be accepted in so far as such rules, applicable to domestic and imported products alike, may be justified on the ground that it is necessary to satisfy mandatory requirements relating in particular to consumer protection and fair trading.

8. Although the legislation of a Member State may, in order to protect an indirect designation of geographical origin in the interests of consumers, prohibit the marketing of wines imported in a certain type of bottle, it must be observed that, in the system of the common market, consumer protection and fair trading as regards the presentation of wines must be guaranteed with regard on all sides for the fair and traditional practices observed in the various Member States.

   The application by a Member State to imports of wine originating in another Member State of national legislation allowing only certain national producers to use a specific shape of bottle when the use of that shape or a similar shape of bottle accords with a fair and traditional practice in the State of origin constitutes a measure having an effect equivalent to a quantitative restriction.

9. Measures having an effect equivalent to quantitative restrictions on imports arising from the fact that national legislation permits a specific shape of wine-bottle to be used only by certain national producers or dealers cannot be justified on grounds of public policy, whether or not the legislation carries penal sanctions; nor can they be justified by the protection of industrial and commercial property on the ground that such a bottle is traditionally used by national producers if identical or similar bottles are used in another Member State in accordance with a fair and traditional practice for marketing wines produced in that State.

In Case 16/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tenth Criminal Chamber of the Landgericht München [Regional Court, Munich] II for a preliminary ruling on the interpretation of Articles 30 and 36 of the EEC Treaty in the criminal proceedings brought against

KARL PRANTL

for contravention of the Weingesetz [Wine Law],

THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans and Y. Galmot (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco, O. Due and U. Everling, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and procedure

A — The facts

1. The "Bocksbeutel" bottle

The Bocksbeutel bottle at the centre of this case has a characteristic bulbous shape. Quality wine psr (produced in a specified region) from Franconia, Baden-Franconia and four municipalities located in central Baden are marketed in Bocksbeutel bottles which have been used in Franconia for centuries.

In Italy, too, especially in the Trentino Alto Adige, the Bocksbeutel bottle has a tradition going back more than one hundred years.

The traditional Italian Bocksbeutel is rounder and has a shorter neck than the Franconian Bocksbeutel.

2. The German wine legislation for the protection of the use of the Bocksbeutel bottle

Paragraph 17 of the Wein-Verordnung [regulation on wine, liqueur wine and wine-based beverages] of 15 July 1971 (Bundesgesetzblatt, Part I, p. 926) was adopted after the Bundesgerichtshof [Federal Court of Justice] gave a judgment on 12 March 1971 in which it held that a Bocksbeutel bottle was an indirect indication of geographical origin and its use for wine not produced in the region in which the bottle is traditionally used might mislead consumers.

Paragraph 17 reads as follows:

"Only quality wine psr from the specific growing area of Franconia, the

Taubertal in Baden, the Schüpfergrund and the municipalities of Neuweier, Steinbach, Umweg and Varnhalt may be marketed in Bocksbeutel bottles of the traditional kind."

The second subparagraph of Paragraph 23 of the Wein-Verordnung provides that:

"Pursuant to Paragraph 67 (5), Point 2, of the Weingesetz [Wine Law] any person who contrary to Paragraph 17 hereof markets in Bocksbeutel bottles products other than those enumerated in that provision shall be guilty of an offence".

Finally, Paragraph 67 (V) of the Weingesetz [Wine Law] (Bundesgesetzblatt 1977, Part I, p. 893) provides *inter alia* that:

"It shall be an offence punishable by fine or imprisonment not exceeding one year

(1) ...

(2) to put on the market, import, export or advertise a product in contravention of the prohibition of misrepresentation contained in Paragraph 46 (I) to (III) hereof or in any regulation adopted under Paragraph 46 (IV) hereof in so far as such regulation refers to this penal provision for the definition of a specific offence ...".

After the entry into force of Paragraph 17 of the Wein-Verordnung protection of the Bocksbeutel bottle seems to have been somewhat weakened in the Federal Republic of Germany as a result of another judgment of the Bundesgerichtshof of 26 January 1979 in which it held that Paragraph 17 had to be construed narrowly and applied only to the original kind of Bocksbeutel bottle and not to bottles of a "similar" or "related" kind.

