2. **Order the defendant to pay the costs, including those of the party intervening and those arising from the application for the adoption of interim measures.**

Mertens de Wilmars Pescatore O'Keeffe Everling

Mackenzie Stuart Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 22 March 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 26 JANUARY 1983

My Lords,

In these proceedings, which were instituted under Article 169 of the EEC Treaty, the Commission seeks a declaration that the French Government has failed to fulfil its obligations under Community rules applicable to the wine sector, and under Article 30 of the EEC Treaty,

(i) by subjecting the customs clearance of Italian table wines to a delay considerably in excess of the time necessary for the performance of the requisite formalities and by making clearance subject to systematic analysis;

(ii) by omitting to commence promptly the procedure for regularizing the transport of a number of consignments of Italian wine as soon as the accompanying documents were presented for clearance at the frontier posts;

(iii) by making the regularization of transport of Italian wines held up at frontier posts subject in numerous cases to the transmission by the Italian authorities of the documents and papers upon which they are based; and

(iv) by delaying clearance even in cases which have been regularized.

The facts giving rise to the dispute are in outline as follows. For some years there has been a substantial trade in the importation to France of Italian table wines in bulk. According to figures presented to the Court by the French Government, during each of the first nine months of 1980 the level of imports was considerably lower than in the corresponding months of the previous year. From October 1980, however, the level of imports rose so as to exceed by a considerable margin those of the previous year. This situation continued broadly until July 1981. Between April 1980 and July 1981, the French authorities sent to their Italian counterparts a number of complaints about alleged breaches of the documentary requirements and the rules relating to hygiene for the transport of wine in bulk. The latter complaints were of a serious nature in that they involved claims that containers used to carry wine had also been used to carry other substances and that asbestos substances had been used in the filtering of the wine, practices which were either potentially harmful to consumers, or at the least polluted the wine. It is, however, right to add that these complaints were limited in number, referred to specific occasions rather than a general practice and were said by the Italian authorities to be contrary to Italian Regulations.

On 10 July 1981 there were two meetings of the Comité national du Commerce communautaire des Vins et Spiritueux, a French trade association. According to the minutes of those meetings, presented to the Court by the Commission, there was a discussion at the first meeting of the problem caused in France by the importation in excessive quantities of Italian wines having a strength of less than 13° proof; it was proposed that members should practise a policy of self-restraint until the end of August 1980 on the understanding that the French public authorities would give a formal guarantee, before 15 July 1980, that imports of Italian wines would be subjected to a delay of four months in all cases in which their strength was below 13° proof and in all other cases when they were imported by traders not belonging to the association. On 20 July 1981 the Comité adopted a resolution recording a meeting between its president and the French Minister for Agriculture, following which the Comité proposed a monthly limit of about 425 000 hectolitres of Italian red and rosé wine, having a strength in excess of 13° proof and indicated that the Comité was prepared to reduce by half the deposit of permits for wine to be taken out of customs charge during the month of August; in return the Comité called upon the French public authorities to take steps to ensure that the policy of self-restraint should not be undermined by traders not belonging to that association.

In August 1981 there were demonstrations involving physical interference with the wine and the vessels which carried it in the wine-producing areas of the South of France against both the price levels and the quantities of imports of Italian wine. From the middle

of that month the French authorities began to subject all bulk imports of wine from Italy to systematic oenological analysis (which entailed substantial delays) and to refuse customs clearance to quantities of Italian wine on the ground of documentary irregularities, in particular, the omission of the word "Italy" from the accompanying Form VA 1, though, in addition complaints were made that the official stamp was not present or not legible on the document accompanying the wine and that e.g. the alcoholic strength and the name of the carrier were not stated in that document. On 14 August 1981, for example, the French authorities sent a telex to their Italian counterparts requiring the latter to send information about the origin of some 21 167 hectolitres of wine, described in 35 forms. On 25 and 27 August 1981 the Italian authorities replied by telex, sending information about that wine including confirmation of its Italian origin. The French authorities, however, responded on 27 August 1981, asking for the accompanying documents. On 26 August, 2 and 11 September 1981, the French authorities sent letters to their Italian counterparts seeking detailed information about a further 2 237 forms relating to 1 068 000 hectolitres of wine and asking for the documents which had accompanied the wine in carriage from Italy to be sent to them. It is clear that the Italian authorities were unable to supply at short notice all the information required of them. In the meantime the wine was detained at the frontier.

