OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 22 MARCH[1]

Mr President,
Members of the Court,

The subject of the application to which my opinion today refers is the customs law of the EEC, or more precisely, the competence of the Commission to grant tariff quotas for the benefit of individual Member States at lower rates than those of the common external tariff.

With the first alignment of national customs duties on the common external tariff there occurred on 1 January 1962, within the Federal Republic, a considerable increase in the customs duties on wines intended for distilling (from 4.60 DM per hectolitre to between 14.05 and 26.05 DM per hectolitre), while at the same time the internal duty applicable to other Member States was reduced from 3.60 DM to 3.20 DM per hectolitre.

Since before this period a considerable percentage of the German demand for wine intended for distilling was met from non-Member States, the Government of the Federal Republic on 16 June 1961 requested the grant of an import quota at a reduced rate of 4.60 DM per hectolitre. It also asked that no time limit should be placed on the quota which would in principle amount to 40% of the total imports of the previous year and, in 1962, for the first time, to 500 000 hectolitres. Later, the request was reduced to 450 000 hectolitres and limited to the year 1962.

The Commission allowed this request in part by a Decision of 11 May 1962, that is, it granted a quota of 100 000 hectolitres at the rate of 4.60 DM per hectolitre. The remainder of the request is deemed to have been refused by implication.

It is against this Decision, which was addressed to the Federal Government with an accompanying letter of 22 May 1962, and which was published in the Official Journal of 1962, No 44, at p. 1368, that the present application is made with the object of annulling that part of the Decision which constitutes a refusal.

The numerous heads of complaint may be summarized as follows:

— infringement of essential procedural requirements;
— infringement of the Treaty;
— misuse of power.

I shall mention these in detail during the course of the legal examination.

Legal consideration

A — Questions of admissibility

It appears from the facts that the request for a quota and the Decision refusing it both relate to the year 1962. It is thus impossible for this application to succeed in obtaining approval of that part of the quota which was requested for 1962 and refused. The question therefore arises whether there is no material legal interest in the proceedings and whether the applicant has no need of legal protection. The Court should examine the question of its own motion. It gives rise to the following considerations.

The proceedings were not concluded in 1962, principally because of our rules of procedure, and not because of the conduct of the parties. In proceedings of this and of a similar nature relating to decisions of the Executives of the Communities which have legal effects limited in time, it frequently happens that owing to the expiry of the time limit, it is impossible to achieve the object of the action. On the other hand, it must not be overlooked that the applicant

1 — Translated from the German.

still has some interest in obtaining a decision by the Court, because the dispute refers to questions of principle which may be of importance in the case of a similar request for a quota submitted by the applicant for 1963 as well as for other similar cases in the future. If this interest were not of itself sufficient, legal questions of great importance would remain unanswered and the Court would be unable for the future to fulfil its task of ensuring the observance of the law in the interpretation and application of the Treaty.

I therefore cannot raise any objection to the admissibility of the application.

B — The substance of the application

The contested Decision is based upon Article 25 (3) of the EEC Treaty, which reads: 'In the case of the products listed in Annex II to this Treaty, the Commission may authorize any Member State to suspend, in whole or in part, collection of the duties applicable, or may grant such Member State tariff quotas at a reduced rate of duty or duty free, provided that no serious disturbance of the market of the products concerned results therefrom'.

As the Commission stated in the course of the proceedings, its Decision is based in the first place on the premise that the negative prerequisite to Article 25 (3) ('provided that no serious disturbance of the market of the products concerned results therefrom') has not been fufilled, which of necessity would have entailed the refusal of the request. Furthermore, and as a subsidiary point, it applied considerations in the exercise of its discretion, which it must do when there is no reason to expect any serious disturbance. These considerations led it to the conclusion that the grant of a quota was not justified, since the production of the Community would allow an adequate supply both in quantity and in quality to the producers of wine spirits in the Federal Republic.

In my opinion, this twofold reasoning is not wholly clear from the text of the Decision. However, the preamble to the Decision contains phrases which indicate that the Commission did not restrict its considerations to the question of serious disturbance but extended them to include the possibilities of supply to German producers, so that to some extent it is possible to speak of principal and subsidiary considerations.

It is in these terms that I should like to develop my examination.