3. The charge against Mr Prantl

The charge against Mr Prantl is that between 3 December 1980 and 10 September 1981 he made improper use of Bocksbeutel bottles by persistently importing into the Federal Republic of Germany and selling and holding in stock for sale there Italian red wine, namely a quality wine produced in a specified region and originating from the Martini cellars in Girlan.

In so acting he offended against Paragraph 17 of the Wein-Verordnung and by virtue of Paragraph 67 (5), Point 2, of the Weingesetz of 14 July 1971 is liable to a fine or imprisonment.

B — The proceedings

On 6 July 1982 the Amtsgericht [Local Court] Miesbach acquitted Mr Prantl after reaching the conclusion that, although the bottles used by his company were traditional Bocksbeutel bottles within the meaning of Paragraph 17 of the Wein-Verordnung, that regulation was not applicable by virtue of Articles 30 and 36 of the EEC Treaty.

The Public Prosecutor appealed to the Landgericht München [Regional Court, Munich] II claiming that Paragraph 17 of the Wein-Verordnung did not have an effect equivalent to a quantitative restriction on imports and was not therefore contrary to Article 30 of the EEC Treaty.

It was also claimed that Paragraph 17 was necessary in the interests of consumer protection and fair trading.

The Landgericht München II decided that owing to their shape the Bocksbeutel bottles used by Mr Prantl looked very much like Franconian Bocksbeutel bottles and that they were traditional Bocksbeutel bottles within the meaning of Paragraph 17 of the Wein-Verordnung.

However, it raised the question whether, if Paragraph 17 of the Wein-Verordnung was contrary to Article 30 of the EEC Treaty, it was still valid by virtue of the exception laid down in Article 36 of the EEC Treaty.

By order dated 12 January 1983 the Tenth Criminal Chamber of the Landgericht München II stayed the proceedings and decided to submit the following two questions to the Court for a preliminary ruling:

"1. Does Paragraph 17 of the Wein-Verordnung of 15 July 1971 [regulation relating to wine, liqueur wines and wine-based beverages] have an effect equivalent to a quantitative restriction on imports prohibited by Article 30 of the EEC Treaty?

2. In the particular circumstances of the present case, can Paragraph 17 of the Wein-Verordnung be applied in order to protect the interests mentioned in Article 36 of the EEC Treaty?"

The order making the reference was registered at the Court on 28 January 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were submitted by Karl Prantl, represented by Stock, Strohm and Reinelt, Rechtsanwälte, the Government of the Federal Republic of Germany, represented by Professor Rudolf Lukes, full professor of law, the Government of the Italian Republic, represented by Ivo M. Braguglia, Avvocato dello Stato, and by the Commission of the European Communities, represented by Richard Wainwright and Bernhard Jansen, members of its Legal Department, acting as Agents.

Pursuant to Article 95 (2) of the Rules of Procedure and upon application of the Government of the Federal Republic of Germany for the case to be decided in plenary session, the Court decided that the case should be considered by the full court.

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. However, the Court decided to ask the Commission and the Government of the Federal Republic of Germany to reply before the oral procedure to the following questions:

1. Questions put to the Commission of the European Communities

The Commission is asked to submit to the Court the results of its investigations (see page 12 of its written observations) into whether similar measures or customs recognized by national law exist in the other Member States.

The Commission is asked to state briefly the work undertaken and the negotiations conducted so far with a view to ensuring protection of the "Bocksbeutel" and the reasons for the failure of the work and negotiations.

2. Question put to the Government of the Federal Republic of Germany

The Government of the Federal Republic of Germany is asked to state the objects of the German association named on page 30 of its written observations and the reasons for which and under which legislation that association registered a collective mark.

II — Written observations submitted to the Court

A — Observations of Mr Prantl, the defendant in the main proceedings

1. Mr Prantl makes four preliminary points concerning the order for reference.

First he considers it more accurate to say that the traditional Italian Bocksbeutel is only slightly rounder and has only a slightly shorter neck than the Franconian Bocksbeutel.

Secondly he notes that the Landgericht neglected to state in the grounds of its order that large numbers of Bocksbeutel bottles have hitherto been imported from Trentino Alto Adige and no difficulties have been raised by the competent German authorities.