On 7 September 1981 the Commission addressed to the French Republic a letter expressing the view that the policy of the French authorities, in subjecting imports to systematic analysis, entailed a breach of its obligations under Council Regulation 337/79 of 5 February 1979 on the Common Organisation of the Market in Wine (Official Journal 1979, L 54, p.1).

On 9 September 1981 the Commission addressed to the French Republic a further letter expressing the view that its practice on the verification of documents accompanying bulk imports of wine from Italy entailed a breach of Article 30 of the EEC Treaty and of Community legislation including Council Regulation 355/79 of 5 February 1979, laying down General Rules on the Description and Presentation of Wines and Grape Musts (Official Journal 1979, L 54, p. 99).

On the same day, the Italian Minister for Agriculture replied to the enquiries contained in the letters from the French authorities dated 26 August and 2 September 1981, but expressed his astonishment at the fact that the enquiries related to the greater part of Italy's bulk exports of wine to France over a period of several months, and that most of the wine remained detained at the frontier, apart from some which had been released and where the questions raised did not seem to be useful.

By letters dated 21 and 24 September 1981. France replied to the Commission's communications of 7 and 9 September respectively, maintaining in each case that the maintenance of French policy was justified. It contended that the errors or omissions in the documents VA 1 were substantial, that they gave rise to reasonable cause for suspecting that the wine did not conform to the wine provisions laid down in the Community so that they were entitled to take the

steps provided for in Article 3 of Regulation No 359/79 and that the Italian authorities had not replied to some of the questions raised for over six months. On 2 October 1981 the Commission gave a reasoned Opinion, concluding that the French authorities' practice with respect to documentary requirements entailed a breach of Community law and on 12 October 1981 the Commission gave a reasoned Opinion to the same effect, with respect to the systematic analysis of imports.

On 13 October 1981 the French and Italian authorities reached an agreement at Pisa providing for the release by 15 December 1981 of 1 068 000 hectolitres of Italian wine detained at the frontier. On 20 October 1981 the French Republic informed the Commission that it had decided to subject imports of Italian wine to spot checks later said to be on a one-in-ten basis, rather than overall analysis. On the same date the Comité national du Commerce communautaire des Vins et Spiritueux sent a circular to its members stating that the French authorities had decided to release the wine detained at the border at the rate of 120 000 hectolitres per week between 19 October and 13 December 1981 and in return the Comité had decided to ban all bulk imports of Italian wine from 25 October until either 30 November or 7 December, depending upon the port of importation. The French Republic says that there was no agreement to this effect between itself and the Comité.

There followed a period of relative calm. In November 1981, when there was to have been a ban on imports by members of the Comité national, the level of Italian wine actually released into France was in fact much lower than at any other time for which figures have been supplied to the Court. Thereafter, the level of imports rose, and by January 1982 they approach the highest level since May 1979. On 2 February 1982 the French authorities reported to the Commission that serious disquiet had developed in the wine-producing area of the south of France, in the face of the rise in Italian imports in January, at prices below those prevailing in the market. Consequently the French Government had decided to conduct more numerous analyses of the quality of wine imported from Italy. The Court has now been informed that the French authorities subjected about three out of four Italian wine imports in bulk to analysis in that period. In a second telex of the same date, to the Vice-President of the Commission, the French authorities referred to the renewed risks of violent demonstations and stressed again the low prices of Italian wine.

Such were the circumstances in which the Commission, on 5 February 1982, initiated the present proceedings. On 4 March 1982 the Court made an order for interim relief; which of course does not prejudge the ultimate decision on the merits.