I — Principal Considerations

Was the Commission prevented from granting a quota having regard to the serious disturbances which might be expected?

1. Infringement of an essential procedural requirement

In the applicant's opinion, the Decision which was taken above all lacks an adequate statement of reasons and therefore infringes Article 190 of the Treaty.

The essence of the statement of reasons is contained in the following sentences: 'On the basis of the existing information it has been possible to ascertain that the production of the wines in question within the Community is amply sufficient. The grant of a tariff quota of the volume requested might therefore lead to serious disturbances of the market in the products in question . . .'

The Commission considers that this is a sufficient indication of the basis of its thinking and that for a well informed Member State, this statement of reasons would be adequate. Moreover, in the course of the oral procedure, its Agent suggested revising, in the light of the Treaty of Rome, the case law of the Court concerning the obligation to give reasoned decisions.

We know that up to the present the Court has always safeguarded with par-

ticular care the observance of the rules concerning the provision of reasons, as has been shown, *inter alia*, by its undertaking an investigation of its own motion.[1]

On many occasions the Court has stressed that a decision must contain an indication of the essential findings of fact and of the legal considerations which were determining factors in the adoption of the measure, so that interested parties, and also the Court itself, may consider whether the decision is well founded.[2]

In Cases 36 to 38/59 and 40/59, the Court adopted the view that it is precisely those decisions which are based upon an evaluation of the economic situation as a whole which require a very full statement of reasons[3] and, in Cases 1/57 and 14/57[4], it even said expressly that 'the words "In the present circumstances" cannot in fact be regarded as a statement of the essential findings of fact upon which the legal justification of the measure depends'.

The wording of the text of the Treaty provides no reason for applying a different criterion to the EEC Treaty from that applied to the ECSC Treaty, for in both cases one might describe it as a solemn requirement that decisions and even, in particular contrast to national law, regulations (corresponding to general decisions under the ECSC Treaty) shall state the reasons on which they are based. To propose that precisely in the case of the EEC Treaty the obligation to state reasons should be weakened seems to me, however, to be singularly inappropriate in view of the novelty of the subject matter with which the Executives of the EEC have to deal.

In particular, I would like to reject the proposition that the statement of reasons for the decision can be proportionate to the other opportunities to obtain information available to the parties to whom the decision is addressed, because we know from other actions that it is a matter of controversy as to who, in cases similar to the present one, apart from the persons mentioned in the decision, is affected by it and has a right to make an application. Moreover, and I believe the applicant to be right on this point, one must not forget the useful function which the obligation to state reasons performs for the purposes of a logical strengthening of the protection afforded by the law, insofar as it forces the Executives, when they formulate the statement of reasons for a decision, to give careful consideration to the conditions giving rise to the decision.

Of course, this is not to say that the Executives must produce an analysis with all the arguments of those affected by the Decision or even that they should elaborate a theory to cover all imaginable objections. In this respect, it is impossible to take seriously the objection raised by the defendant in the course of the oral procedure, namely, that the requirements with regard to particulars of fact and law of a statement of reasons should not be taken to such an extent that the Commission would be obliged to furnish copies of voluminous statistics or a summary of the anticipated content of a possible reference to the Court. Nobody has in mind any such exaggeration of the duty to provide reasons. If, however, the Commission invokes a criterion as important as that of serious disturbances, a mere reference in the Decision to 'existing information' is not sufficient, above all because it creates the false impression that what is concerned is the information provided by the applicant or uncontested values. It is required rather to state the essential figures and facts the evaluation of which has led it to its

1 — Case 18/57, Rec. 1958–1959, p. 14.
2 — Case 6/54, Rec. 1954–1955, p. 219; Case 2/56, Rec. 1957, p. 36; Case 9/56, Rec. 1958, p. 29; Case 18/57, Rec. 1958–1959, p. 114; Case 14/61, Rec. 1962 p. 523.
3 — Rec. 1960, p. 89.
4 — Rec. 1957, p. 219.

Decision—that is, to give information regarding the state of the market and its development (the extent of supply and demand) having regard to its trend over several years. This requirement is all the more reasonable when a substantial part of the quota (approximately one quarter of the amount requested) has been granted thus disproving to this extent the existence of any serious disturbance.

