OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 16 June 1987 *

Mr President,
Members of the Court,

I — Background and purpose of the application

1. Viticultural products are not only subject to the 'supplementary trade mechanism', which is the subject of the proceedings brought by Spain in Case 119/86 on which I have just given my Opinion. Article 123 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (hereinafter referred to as 'the Act of Accession' [1]) also subjects them to another mechanism, for 'regulatory amounts'. Paragraphs (1), (2) and (3) of that article lay down the principle of the regulatory amounts and describe how they work for table wines, wines with an appellation as to origin and certain other viticultural products imported from Spain into the Community as constituted before Spain's accession (hereinafter referred to as 'the Community of Ten'). The purpose of the regulatory amounts is defined in the fourth recital of the preamble to Council Regulation (EEC) No 480/86 of 25 February 1986 laying down general rules for their application. [2] Their purpose is

'to prevent disturbance on the market of the Community as constituted on 31 December 1985 without affecting the traditional pattern of trade in the abovementioned products'

so that there is no need to apply it to Spanish wines

'where there is no danger of disturbance'

whilst provision should be made

'for adjustment of the regulatory amount for the product in question on the basis of its market situation'.

It is therefore a flexible mechanism designed to prevent the risks of disturbance which imports of Spanish wine at prices lower than the Community guide prices might cause.

2. Like 'accession' compensatory amounts laid down by Article 72 of the Act of Accession for the other products covered by a common organization of the markets, regulatory amounts therefore appear to be

'designed to facilitate the transition of the new Member States from their previous status as third countries . . . to their new status as Member States'. [3]

However, they are fundamentally different from 'accession' compensatory amounts, as is quite clear from the accession negotiations which led to their establishment and to the adoption of Article 123 (3) of the Act of Accession. The first sentence of Article 123 (3) states that:

* Translated from the French.

1 — Official Journal L 302 of 15. 11. 1985, p. 23.

2 — Official Journal 1986, L 54, p. 2.

3 — Case 6/78 *Union française de céréales* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 1675, paragraph 3 at p. 1683.

'The regulatory amount shall be fixed at a level which ensures conditions under which treatment is no less favourable than those in force under the arrangements prior to accession'.

The second sentence states that 'to that end' this amount is to be calculated in such a way that the amount obtained by increasing the guide price in Spain by the regulatory amount and the customs duty does not exceed the reference price in force for the product in question. That maximum limit, with the function of providing an adjusted offsetting of prices, is the main characteristic of the system established by Article 123.

3. Council Regulation No 480/86, which is not contested in this case, lays down the general rules of application for the mechanism. The action for annulment brought by Spain is in fact essentially directed against Commission Regulation (EEC) No 648/86 of 28 February 1986 (Regulation No 969/86 merely corrected a substantive error) fixing, for 1985/86 as from 1 March 1986, the regulatory amounts for the products subject to it. In support of its application the applicant State has submitted three submissions which must be examined in turn.

II — Infringement of essential procedural requirements

4. In Spain's view, the legality of the Commission regulation is vitiated by a procedural irregularity and by a failure to state reasons.

Procedural irregularity

5. The defendant itself admits that, contrary to what is expressly stated in the second recital of its preamble, the measures introduced by Regulation No 648/86 were not taken in accordance with the opinion of the Management Committee for Wine, but, as is clear from the minutes of the meeting of the Committee, without its opinion. However, such a discrepancy does not constitute an infringement of an *essential* procedural requirement.