In accordance with Article 36 of the EEC Treaty, the French Government retains the power to impose restrictions on the import of wines from Italy, by means of oenological tests or otherwise, when such restrictions are justified in

order to protect human life and when they do not constitute a means of arbitrary discrimination or a disguised restriction on trade. As the Court observed in Case 35/76, *Simmenthal* v *Italian Minister for Finance* [1976] ECR 1871 at 1886, however, Article 36 is not designed to reserve the stated matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to therein. Thus, national authorities do not have an unqualified power of appreciation, to determine whether a particular restriction is justified, or constitutes a means of arbitrary discrimination. Rather, the law of the Communities, as interpreted by the Court, determines whether a particular restriction is capable of being justified or is discriminatory. The Court has held that a restriction is not justified under Article 36 if it is not "necessary for the effective protection of health and life of humans", in particular if "the health and life of humans can as effectively [be] protected by measures which do not restrict intra-Community trade as such": Case 104/75, *De Peijper* [1976] ECR 613 at 636 and Case 251/78, *Denkavit* [1979] ECR 3369 at 3391. It has, furthermore, envisaged the possibility that even when occasional inspections of an imported product are permitted, in the interests of health, such inspections may be incompatible with Article 36 if they are "increased to such en extent as to constitute a disguised restriction on trade between Member States": Case 35/76, *Simmenthal* at p. 1888.

The French authorities cannot, as I see it, on the evidence before the Court, contend in the present case that there was at the material time a widespread and serious risk to human health arising from imports of Italian wine, and counsel for the French Government accepted expressly at the oral hearing that his and the Italian Government agreed that transport of Italian wines in polluted containers occurred only exceptionally in the instances to which I have referred.

The arguments that what was done was in the interest of consumer health and protection are not convincing when it is seen that overall analysis was replaced by one in 10 analysis without any ill-effects being suggested. The sudden increase in analysis to three out of four loads is not shown in any way to be related to incidents of defective wine. Nor is it suggested that the sampling of not more than 15% of the loads presented at the frontier, ordered by the Court's interim measures, led to any complaints of defective wine.

Moreover, it was established at the hearing on the application for interim relief that wine produced in France is not subject to systematic checking of its oenological properties once it has been placed in vehicles for transport. There

are spot checks upon transporters, designed to guard against the conveyance of the wine in polluted containers; but such checks are not conducted in each and every case, and the vehicle on which a check is made is not detained, together with its cargo, pending the analysis of the sample. Moreover, although substantial checks are carried out for quality on French wine, they are very much less proportionally than those carried out in respect of Italian wines during the periods of which complaint is made. It follows that producers of Italian wines were placed at a disadvantage relative to their French competitors, when the former were liable to suffer the delays occasioned by the systematic universal or even very extensive examination of their produce. The fact that in 1979, loads subject to sample analysis could be cleared in 14 days, whereas, under the measures taken, wine of under 13° strength was subject to 4 months' delay, and wine over 13° strength was subject to 1 month's delay speaks for itself. Such discrimination is precluded by the second sentence of Article 36 of the EEC Treaty. The percentage of checks whether of all loads, or of three loads in four, is disproportionate to the steps required by the fact that on a relatively small number of occasions the containers, or the process of filtering adopted, had been found to be defective.

It was contended on behalf of the French Government that it was entitled to detain or exclude substantial quantities of Italian wine by reason of breaches of the documentary requirements imposed by Community law. In particular, the French Government relied on the importers' failure to specify on the accompanying forms the Member State of origin of the wine.

The form of accompanying documents for wine products transported between Member States is prescribed by Commission Regulation No 1153/75 of 30 April 1975 (Official Journal 1975, L 113, p. 1), as amended by Commission Regulation No 2617/77 of 28 November 1977 (Official Journal 1977, L 304, p. 33). Form VA 1, which is contained in the annex to the 1975 Regulation, contains a box (No 11) headed "Description according to the relevant provisions". It is not readily apparent from that heading that what is required is the name of the Member State of origin, particularly as there is another box (No 15) entitled "Wine-growing zone". It is, therefore, perhaps not surprising that in very many of the VA 1 documents supplied to the Court the Italian exporter or his agent had written in Box 11 some such phrase as "Vino rosato da Tavola". Nor, equally, is it surprising that in the case of exports of French wine to Italy, Box 11 was very often completed by some generic description of the wine or by the name of the region in which it was produced without the country of origin being stated. The fact that the wine-growing zone may cover regions in more than one Member State is not self-evident. It is, however, clear, and is accepted on all sides, that the "relevant provisions" mentioned in the heading to Box 11 are the provisions of Regulation No 355/79,

which provides in Article 9 (1) (c) (i) that the description of the official documents (including the accompanying documents by virtue of Article 1 (2) (b) of the same Regulation) in respect of wine consigned from one Member State to another shall include the name of the Member State in whose territory the grapes were harvested and made into wine. Accordingly, the word "Italy" ought to have appeared in Box No 11 on the VA 1 forms accompanying wine exported from Italy to France.