Apart from the details concerning the importation of distilling wines into the Federal Republic, which is important in another connexion, the Decision, as we have seen, does not contain any indication of the figures.

We must therefore find that the Decision does not meet the requirements of Article 190 of the EEC Treaty and that it should be annulled, unless it can be justified by the subsidiary considerations.

However, I will not now immediately turn to the subsidiary considerations, but will examine, in the interests of a full treatment of the subject, whether the other submissions of the applicant with regard to the principal considerations are valid.

2. Infringement of the Treaty

Regarding the question of the infringement of the Treaty, the applicant makes several complaints. In particular it objects that:

— The Commission has founded its view upon an incorrect concept of 'serious disturbance'

— It did not draw up in a correct manner its forecasts on the economic repercussions of the requested quota;

— It committed errors in the course of ascertaining the determinative economic facts.

(a) With regard to the concept of 'serious disturbance', the applicant's criticism refers, above all, to certain comments contained in the statement of defence. We learn from these that the Commission based its examination on the market situation as it would exist if the common external tariff were applied in full. It finds that the internal market of the Community would function with less disturbance if it were open only to imports of wine originating from third countries which were subjected to the rates of the common external tariff, and it continues: 'In this sense therefore the admission of any imports from third countries by way of the grant of a quota creates the effect of a disturbance within the meaning of Article 25 (3), ... Other important facts which the applicant in addition considers to be essential are not only unfounded but also irrelevant both from the point of view of logic and of the spirit of the provision. Their "importance" applies at most to the question whether the disturbance can be described as "serious" '.

It is on this that the applicant understandably bases its complaint that the Commission is seeking to realize an abstract pattern. The assumption that the Common Market would function with less disturbance if the common external tariff were applied amounts to a generalization and disregards the difficulties which were bound up with the establishment of the external tariff. Economic legislative measures of this kind, which are intended to apply for a comparatively long period, are always founded on fairly rough forecasts of economic development. It is precisely for this reason that the quota measures of Article 25 are provided as a corrective. But they could not attain the importance which they were intended to have if the quotas were to be considered *eo ipso* as disturbances. Properly speaking, the Commission must have regard to the real repercussions of a quota upon the actual market situation, and ascertain whether grave distortions are to be feared, a task made the more difficult by the fact that the concept of the market is influenced by extremely varied

interests—interests of consumers and producers and national interests in maintaining traditional currents of trade.

Certain references made during the course of the oral procedure may lead one to think that the Commission's considerations were not wholly confined to an abstract examination of the system of the Treaty. Indeed, we must stress that its point of view, according to which the only circumstance in which a disturbance is not to be expected is if import prices were to exceed the level of the prices in the Common Market, can no more satisfy the requirements of an examination for the purposes of Article 25 (3) than the finding, which is conclusive in appearance only, and which is set out in the statement of reasons for the Decision, that the very fact that there exists a production which is amply sufficient makes it probable that there will be serious disturbances in the event of the grant of a quota. At most, consideration could be given to its remarks relating to the well-known overproduction and to the difficulties of finding a ready market experienced by Italian and French producers. But the overriding impression remains that a tendency to systematize and to reason in abstract terms has influenced the Commission at least to a considerable degree in its choice of starting point.

(b) An equally unsatisfactory impression is created with regard to the way in which the Commission came to its conclusion with regard to a disturbance of the market. The applicant refers to the preamble to the Decision where the following phrase is found: 'The grant of a tariff quota ... *might* therefore lead to serious disturbances of the market in the goods concerned'. From this it concludes that the Commission was satisfied with a certain degree of probability, whereas its duty was to reach findings of probability amounting almost to certainty.

During the course of the oral procedure, the Commission told us that in view of its lack of experience in matters of quotas it decided to commence by reducing imports, so that it would ascertain what repercussions would result. This admission, like the statement of reasons for the Decision, provides grounds for thinking that the criticisms of the applicant, regarding the examination of the market situation, are justified. On the other hand, however, we read elsewhere in the Commission's pleadings that above all it had endeavoured to make an economic forecast, a prediction regarding the development of the market in accordance with the principles of economic experience, and on the basis of all the known economic factors, that is to say, it had undertaken an examination of the facts, the exactness of which met the requirements of Article 25 (3).