6. Spain does not challenge the legality of the contested regulations for having been adopted without the Committee's opinion. Under the 'Management Committee' procedure, the Council determines the way in which the Commission is to exercise the implementing powers which it delegates to it. In the present case, it is Article 11 of the parent regulation which requires the Commission to observe that procedure. Article 67 of Council Regulation (EEC) No 337/79 on the common organization of the market in wine,[4] to which it refers, states that 'the Committee shall deliver its opinion' on the draft of the measures submitted by the Commission and, if the measures adopted immediately by the Commission 'are not in accordance with the opinion of the Committee', they shall 'forthwith be communicated' to the Council. When required to rule on the effect of the *non-delivery* of an opinion by the Committee on the Commission's *powers*, the Court therefore held that it is only if the measures adopted by the Commission are *not in accord* with the Committee's opinion that the power to adopt the measures reverts to the delegator so that

'in those circumstances the absence of an opinion by the Committee in no way affects the validity of the measures adopted by the Commission'.[5]

4 — Official Journal 1979, L 54, p. 1.

5 — Case 95/78 *Dulciora SpA* v *Amministrazione delle Finanze dello Stato* [1979] ECR 1549, paragraphs 49 and 50 at p. 1568.

In adopting the contested regulations the Commission therefore acted wholly in accordance with the provisions of Article 67 of Regulation No 337/79 which governs the conduct of the Management Committee procedure.

7. What is also objected to in this case is the non-observance of Article 190 of the EEC Treaty which states that Commission regulations must 'refer to any . . . opinions which were required to be obtained pursuant to this Treaty'. Even if a wrong reference to a non-existent opinion had to be equated with lack of approval, that would not in any way affect the legality of the contested regulations. That presupposes that the alleged irregularity concerns an *essential* requirement, as is required by the first paragraph of Article 173 of the EEC Treaty. In other words, it is necessary to examine whether in the absence of such an irregularity the contested measure might have been different.[6] As we have seen, that is not the case in this instance. Therefore, a mere substantive error of drafting cannot have the anticipated effect.

Failure to state reasons

8. The applicant complains that the Commission fixed a regulatory amount set at a flat rate for certain wines with an appellation as to origin and at a zero rate for others without justifying the need to introduce them by the existence of *risks of disturbance* on the market of the Community of Ten, despite the provisions of Article 123 (2) (b) of the Act of Accession and Article 3 of the Council's implementing regulation.

6 — Case 150/84 *Bernardi* v *European Parliament* [1986] ECR 1375, paragraph 28 at p. 1394.

9. In fact, the contested regulation is silent on this point. Apart from a generic reference to Article 123 (2) and to the Council parent regulation, the threat of disturbance is not even mentioned in the preamble to Regulation No 648/86. The application of Article 123 (2) (b) and of Articles 3 and 4 of the Council regulation is in fact *implicit* from the *annex* to the regulation from which it appears that the regulatory amounts applicable to certain wines with an appellation as to origin are, as a general rule, lower than those applied to table wines and fixed at zero for quality wines produced in specified regions, that is to say, as the Commission indicated in reply to one of the Court's questions, dry liqueur wines.

10. The Commission, in its defence, has essentially confined itself to referring to that annex, explaining only (in its reply to the Court's questions and at the hearing):

(i) the disturbance factors which may justify the application of a regulatory amount, in this case prices and 'the possibility of commercial substitution' of wines with an appellation of Spanish origin;

(ii) the reasons for fixing different monetary amounts in the annex to the regulation, a zero rate for high-priced wines which are not produced in the Community of Ten and a flat rate for the other wines owing to their lower prices and the lack of data from Spain, entailing a potential risk of disturbance.

Without prejudging the importance of each of the various reasons put forward, one is

bound to be struck by the contrast between those explanations, which were given during the proceedings at the Court's request, and the provisions of the contested regulation, which, as I have pointed out, are silent on this point. Since it is its *first* regulation fixing the regulatory amounts for wines with an appellation as to origin, such explanations make clear, if this was needed, the absolute necessity for the Commission to state detailed reasons.