It does not, in my opinion, follow that the French authorities were entitled in the circumstances of this case to rely upon failures to complete Box No 11, so as to detain large quantities of Italian wine at the frontier. Nor was it justified in the circumstances to ask for all the supporting documents which were required by the French authorities. It is plain from the copies of form VA 1 provided to the Court that in the period immediately preceding the events giving rise to this litigation, as well as in earlier years, it was very common for the Member State of origin to be omitted from Box No 11, both in the case of exports from France into Italy and from Italy into France and that this practice was condoned by the authorities at the ports of entry in both Member States. No doubt in practice the customs authorities were content to look at the form as a whole, and to accept pragmatically, even though not so as to satisfy a strict burden of proof, that, if the form was written in the Italian language, gave the name of an Italian consignor and carrier, stated the wine-growing zone which included Italy and the competent agency as being the Italian Minister for Agriculture in Rome, and the customs office of departure as being in an Italian town, and there were no indications to the contrary, it was wine made in Italy, and vice-versa for France. There was no real evidence anywhere to suggest that any of the wine was not of Italian origin so as to give rise to reasonable suspicion that it was not.

A Member State wishing to alter this state of affairs could have made use of the machinery established by Regulation No 337/79, which provides in Article 65 that Member States and the Commission shall communicate to each other the information necessary for implementing that Regulation and establishes in Article 66 a Management Committee for Wine, competent to examine questions raised at the request of the representative of a Member State. These provisions are supplemented by Council Regulation No 359/79, of 5 February 1979, on direct cooperation between the bodies designated by Member States (Official Journal 1979, L 54, p. 36), which provides in Article 8 that representatives of the Member States shall meet at regular intervals within the Management Committee for Wine to discuss any problem relating to the uniform supervision of Community provisions in the wine sector. The purpose of this machinery is to ensure the uniform application of Community provisions in the wine sector, and thereby prevent dislocation in trade, such as was the predictable consequence of the action taken by the French authorities.

More easily, if the French customs authorities wished to change what seems to have been a long-standing practice, they should have given warning to the Italian authorities that, after a period sufficient to put exporters on notice, they would insist upon strict compliance with the requirements of the Regulations, and that otherwise consignments of wine in bulk would not be released into France.

Moreover, although the Italian authorities were strictly wrong in their argument that if the actual alcoholic strength (Box 12) is completed, the total alcoholic strength density (Box 13) is the same for dry wines so that to complete Box 13 is an act of supererogation, it is understandable why Box 13 was not completed. Equally, although both the copy and the original should bear the official stamp, there really is no ground for suspicion if the Italian authorities can briefly confirm that the original is properly stamped.

The requests put by the French to the Italian authorities for information about consignments of wine arriving in France are not themselves in my view to be justified in this case by reference to Article 3 of Regulation No 359/79, nor by reference to Commission Regulation No 1714/81 of 26 June 1981 (Official Journal 1981, L 170, p. 28). The first of those Regulations provides for direct co-operation between national authorities in certain cases, notably when there is "reasonable cause for suspecting that the product does not conform to the wine provisions" or when documents or entries in records "are open to doubt". The second provides in particular for speedy means of communication between national authorities in order to prevent or uncover infringements and to penalize fraud. The French authorities sought to rely on these two Regulations in a telex dated 14 August 1981, in which they requested the Italian authorities to supply all the information necessary to determine the origin of wine that arrived at the port of Sète on four vessels on the previous day. Neither that telex, nor any representation made to the Court, indicates that there existed reasonable cause for suspecting that the product failed to comply with Community provisions relating to wine, or that the accompanying documents were "open to doubt" or that there was reason to suspect an infringement or fraud. The telex does not state that the exporter had failed to complete properly Box 11 of Form VA 1; but if that were so, that failure would, in my view, not warrant the conclusion that the documents or records were open to doubt, in view of the particular circumstances of this case, including the French and Italian authorities' history of condoning identical failures in the past.

