REPORT FOR THE HEARING
delivered in Case 74/86 *

I — Facts and procedure

1. *The relevant legislation*

The areas under vines in the Community are divided into wine-growing zones. According to Article 32 (1) of Regulation No 337/79, the Member States may permit the natural alcoholic strength by volume of wine to be increased in each wine-growing zone. The amount of increase varies according to the wine-growing zone concerned. In wine-growing Zone A, the increase may not exceed 3.5% vol. Article 32 (2) further provides that in years when climatic conditions have been exceptionally unfavourable, the alcoholic strength by volume provided for in Article 32 (1) may be increased in wine-growing Zone A to 4.5% vol. The decision to authorize an increase under Article 32 (2) must be taken by the Commission in accordance with the procedure for referring matters to the Management Committee (Article 32 (4) in conjunction with Article 67 of Regulation No 337/79).

2. *Background to the dispute*

As regards increases in the alcoholic strength of wine, the German Weingesetz (Wine Law) (*Bundesgesetzblatt* I 1971, p. 893), as in force on 14 July 1971, referred to the relevant provisions of the regulations on the common organization of the market in wine. At the beginning of 1982 that law was amended by the Bundestag in so far as the following sentence was added to the reference to Regulation No 337/79 in paragraph 6 (2):

'In respect of certain vine varieties and certain localities of the Mosel-Saar-Ruwer, Mittelrhein and Ahr wine-growing areas, alcoholic strength by volume may be increased to 4.5% vol.'

On 8 July 1982 the Commission sent a telex message to the Government of the Federal Republic of Germany requesting it to stop the entry into force of the Law as amended by the Bundestag because it was incompatible with Article 32 (1) of Regulation No 337/79. On 30 July 1982 the Federal Government replied that it shared the Commission's view and that the telex message sent by the Commission on 8 July 1982 had been sent to the authorities of the *Länder* responsible for implementing the Weingesetz and to the trade circles concerned. The Federal Government also undertook to eliminate the conflict between paragraph 6 of the Weingesetz and the Community regulation as soon as possible.

The amending Law was signed by the Federal President and by the Federal Government on 27 August 1982. After publication in the *Bundesgesetzblatt* on 31 August 1982 it entered into force on 1 September 1982.

At the same time the new codified version of the Weingesetz was published in the *Bundesgesetzblatt*. Paragraph 6 (2) was accompanied by a footnote worded as follows:

* Language of the Case: German.

'According to Article 32 (1) of Regulation (EEC) No 337/79, the maximum enrichment limit in all wine-growing regions in wine-growing zone A is 3.5% vol. It may be increased by decision of the Commission of the European Communities to 4.5% vol. in years when climatic conditions are exceptionally unfavourable.'

During 1983 and 1984 the Federal Government did not take steps to repeal the contested provision of national law. During that time it tried to have Regulation No 337/79 amended so as to eliminate the incompatibility of paragraph 6 of the Weingesetz with Article 32 of the Regulation. In letters dated 13 December 1982 and 22 December 1984 the Commission refused to make such an amendment.

By letter of 9 October 1984 the Commission commenced the procedure for establishing a breach of the Treaty. In accordance with Article 169 of the Treaty, it requested the Federal Government to submit its observations within a period of two months.

In its reply of 11 December 1984 the Federal Government admitted that paragraph 6 of the Weingesetz was incompatible with Community law. It stated that the planned amendment of national law had been delayed but that a draft law was to be drawn up by the beginning of 1985. After establishing that the procedure for amending the law had still not been commenced at the beginning of 1985, the Commission delivered a reasoned opinion on 1 July 1985 which has remained unanswered.

Pursuant to the second paragraph of Article 169 of the Treaty the Commission brought the matter before the Court.

3. *Procedure*

The Commission's application was registered at the Court on 12 March 1986.

The written procedure followed the normal course. However, the Commision decided not to lodge a reply.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By letter of 1 February 1988 Martin Seidel and Hans-Joachim Horn, who replaced Peter Rohland as from 25 August 1987, notified the Court that they were no longer agents for the German Government in this case. During the later oral procedure, the Federal Republic of Germany was represented by Jutta Peters of the Federal Ministry for Youth, the Family, Women and Health, and Dietmar Knopp and Frank Montag, Rechtsanwälte, Cologne.

II — Conclusions of the parties

The *Commission* claims that the Court should:

1. Declare that, by introducing a rule into the Weingesetz providing that, in respect of certain vine varieties in certain localities of the Mosel-Saar-Ruwer, Mittelrhein and Ahr wine-growing areas, alcoholic strength by volume may be increased to 4.5%, the Federal Republic of Germany has infringed the rules of the common organization of the market in wine, in particular Article 32 of Council

Regulation No 337/79, and Articles 5 and 189 of the EEC Treaty;

2. Order the Federal Republic of Germany to pay the costs.

The *Federal Republic of Germany*, the defendant, contends that the Court should adjudicate on the application with due respect for the law.

III — Submissions and arguments of the parties

The Commission contends that the maintenance in force of paragraph 6 of the Weingesetz, as amended in 1982, creates in the first place a considerable degree of legal uncertainty. In support of that argument it points out first of all that neither the sending of the Commission's telex message to the authorities in the *Länder* responsible for the implementation of the law nor the footnote in the notice of the new version of the Weingesetz can guarantee the effective application of the maximum limits laid down in Regulation No 337/79. In German constitutional law, the publication of the new version is only an informative communication and has no legislative force. Moreover, having regard to the principle of certainty in criminal law, it is doubtful whether, in view of the present wording of paragraph 6, German courts could apply criminal provisions where wine is enriched to a degree exceeding the normal rate of 3.5% vol.

The Commission further states that paragraph 6 has created an ambiguous legal situation in so far as it has inserted into the German wine legislation a provision whose wording departs from the wording of the Community regulation in question. In the minds of the persons concerned such a situation leads to uncertainty as to the law in force. According to established case-law, such a situation constitutes a breach of the second paragraph of Article 189 and of Article 5 of the EEC Treaty (see, for example, the judgment of 4 April 1974 in Case 167/73 *Commission* v *France* [1974] ECR 359 and of 25 October 1979 in Case 159/78 *Commission* v *Italy* [1979] ECR 3247).

In the second place, the Commission contends that Regulation No 337/79 and Articles 5 and 189 of the EEC Treaty have been infringed in so far as paragraph 6 of the Weingesetz gives the impression that the degree of enrichment may be increased to 4.5% vol. only in the Mosel-Saar-Ruwer, Mittelrhein and Ahr wine-growing regions whereas Article 32 of Regulation No 337/79 provides that alcoholic strength may be increased to 4.5% vol. in the whole of wine-growing zone A.

The German Government observes that it does not deny that the Commission's complaint is well founded. However, it points out that in the Federal Republic of Germany the provisions of Community law on the increase of alcoholic strength are strictly applied in practice so that there is no legal uncertainty in this regard. It also states that at the present time a reform of the legislation concerned is in preparation with the aim *inter alia* of repealing the provision in question.

T. Koopmans
Judge-Rapporteur