All these remarks on the concept of serious disturbance and on the method of establishing its existence fail to give us a clear picture or provide a clear argument, but reveal instead a changing and contradictory attitude on the part of the Commission. But whether they justify the conclusion that the Commission has acted in an irregular manner is a question which I would rather leave open. In any event, I do not propose to draw any inferences from these factors with regard to the legality of the Decision.

(c) Let us rather concern ourselves with the economic facts to see whether the Commission has started from a correct position. The decisive question is the following: Is the production of the wines concerned (that is to say, wines suitable for the manufacture of wine spirits) amply sufficient within the Community so that additional imports from third countries in 1962 would have led to a serious disturbance?

The Commission, in its argument, compared the demand of the Federal Republic of Germany for distilling wine to the production in France and in Italy (since only these countries come into

consideration) of white wines capable of being distilled, and deducted from the production figures the quantities which were processed in France and Italy into spirits or in some other way and which were exported. For this purpose, it chose average figures calculated for the years 1959 to 1961 and came to the conclusion that, for the needs of German producers of spirits amounting to 1.2 million hectolitres, there was available a supply of approximately 15 million hectolitres of white wine usable for all purposes. This allowed the Commission to speak of a production which was amply sufficient.

This comparison would obviously suffice to prove a serious disturbance of the market provided that it were impossible to dispose of the 15 million hectolitres and provided that it was perfectly clear that such a market situation ought not to be aggravated by the additional importation from third countries of 450 000 hectolitres of wine suitable for distilling.

But matters are not quite so simple, because on the one hand the figures quoted are in part contested and, on the other hand, the picture requires to be completed. The questions put by the Court were intended to obtain further clarification.

In the first place it should be remarked that the parties are not agreed as to the proportion of the production of white wine which comes into consideration for the purposes of the manufacture of spirits. According to the applicant, it is impossible to define exactly which white wines are suitable for distillation or to establish the quantity. The Commission emphasizes expressly that in this connexion it has relied on estimates.

Another difficulty arises with regard to ascertaining the Italian production of white wine which, for lack of any separate statistical analysis, was estimated on the basis of information received from the Italian Government and appears to be approximately one third of the total production of wine. An expert's report might possibly provide reliable explanations with regard to these two questions. I would not wish to propose that such proof be obtained, but, commencing with the figures produced and making certain necessary corrections, I should like to try to reach a conclusion.

The following considerations require attention.

— Since the request for a quota refers to the year 1962, it seems appropriate not to use the average figures for a number of years, but to base one's calculations upon the quantities available for the financial year 1961/62 which, according to the information of the Commission, were considerably less in France and somewhat less in Italy than those of the financial year 1960/61.

The comparative quantity of white wine capable of being distilled is thus reduced from 22 million hectolitres to approximately 20 million hectolitres (Schedules 2 and 3 to the Commission's answers).

— It should be borne in mind that the information furnished regarding the quantities used by the German producers does not refer to white wine but to distilling wine, that is, wine fortified to 22° by the addition of alcohol. With a normal alcohol level of 8.5° it follows that the demand for white wine is approximately 3 times the quantity of distilling wine (for the financial year 1961/62 approximately 4 million hectolitres.).

—In asking these questions, the Court wished above all to ascertain the net surplus of white wine. For this purpose it is necessary to deduct from the quantity suitable for distillation those quantities for which another use is assured (table wine, home consumption by producers, export, processing into products other than spirits). The Commission's figures do not provide any information concerning home consump-

tion by producers or the consumption of table wine. Even if it were correct that home consumption and consumption of table wine may be reduced by the demand for distilling wine, it is nevertheless necessary for a market analysis to contain fixed values for table wine and for home consumption, since certain quantities are in any case reserved for those purposes and withdrawn from the market in distilling wine. On this point there is obviously some difficulty owing to the lack of detailed statistics. The Commission confines itself to observing on this point that the statement in its rejoinder concerning the utilization of the production of white wine relies on estimates. It does not provide in its rejoinder or in its answers to the questions put by the Court any explanation concerning the consumption of table wine or the home consumption of producers.