A Member State which seeks to use the machinery created by Regulation No 359/79 is, it seems to me, under an obligation to act with reasonable promptitude. It is not entitled to detain wine at the port of arrival for a protracted period before initiating enquiries in accordance with Article 3 of that Regulation. In the present case, however, it is established

that the requests sent by the French to the Italian authorities, in August and September 1981, for verification of more than 2 200 VA 1 forms, related to wine which had arrived at French ports over a period of several months. Some, so it appears, had arrived in January; other consignments in May, June and July. Counsel for the French Government contended that some of these requests for information, although made *ex post facto*, "quite possibly" related to consignments of wine which had been, at least in part, cleared by the French customs. Nevertheless, it is clear that there were also cases when the wine was detained at the port for substantial periods before the making of any request for information. Counsel for the French Government did not seriously deny that this was the case. The replies of the Italian authorities to the Court's questions establish it. Moreover, although in some cases the Italian authorities took time to reply, a complaint can hardly be made of this in view of the very large number of queries which were sent through about bulk consignments of wine.

Equally, once verification of the documents has been completed, and they are found to be in good order, the authorities of the State of importation are under a duty to clear the wine through the customs promptly. In this case, however, there were instances when the wine was not cleared when this was established. For example, by a telex dated 20 August 1981 the French authorities sought specific information about certain consignments of wine. The Italian authorities replied, giving that information, by telexes dated 25 and 27 August. The wine in question was not, however, released until a date in October, after the agreement reached at Pisa.

Finally, it is to be emphasized that Regulation No 359/79, which sets out the rules governing cooperation between national authorities to verify compliance with Community and national provisions in the wine sector, is based on Article 64 (2) of Regulation No 337/79, which authorizes the Council to adopt "measures to ensure uniform application of Community provisions". The provisions contained in Regulation No 359/79 are, therefore, designed to be used for that specific purpose and not for the purpose of controlling the rate of importation of wine, even when a Member State considers that the rate is excessive. The fact that in the months of August, September and October 1981 Italian wine transported in bulk was cleared through the French customs at a rate corresponding to that proposed by the Comité national in its resolution of 20 July 1981 cannot realistically be ignored. As counsel for the Commission demonstrated at the oral hearing, the quantities cleared in those months corresponded, more or less, with the accumulated backlog. Nor can the fact that in its telex to the Commission dated 2 February 1982 the French Government stated that the measures which it had then taken were the consequence of the disquiet that had arisen in the South following the steep rise in imports of Italian wines in January be ignored. Those measures had the effect, according to figures given by the French

Government, of reducing the volume of Italian wine cleared through the French customs, again, approximately to the level proposed by the Comité national. Accordingly, although I would accept that there were substantial grounds for the containers of certain limited consignments to be investigated in the first half of 1981, and although the exporters did not strictly comply with the regulations, I do not consider that the French authorities have made out their case that these justify the steps which they took or that, despite delays in replying to some of the queries they posed, the Italian authorities have failed to cooperate, or that there was real evidence of fraud or suspicion that the wine was not of the quality or type or origin which it was supposed to be. The coincidence of the French authorities' problems with wine growers in the South and the terms of the telexes of 2 February 1982, *inter alia,* seem to me the raise the inescapable inference that, however understandably, the French authorities were delaying or blocking substantial quantities of Italian wine in order to deal with these problems. The steps they took were disproportionate so far as the Treaty was concerned and amounted to a breach of Article 30.

The difficulties faced by wine-producers in the South in economic circumstances such as existed in the early months of 1981 and in January 1982 have to be recognized, yet as the French Government itself acknowledged, in its telex to the Vice-President of the Commission dated 2 February 1982, the solution of those problems must be reached at the Community level, given the existence of a common organization of the market in wine.

For these reasons I am of the opinion that the Commission is entitled to the declaration that it has sought and the French Government should be ordered to pay the costs of the proceedings.