11. It is true that the regulatory amounts are generally intended to prevent the disturbances that wine imports might cause on the common market of the Ten from happening, so that it could be argued that there is no need for the Commission to justify their introduction since it is easily established that there is a difference of price. However, although that argument is valid for table wines, with regard to which the Act of Accession states that 'a regulatory amount *shall be levied*', it is not valid for *wines with an appellation as to origin* in respect of which the Act of Accession provides that a monetary amount *'may be fixed'* on the wines where they are *'likely to create* disturbances on the market'. Unlike in the case of table wines, to which the regulatory amount automatically applies, subject to an adjustment according to their quality, here, the risk of disturbance must be proved. For those wines, the Act of Accession makes this a specific condition for the introduction of a regulatory amount, in addition to the difference in price.[7] In the case of more characteristic wines, the risk of disturbance cannot in fact be presumed. Moreover, some of them, such as dry liqueur wines, have no equivalent in the Community of Ten and are not subject to a regulatory amount. However, if the possibility of substitution is the *sine qua non* for a price comparison, that factor alone cannot prove the risk of disturbance. Neither the Act of Accession nor the Council regulation states how the existence of a risk of disturbance is to be determined.

12. A useful comparison may be made in this regard with the provisions of the Act of Accession dealing with the supplementary trade amount for certain agricultural products. Article 85 (1) provides in fact some indications as to the nature of the disturbances to be taken into account in order to bring into operation the protective system for which it provides: 'a significant increase' in imports that could lead to the ceiling previously fixed 'being reached or exceeded'. Article 85 (3) (b) states the factors on the basis of which the seriousness of the disturbance may justify the application of definitive measures limiting or suspending imports: 'the trend in market prices and the quantities forming the subject of trade'. Finally, Council Regulation No 569/86, which lays down general rules for the application of the supplementary mechanism, states in Article 6 the factors for assessing the market situation which the Commission must take into account. Similarly, as far as the adaptation of the regulatory amount for table wines is concerned, it may be pointed out that Article 123 (2) (a), as supplemented by the relevant joint declaration, and Articles 2 (3) and (6) of the parent regulation indicate the criteria for that adjustment. In this case, as in the previous case, the reasons for fixing the regulatory amounts for those wines, placed in the context of the system in question, are clear.

7 — See, *a contrario*, the judgment in Case 5/67 *W. Beus GmbH & Co.* v *Hauptzollamt München* [1968] ECR 83 at p. 93.

13. As we have seen, no analogous provision is to be found in the Act of Accession or the Council's implementing regulation as regards the fixing of the regulatory amounts for wines with an appellation as to origin referred to in the annex to the contested regulation. In other words, the context in which the Commission regulation was adopted is not in itself sufficient to explain their adoption. That fact is sufficient to establish the alleged failure to state reasons. Moreover, the case-law of the Court confirms that conclusion. A statement of reasons

'must be appropriate to the nature of the measure in question'.

Although the Court accepts that

'the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact or of law dealt with in the regulations',

this is only if

'the latter *fall within the general scheme of the body of measures of which they form part*'.[8]

To sum up, the Act of Accession and the Council regulation do not provide any evidence suggesting that the Commission is exempt from complying with the obligation laid down in Article 190 of the EEC Treaty to provide a statement of reasons, even if it is only brief.[9] Moreover, in the present case, it was not a question of implementing or maintaining existing rules[10] or a Community system familiar to those concerned[11] but, once again, the *first* regulation on this matter. The aim of the obligation to state reasons is to

'show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review'.[12]

Having regard to the foregoing considerations, the fact remains that that aim is not achieved by Commission Regulation No 648/86, as amended by Regulation No 969/86, it being unnecessary to appraise the reasons — convincing as they may have been — advanced by the defendant during the proceedings.

III — Breach of the ceiling rule

14. The applicant State contends that, although the regulatory amounts imposed by the contested regulation comply formally with the calculation described in the second sentence of Article 123 (3), they were fixed for certain wines, in particular white table wines, at such a level that the condition laid down in the first sentence requiring treatment to be no less favourable than before accession is not observed. In its view, the regulatory amount may only offset the reduction of the customs duties applied before accession, as arising under the relevant rules laid down in the Act of

8 — Judgment of 22 January 1986 in Case 250/84 *Eridania Zuccherifici Nazionali SpA and Others* v *Cassa Conguaglio Zucchero and the Italian Ministry of Finance* [1986] ECR 117, paragraphs 37 and 38 at p. 146 (emphasis added).