As against this, with the assistance of general information drawn from the official agricultural statistics of the Community, the applicant attempts to resolve the difficulties and to outline a picture of the true market situation. Calculating on the basis of the figures relating to the total consumption of wine, the consumption of table wine and the home consumption of producers in France and Italy, it arrives at the conclusion that, after deducting these quantities from the production of white wine, there is no surplus to be found to meet the demand of producers of spirits. I cannot judge whether this conclusion is correct for it is possible that home consumption of producers may be included in the figures relating to the consumption of table wine. In addition, it may be objected that white wine is not consumed as a table wine in the same proportions as red wine. However, it does seem to me safe to say that by taking into consideration table wine and home consumption of producers the comparative figures provided by the Commission require considerable amendment.

If, in view of these elements of uncertainty, one is not prepared to accept the applicant's calculations, then an attempt must be made to evaluate the state of the market by means of other evidence.

For this purpose the following arguments are relevant.

— The Commission maintains that considerable quantities of wine are regularly disposed of in France by compulsory distillation, which would tend to indicate a surplus.

In reply to questions put by the Court, the Commission stated that statistics did not distinguish between the compulsory distillation of red wine and of white wine. However, in the opinion of the Commission, compulsory distillation applies more to red wine than to white wine.

We gather moreover from the rejoinder (page 9) that compulsory distillations took place during the financial year 1958/59, that is to say, after the year of the bad harvest in France which, according to the explanations of the Commission, even gave rise to the imposition of restrictions on the export of white wine suitable for distilling. This leads one to think that it is not primarily white wine which is affected by compulsory distillation.

As the applicant stresses, the Commission does not distingush between compulsory deliveries of wine alcohol and compulsory deliveries of alcohol from wine residue (husks, lees). The Order of 16 May 1959 only maintained the latter; since 1959, therefore, it has been impossible any longer to speak of compulsory distillation in the proper sense of that term.

Finally, in the proposals of the Commission with regard to the establishment of common agricultural policy[1] the pre-

1 — Document of 30 June 1960.

vention of the excessive pressing of grapes and the improvement of the quality of wine are given as reasons for the above compulsory deliveries of alcohol, but not efforts to eliminate existing surpluses.

— Moreover, the Commission has referred to the continuing reduction in area of French vineyards. But it could not indicate in what measure this affects white wine suitable for distillation. In addition, opposed to this argument, there is the fact that the French Decree of 20 January 1962 regarding cultivation seeks in particular to promote the production of white wines capable of being distilled.

If, therefore, the information of the Commission does not give us any reliable assistance in resolving the problem, we must on the other hand take into account the following considerations:

— In the agricultural statistics of the Community (pages 32/33) stocks of wine in France and Italy are shown. If one compares these figures over a comparatively long period (and thus not commencing with the bad harvest of 1957), and if one relates them to the production figures, one does not find an excessive proportion or an increase of stocks which would be evidence of overproduction.

— During the course of the proceedings, the applicant has referred to the evolution of the prices of wines for distillation within the Community, which in 1962 clearly showed a tendency to rise, at the precise moment when German producers had to resort to an increasing degree to the Common Market, as a result of the rejection of the request for a quota. The figures provided by the Commission confirm this contention. In view of the fact that the wine harvest in France and Italy in 1962 was considerably greater than in the previous year (a fact which appears also from the information of the Commission), in view of the reduction of internal customs duties, and in view of the fact that long-term agreements with Italian suppliers partially prevented price increases, it cannot be concluded that there was a considerable surplus, but rather a certain scarcity of supplies.

— Finally, the agricultural statistics of the Community make it possible to ascertain the extent to which the Community is self-supporting in respect of wine. Analogous figures appear in the proposals of the Commission for the establishment of a common agricultural policy[1] According to these figures, one finds, for the years 1953 to 1960, a degree of self-sufficiency for the EEC which has never exceeded 91.6% and which, including the French overseas departments which principally produce red wine, varies between 75.2 and 101.7%. According to these tables there would not appear to be a considerable surplus.

Final inferences

All these factors do not show us a picture of a market suffering from an overproduction of white wine suitable for distillation.

No other facts have been put forward which could give rise to fears of a serious disturbance of the market in the event of the grant of a quota. The principal argument of the Commission, therefore, fails and its Decision is proved also to be wrong in fact.