Thirdly Mr Prantl maintains that the defence he advanced before the national court to the effect that Italian law allows any person to use "Bocksbeutel" bottles irrespective of the wine psr they contain must at least be considered valid where the use of such bottles for wine from certain regions has a long tradition. Therefore the protection of German or Community consumers does not *a priori* necessitate the adoption of a special provision such as Paragraph 17 of the Wein-Verordnung of 15 July 1971 read together with the penal provisions of that regulation.

Fourthly and lastly Mr Prantl refers to the alternative application that he submitted to the national court of first instance requesting that the reference for a preliminary ruling include the question whether Paragraph 17 of the Wein-Verordnung is contrary to Community law at least in so far as the prohibition contained therein and the related penal provisions have application even if bottles resembling Bocksbeutel bottles in which wine from Trentino Alto Adige is sold have, as in this case, clear and detailed labels which cannot cause any confusion and which make it clear to the consumer that the wine contained in them comes from regions other than those referred to in Paragraph 17 of the Wein-Verordnung.

2. Mr Prantl takes the view that the rules in question are contrary to Article 30 of the EEC Treaty on the ground that they constitute a measure equivalent to a quantitative restriction on imports. In this regard he refers to the case-law of the Court according to which provisions constituting an indirect or potential obstacle to intra-Community trade must also be regarded as measures having an effect equivalent to restrictions on imports; formal discrimination is not necessarily the determining criterion.

The Court has also emphasized many times that such measures having equivalent effect do not necessarily consist exclusively of trade regulations in the strict sense.

From this Mr Prantl concludes that by its nature and effect Paragraph 17 of the Wein-Verordnung exceeds the effects intrinsic to such trade regulations.

Moreover, in its present form and construed widely without regard to the actual labelling and description of the wine, such a provision is not necessary

for meeting the over-riding requirements of, in particular, consumer protection and fair trading.

3. Finally, Mr Prantl maintains that the derogations laid down in Article 36 of the EEC Treaty do not apply in the present case.

The first point he makes in this regard is that Article 36 of the Treaty is a derogating provision and must therefore be construed narrowly.

Secondly, he contends that, although a Member State may, in order to ensure fair trading and protect consumers, adopt regulations restricting the use of specific shapes of wine bottle in order to prevent confusion as to the origin of wine, the Court has consistently held that it is necessary to investigate in particular whether the measure adopted for this purpose is absolutely necessary (and not just desirable), whether it remains justified with the passage of time and finally whether it would be impossible to replace it by another less stringent measure more in keeping with the principle of the free movement of goods within the European Community.

Mr Prantl considers that, in view of the case-law of the Court, in this instance that is not the case.

The provision in question does not accord with the principle of proportionality and of adopting the least drastic measures possible because the original label on the imported product provides the consumer with "information on the nature of the product in question equivalent to that of the description prescribed by law" (judgment of 16 December 1980 in Case 27/80 *Fietje* [1980] ECR 3839, paragraph 15 at p. 3855).

In the present case there can be no doubt that the detailed information and names appearing on the bottle, which all refer to Italy as being the country of origin and specifically to Trentino Alto Adige, are a sufficient indication to the consumer that the product sold in those bottles does not come from Franconia but from Trento Alto Adige.

According to Mr Prantl, German competition law is one of the most rigid in the world. Unfortunately the German case-law on competition is based on the "image of an infantile, almost pathologically stupid and negligently inattentive average consumer". This is a lamentable attitude and the Court of Justice attaches great importance precisely to the information provided on labels (judgments of 22 June 1982 in Case 220/81, *Timothy Robertson and Others*, [1982] ECR 2349 and of 16 December 1980 in Case 27/80, *Anton Fietje*, [1980] ECR 3839).

Finally, the maintenance of Paragraph 17 of the Wein-Verordnung constitutes discrimination against other Member States which could be avoided and which far exceeds the needs of consumer protection.

Although the shapes of Franconian Bocksbeutel bottles are themselves not completely identical and some of them look quite different, producers of Franconian wine may use that shape of bottle without any restriction whereas wine producers in Trentino Alto Adige, who have used Bocksbeutel bottles for centuries too, are entirely prohibited from using it.

This situation is all the more shocking because since the judgment of the Bundesgerichtshof of 26 January 1979 referred to above Portuguese Bocks-

beutel bottles may be imported into Germany without limit.