9 — See in particular, *a contrario*, Case 78/74 *Deuka, Deutsche Kraftfutter GmbH, B. J. Stolp* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1975] ECR 421, paragraph 6.

10 — Case 136/77 *Firma A. Racke* v *Hauptzollamt Mainz* [1978] ECR 1245, paragraph 9 at p. 1257; Case 87/78 *Welding & Co.* v *Hauptzollamt Hamburg-Waltershof* [1978] ECR 2457, paragraph 11 at p. 2468; Case 230/78 *SpA Eridania-Zuccherifici Nazionali and Another* v *Minister for Agriculture and Forestry and Others* [1979] ECR 2749, paragraphs 15 and 16 at p. 2766.

11 — Case 125/77 *Koninklijke Scholten-Honig NV and Another* v *Hoofdproduktschap voor Akkerbouwprodukten* [1978] ECR 1991, paragraph 22 at p. 2003.

12 — Case 250/84 *Eridania*, cited above, paragraph 37.

Accession. This submission, besides being unsupported by any substantive evidence, is based on an unacceptable interpretation of the ceiling rule.

15. In reply to one of the Court's questions the Commission has submitted a comparative table, set out in the Report for the Hearing, showing the calculation of the regulatory amounts for certain table wines. The applicant has not disputed that the table accurately sets out the calculation described in the second sentence of Article 123 (3). It is clear from the table that the reference price, representing the ceiling to be observed, is never reached. Furthermore, the sum of the Spanish guide price, customs duty and the regulatory amount is more than 50% below that maximum in the case of certain types of wine.

16. What is more, there is nothing to justify separating the two sentences of Article 123 (3) as Spain does. Besides the causal link established between them by the words 'to this end', which make it clear that the calculation which follows describes the statement of the rule laid down in the first sentence, the method of making that calculation does not appear to me to lead to unfavourable treatment of Spanish wines. The reference price, which was the minimum price to be observed before accession, has, since accession, become a maximum which may no longer be imposed on Spanish wines. If it proved that the customs duties still charged on imports of Spanish wine adversely affect their guide price, offset by the regulatory amount, by taking them above the ceiling constituted by the reference price, the regulatory amount would have to be adjusted automatically in consequence. The method of calculation set out in the second sentence of Article 123 (3) is not therefore such as to frustrate the aim set out in the first sentence thereof. The submission that it has not been observed must therefore be rejected.

IV — Breach of the rule regarding the adjustment of the regulatory amount for certain table wines

17. The applicant State complains that the Commission fixed the regulatory amounts applicable to table wines only on the basis of the traditional categories A I, A II and A III for white wine and R I and R II and R III for red wine without adapting them, despite what is provided in Article 123 (2) (a) and provisions adopted for their application. Within each of the aforementioned categories the Commission ought to have distinguished sub-categories according to the price of the various types of table wine on the basis of their quality, vatting, bottling and labelling, in order to determine the regulatory amount actually necessary to offset exactly the difference between Community prices and Spanish prices. Furthermore, in the case of red wines in Categories R I and R II, the Commission fixed regulatory amounts which do not correspond to the difference between Community and Spanish guide prices for those wines.

18. This submission, like the previous one, cannot be accepted either. In reply to questions asked by the Court the Commission stated that, in the case of certain table wines, the regulatory amounts must be adjusted to reflect

'high quality due to the particular care taken over them and to the specific conditions in which they are produced'.

For that purpose, it associated

'bottling in the production area' with 'quality'.

It is clear from the annex to the contested regulation that specific regulatory amounts were laid down for white table wines and for red or rosé wines 'in containers holding 0.75 litres or less', that is to say in bottles. The regulatory amounts are 50% lower than those for the same kind of wines in containers holding more than 0.75 litres, that is to say supplied in bulk. That difference implies, as the Commission's answer indicates, that the regulatory amounts have been adjusted. Although it is regrettable that the reasons for that difference are not mentioned in the preamble to the contested regulation, it may be noted, to go back to the case-law already cited, that they follow logically from the context of the provisions in question.