II — Subsidiary Considerations

The twofold justification for the Decision obliges me to examine the Commission's subsidiary considerations before we pronounce our final decision. Under this head, the Commission argues that, even applying the discretionary

1 — Document of 30 June 1960. Chapter "Wine", Table, p. 2.

powers granted to it by Article 25 (3), it had no grounds for granting the quota.

These subsidiary considerations concerning the exercise of discretionary powers are the subject of a series of complaints; in the first instance, of a lack of statement of reasons.

1. Inadequacy of the statement of reasons

If one looks at the text of the Decision, disregarding that section which is not part of the preamble to the negative Decision relating to the exercise of discretionary power, essentially the following findings remain:

'Processing industries must be supplied under conditions ensuring a rational development of production and an expansion of consumption within the Community; there is no indication that the existing market situation within the Community does not allow these branches of the industry in the Federal Republic of Germany a supply which is adequate in quantity and in quality under the same conditions applicable to other consumers within the Community.'

The applicant rightly criticizes this reasoning in two respects: on the one hand, the Commission is content to refer to 'the existing market situation', an expression which the Court had expressly condemned as inadequate in the judgment cited (Cases 1/57 and 14/57); on the other hand, it gives no clue as to how it balanced the various interests, whilst observing the different criteria for the exercise of its discretion laid down by Article 29, of which only one is mentioned.

We must therefore also state that there is a serious deficiency in the statement of reasons furnished in the subsidiary considerations of the Commission if, as I consider necessary, the criteria established by the case law relative to the ECSC Treaty are to retain their validity.

Although the annulment of the Decision is thus inescapable, I shall deal again, for the sake of a full treatment of the subject, with the other material complaints which have been submitted in relation to the entirely new problems raised by these proceedings.

2. Infringement of the Treaty

(a) In the application, but with less insistance thereafter, the applicant expressed the view that the Commission must grant a quota when there was no reason to expect serious disturbances to be caused. It therefore interprets Article 25 (3) as a legislative provision which imposes an obligation upon the Commission, while the latter claims that under Article 25 (3) it enjoys a discretionary power.

If one considers the text of this provision, it appears that, as distinct from paragraphs (1) and (2) where the chosen phrase is: 'the Council (or the Commission) *shall* . . . grant . . . quotas', paragraph (3) contains the expression: 'the Commission may grant . . . quotas'.

Acording to the traditional rules of interpretation, this difference of expression indicates a difference in the legal content. Only paragraphs (1) and (2) therefore enact a general duty to grant quotas, while paragraph (3) confers upon the Commission a discretionary power provided that the negative condition of a serious disturbance is not fulfilled.

This textual interpretation is confirmed by a systematic examination. Article 25 (3) applies to agricultural products specified in Annex II. These are the subject of special provisions in Articles 39 to 46, in particular the establishment of a common agricultural policy (Article 38), and also the common organization of agricultural markets (Article 40). It follows therefrom that future development of agriculture is not fully mapped out by the Treaty; the details must still be determined. Such

a picture is not so much consistent with an obligation on the part of the Commission to authorize quotas under certain conditions as with a possibility in the sense of a discretionary power which should be applied according to the criteria of Article 29 and according to the principles of the common agricultural policy as this is gradually developed.

Consequently, Article 25 (3) does not of itself establish a claim for the grant of a quota.

(b) The applicant in addition relies upon declarations of the Commission in connection with the fixing of certain custom duties under the common tariff. It is well known that in respect of the products in List G, the common external tariff was to be determined by negotiation between the Member States (Article 20 of the Treaty). This was done by an Agreement of 2 March 1960. The final act of this Agreement which was also ratified and which entered into force together with the Agreement (Article 3 of the German Ratification Law, *Bundesgesetzblatt* 1961, Part II No. 16) contains the statement that the Member States acknowledge the intention of the Federal Republic to obtain tariff quotas for certain products, *inter alia,* wine for distillation. Furthermore, the Member States acknowledge the declaration of the Commission according to which it 'is ready to grant quotas at reduced rates or free of duty for the other above-mentioned products (including wine for distillation) in favour of consumers and processing industries of the Member State making such request within the framework of Article 25 (3) and (4) when the state of the market within the Community does not allow these industries an adequate supply in quantity and in quality on conditions enjoyed by other consumers within the Community'.

