubbed up" or (b) against planting "the total area cultivated by the members of the producer group less the area grubbed up or no longer under hops following the application of the plan".

In my view it is the latter as otherwise it would be possible to close down one area and to take the aid under Article 3, and then to begin production elsewhere on an area of the same size or even a larger area. In this way the object of reducing the area under cultivation would not be achieved even if it could be argued that new land with possibly better yields had been used to replace

exhausted land with low yields. During the standstill period under Article 1, the aim was to avoid overall increase: under Articles 3 and 4 it was to achieve reduction, subject to the payment of aid. The result of the ban is simply to prevent a producer group from making up the loss of an area grubbed up by extending production elsewhere: it does not involve the consequences that existing areas (within the overall limit) cannot be replanted with new varieties or, as I see it, that further plans involving further reductions in acreage could not be put forward.

The argument that the Commission's interpretation is contrary to the general pattern of aid schemes because it restricts the economic freedom of producers who do not wish to benefit from the aid, must be rejected for the reason advanced by the Commission, namely that aid is not to the individual, as in other cases, but to the producer group.

It was also said that the Commission's interpretation is unworkable because in practice only a minority of members of a producer group participate in a conversion or reorganization plan; if the Commission were right, this minority could never obtain the assent of the other members of the group to it because it would only disadvantage them. This argument is unconvincing. To begin with, it could well be as a result of the interpretation of Article 4 given by the Bavarian Government that conversion or reorganization plans adopted in Germany involve only a minority of the group. If producer groups had been advised as to the meaning of Article 4, their assessment of the benefits of adopting a conversion or reorganization plan might have led them to conclude either that it would be more advantageous if a majority of members participated or that it would still be advantageous if only a minority did so. In any event there is no evidence that producer groups would have declined to take advantage of the aid scheme had they known of the Commission's interpretation of Article 4 and, even if this were so, it is not a telling argument against that interpretation: there is no general principle of Community law that all aid schemes must be as advantageous as possible to the potential beneficiaries; the Community legislator has a discretion in the matter and, certainly in the case of voluntary schemes, may formulate one which, if adopted, is disadvantageous at any rate to some members of a group.

Lastly, counsel for the German Government submitted that the scheme, as interpreted by the Commission, infringed fundamental rights in that (1) the prohibition on any extension of the area under hops by members of a producer group not participating in a conversion or reorganization plan limits their property rights without adequate compensation and therefore amounts to expropriation, and (2) there is discrimination between such persons and individual producers who do not belong

to the group and are not covered by Article 4. In Case 44/79, *Hauer* v *Land Rheinland-Pfalz* [1979] ECR 3727, the Court considered this problem in relation to a regulation prohibiting the new planting of vines. In the present case, as in Joined Cases 41, 121 and 796/79, *Testa* v *Bundesanstalt für Arbeit* [1980] ECR 1979, the position is somewhat different because the aid scheme is optional and any burdens it imposes are assumed voluntarily by the members of the producer group. It is for them to decide whether or not they wish to take advantage of the scheme. Nobody forces them to. However, if they do decide to take the benefit of the scheme, they must also accept the burden. In these circumstances the argument that the scheme infringes fundamental rights must be rejected.

In consequence, despite the arguments of the German Government, and although the intention could have been more clearly expressed, I am not prepared to assume that the failure to amend the draft of Article 4 was inadvertent.

For the reasons I have given, it is my opinion that the interpretation given to Article 4 of Regulation No 2253/77 by the Commission is correct and that it is therefore entitled to the declaration sought and an order that the German Government pay the costs.