19. Article 123 (2) (a) provides in fact that the level of the regulatory amounts normally applicable to table wines is adjustable 'to take account of the situation of market prices as assessed according to the different categories of wines and on the basis of their quality'. The joint declaration on this provision states that for the purposes of its application there must be taken into consideration

'the specific prices of certain types of product on the basis of their quality and their vatting, bottling and labelling, which should lead to a reduction of the regulatory amount on the basis of the highest price for these types of wine'.

Finally, Article 2 (3) of the parent regulation states that 'for certain table wines' the adjustment shall be made taking into consideration 'their specific prices on the production market and the type of vatting, bottling and labelling to which they are subjected' and that the regulatory amount 'shall be set at a level below the highest regulatory amount for the type of table wine in question'.

20. What conclusion may be drawn? The regulatory amount laid down for certain table wines, red or white, is, for the various types of wine, equal to 50% of *the lowest regulatory amount for wine in bulk.* In those circumstances, the Commission cannot, in my view, be criticized for not differentiating the regulatory amounts according to each type of wine and according to the different qualities of each type of wine. As regards the association made between bottling and quality, this, in my view, is hardly objectionable since, in the Commission's judgment, 'bottling in the production area' reflects the 'higher quality' of those wines. The latitude left to the institution in this regard therefore allowed it to fix a flat-rate regulatory amount on table wines on the basis of the convenient criterion of bottling. In any event, the applicant has not produced any specific evidence showing that the lower regulatory amounts so laid down were not determined in accordance with the requirements of Article 123 (2) (a). Given the discretion enjoyed by the Commission in such a matter, it must be considered that the adjustment envisaged in Article 123 (2) (a) was made in accordance with that provision.

21. As regards, more particularly, the method of calculating the regulatory amounts applicable to red table wines in Categories R I and R II, the rate of which is not based on the difference between the Community and Spanish guide prices, the Commission also stated in reply to one of the Court's questions that regulatory amounts lower than the amounts normally resulting from that difference had been

fixed in order to take account of the real Spanish prices for those products, which were higher than the relevant guide prices. In my view, that explanation, which has not been disputed by the applicant, is satisfactory.

V — Conclusion

22. In my view, Commission Regulation No 648/86 and Regulation No 969/86 correcting it must therefore be annulled only on account of the breach of an essential procedural requirement arising from the failure to provide explicit or implicit reasons for the fixing of the regulatory amounts for certain *wines with an appellation as to origin.* In accordance with the first paragraph of Article 176 of the EEC Treaty, it is for the Commission to take the measures which the annulment of its regulation on this point would require. That should normally involve the repayment of the regulatory amounts levied on those wines. However, such a result might appear extreme: under Regulation No 2715/86,[13] which applied to 1986, regulatory amounts, though in fact lower, were also imposed on those wines but Spain did not consider it necessary to contest the principle of that measure. A reasonable solution would be for the Commission to repay the regulatory amounts only up to the difference between the amounts fixed from 1 March to 31 August 1986 by the contested regulation and the amounts provided for in respect of the 1986/87 marketing year in the aforesaid regulation in order to take account of the interests of both the Community of Ten and of Spanish producers and traders. The Commission would thus be acting in accordance with its relevant responsibilities under the Act of Accession and under the parent regulation of the Council as well as in accordance with the requirement laid down in the first paragraph of Article 176 of the EEC Treaty.

23. I therefore propose that the Court should:

Annul Commission Regulation No 648/86, as amended by Regulation No 969/86, in so far as it fixes regulatory amounts for certain wines with an appellation as to Spanish origin;

Order the costs to be borne by the defendant institution.

13 — Official Journal 1986, L 249, p. 27.