The applicant is of the opinion that the Commission's Decision did not follow the lines of these declarations, and that this was tantamount to an infringement of the Treaty, as these declarations and their acceptance by the Member States constituted a provision implementing the Treaty or, at least, a specific expression of its rules.

Even if one does not follow the applicant all the way in its legal analysis, in my opinion it is not possible to deny all legal binding force to these declarations, for on the one hand, the preamble to the Agreement contains a reference to the declarations, and on the other hand, Article 1 of the Agreement states that 'the tariff provisions of the present Agreement are an integral part of the Common Customs Tariff laid down by the Treaty'.

There is no doubt, moreover, that when the Commission and the Member States made their declarations they intended more than a simple reference to the applicability of Article 25 (3). This would be incompatible with the insistent, even solemn, form of the declarations and their content. Above all, however, this intention would also be incomprehensible, on the basis of the development of the negotiations, about which we have been informed by an extract from the minutes of the negotiations which has been produced by the applicant. We can deduce from it that the fixing of the external tariff for wine caused serious difficulties. In return for their agreement to the proposed duties, several States demanded a *guarantee* that tariff quotas would be granted and pointed out that Article 25 (3) of the Treaty did not offer any such guarantee. That is why the minutes record that the Member States were agreed that tariff quotas should be authorized under a procedure *similar* to that provided for in Article 25 (3) and (4).

As I cannot accept that the Member States would have intended to alter the Treaty in this way, only one objective interpretation remains, in view of the circumstances mentioned: the Governments intended to give to the Com-

mission, in respect of the application of its powers regarding certain products, specific and binding directives which must assume particular importance within the framework of the general considerations which Article 25 (3) requires the Commission to apply in the exercise of its discretion.

The Court must therefore, in considering the contested Decision, examine whether the Commission has complied with these directions and for this purpose it is of course not enough merely to find that the preamble to the Decision contains some phrases reminiscent of the declarations of the final act.

(aa) So far as legal interpretation is concerned, the applicant maintains that the declaration requires the specific needs of German producers to be taken into account, above all as regards the quality and the normal purchase price. The Commission thinks this view is wrong.

Now it must indeed be admitted that during the course of negotiations mentioned above, the question was raised of 'the normal requirements of the processing industries of the Member State submitting a request'. This would allow one to have regard to the peculiarities of national needs.

There can also be no doubt however that the terms of the declaration of the Commission, as formulated in the final act, do not show that these interests were taken into consideration. According to the text, it is only necessary to ensure that the German consumers are not placed at a disadvantage in relation to other consumers in the Community as regards the quantity and quality of supply. The declaration therefore establishes for the Common Market a kind of *precept of equality of treatment.*

(bb) So far as the facts are concerned the question arises whether the quantity and quality of the supply to German producers from the Common Market could be regarded as assured for the year 1962.

On this point the applicant again commences by referring to the information contained in the official agricultural statistics concerning the degree of self-sufficiency of the Community in respect of wine, as well as to its calculations relating to the utilization of the production of white wine, on the basis of all the information relating to home consumption of producers and to the consumption of table wine within the Community. In addition, it remarks that after 1962 a decline to the extent of 30 000 hectolitres in imports of distilling wine was to be observed, in spite of an increase in the production of spirits in the Federal Republic and this would tend to indicate an insufficient supply.

The figures put forward by the Commission show us that production of white wine in 1962, which is also partially to be taken into account for the purposes of the production of spirits for 1962, showed a considerable increase upon that for the preceding year. Such a circumstance, since it was not foreseeable by the Commission, cannot be taken into account as justifying its Decision, although it certainly did have some influence upon the state of supply in 1962.

Although all these factors raise some doubts whether the Decision on quotas is correct, I would still hesitate to consider them as sufficient evidence or as proof of the unsoundness of the Decision having regard to the declarations in the final act. I think that the facts which we have available are simply not adequate to enable us to come to this conclusion. But if a *non liquet* still remains, it must fall upon the applicant, who requested the Commission to grant a quota on the basis of certain facts (insufficient supplies).

(c) Finally, upon a request being made for a quota for goods to which the special declarations in the final act apply, the criteria of Article 29 must also be observed. The applicant claims that this has not been done properly, by virtue of the simple fact that the Decision mentions only one of the four criteria laid down in Article 29.

The Commission declared during the proceedings that it had considered all the criteria under Article 29 but that as they were contradictory and could not all be fully observed simultaneously, it had been obliged, in balancing the interests concerned, to give priority to one of them.

A comparison of the criteria of Article 29 shows the correctness of such a starting point. The individual criteria to be taken into consideration in order to decide upon requests for quotas do in fact show opposing tendencies.

If the promotion of trade with third countries as well as the expansion of consumption constitute arguments in favour of the granting of quotas, the necessity of ensuring the improvement of the competitive capacity of undertakings within the Community and the rational development of production would on the other hand lead to the rejection of requests for quotas, if one were primarily considering the production of wine. According to circumstances, the other criteria of Article 29 may recommend the adoption of a negative or positive Decision.

As in the case of the objectives of the ECSC Treaty, it will be necessary therefore to balance the criteria according to the economic situation and having regard to all the private and public interests concerned, without its being possible to indicate in a general manner which considerations must have priority.

It became clear in the oral procedure to which objectives the Commission attached particular importance. Its principal aim was to achieve the customs union and to protect agricultural production within the Community.

But the mention in the preamble to the Decision of the supplying of processing industries and the expansion of consumption is misleading unless the Commission wished to imply thereby that these criteria were not seriously compromised, or that the balancing of interests demanded the acceptance of certain sacrifices in this respect.

In fact, it is clear that the refusal of the request for a quota has the effect of imposing a burden on processing industries, as well as on consumers in the Federal Republic. The refusal results therefore either in imports at higher rates of duty from third countries or in an increase of purchases within the Community. Both these choices involve price increases for producers of spirits since the external tariff of the Community has been substantially raised and since the prices of French distilling wine are considerably higher than those of third countries.

The quota-measure taken thus impedes the rational development of processing industries and the expansion of consumption. It is not yet possible to determine with certainty the particular repercussions arising from it. The applicant indicates that the price of spirits has already increased by 10% and that consumers were clearly foresaking spirits which until now had been cheap. This could cause grave danger for the producers of these spirits. The Commission thinks that prices will continue to evolve according to the tendency which has persisted up to the present, but emphasizes at the same time that considering the length of the production process, the present price lists could not yet be reflecting the repercussions of the supply conditions of the year 1962.

As regards the effects on trade with third countries, one can, however, even now see one certain result: Trade is clearly declining.

It cannot be the task of the Court of

Justice to prescribe for the Commission the exact extent to which importance should be attributed to the criteria under Article 29 in each particular case. To do this would narrow to an unacceptable degree the Commission's scope for assessment. Our duty is merely to verify its reasoning and to find whether it has placed emphasis in the right place having regard to all the economic and political factors which can be recognized as being relevant.

The contested Decision was fundamentally influenced by the assumption that the production of white wine in the Community is 'amply' sufficient. If such were the case, it might seem well worth arguing—but the question can remain open—that an absolute priority should be given to the protection of production within the Community. But if the actual economic situation presents a different picture (I recall in this respect above all the figures relating to the extent of self-sufficiency of the Community) the emphasis must necessarily be transferred to the other criteria which have been neglected, not least of which is the promotion of trade with third countries, the importance of which is acknowledged not only by Article 29 but by the preamble to the Treaty, and Article 110. It is, therefore, the errors in the evaluation of the facts (which we have examined at length), in the actual starting point, which undermine the Commission's evaluation of the interests involved and cause its deficiencies to be revealed. Thus a further reason is disclosed which forcibly points to the annulment of the contested Decision.

3. The varied submissions concerning misuse of power have not been examined. I think, however, that there is no necessity to discuss these matters in view of the result of my investigation so far, but also because they have in substance already been examined to a large extent at the same time as the complaint of infringement of the Treaty.

C — Summary

The results of my examination may be summarized as follows:

The Decision of the Commission, in its principal as well as in its subsidiary lines of reasoning, is shown to contain errors of form and errors of substance, which clearly call for its annulment.

My opinion therefore is that the Decision should be annulled and that costs be awarded against the defendant.