In conclusion Mr Prantl proposes that the Court should reply in the affirmative to the first question and in the negative to the second and "in any event declare Paragraph 17 of the Wein-Verordnung inapplicable in cases where labels on Bocksbeutel bottles bear a sufficiently clear indication that the wine sold therein originates from South Tyrol in Italy."

B — Written observations submitted by the Government of the Federal Republic of Germany

As a preliminary point the German Government stresses that in proceedings under Article 177 of the Treaty the Court cannot decide whether provisions of national law are compatible with Community law.

In the present case, therefore, the Court's task is to ascertain whether the provisions of the EEC Treaty on the free movement of goods permit national legislation of the kind prohibiting the use of Bocksbeutel bottles in order to protect indirect designations of geographical origin.

The Government of the Federal Republic of Germany considers that Paragraph 17 of the Wein-Verordnung does not constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty and that even if it is to be regarded as such it is justified by the derogations laid down in Article 36 of the Treaty.

1. The provision in question does not constitute a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty

To support this contention the Government of the Federal Republic of Germany advances three arguments based on the precise scope of the legislation, on the meaning that must be attributed to the concept of a measure having an effect equivalent to a quantitative restriction on imports and finally on an analysis of Paragraph 17 of the Wein-Verordnung having regard to the criteria thus derived.

(a) The precise scope of the provision in question: The purpose and effect of Paragraph 17 of the Wein-Verordnung is merely to protect the traditional Bocksbeutel bottle in so far as it constitutes an indirect designation of origin

The first point it makes in this regard is that the relevant German legislation on wine does not prevent wine from other Member States, including Italian red wine from Trentino Alto Adige, from being marketed in the Federal Republic of Germany, nor does it prevent such wine from being marketed in containers habitually used for that purpose.

The sole object of the legislation is to prohibit marketable wine, bottled and labelled in the usual or in any other form, from being sold in the Federal Republic of Germany in forms of presentation which represent an indirect designation of origin for wine produced in a specified region and which are thus a sign of quality.

Consequently, the provisions at issue do not constitute an obstacle to the free movement of goods but merely prevent "deception" in the free movement of goods.

The second point made by the Government of the Federal Republic of Germany is that in the present case Mr Prantl is charged with bottling and marketing wines in bottles which, according to the regional health

authority for South Bavaria, were made as traditional Bocksbeutel bottles in the Federal Republic of Germany or Austria and which thus represent an indirect designation of origin for wine produced in Franconia and in some localities of Baden.

Therefore, unlike in the "packaging" cases previously decided by the Court, a method of putting up a product which constitutes an indirect indication of geographical origin is knowingly being used in this case.

More specifically, the Government of the Federal Republic of Germany points out that Paragraph 17 of the Wein-Verordnung specifies the conditions which the presentation of wine must satisfy by virtue of Paragraph 46 of the Weingesetz as well as Article 43 of Council Regulation (EEC) No 355/79 of 5 February 1979. The provision prohibits traditional Bocksbeutel bottles from being used for wine produced in regions other than Franconia and some localities of Baden because in German law and in Community law such a method of putting up wine is unlawfully misleading and confusing as to the nature and origin of the wine. The provision aims to protect a method of presentation indirectly designating certain wines having characteristic, geographically-determined qualities.

Designations of geographical origin are an important category of marks in commerce and serve to protect consumers and the public interest, for they help to identify highly characterized products by their visual impact and are a means of ensuring market transparency.

Moreover, in principle it is accepted in German case-law that the traditional Bocksbeutel bottle is an indirect indication of origin and quality for Franconian wine, in this respect confirming the results of an opinion poll carried out in the Federal Republic of Germany.

Finally, the Government of the Federal Republic of Germany points out that in its judgment of 26 January 1979 referred to above the Bundesgerichtshof clarified the ambit of Paragraph 17 of the Wein-Verordnung by stating that protection of the indirect designation of origin was confined exclusively to the traditional Bocksbeutel bottle.

(b) The actual concept of a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty

In the view of the Government of the Federal Republic of Germany a national measure whose sole purpose is to protect an indirect indication of geographical origin and which does not adversely affect fair trading in the Community does not constitute a measure having equivalent effect within the meaning of Article 30 *et seq.* of the EEC Treaty.

In its view the concept of a measure having equivalent effect must in fact be considered with reference to the EEC Treaty, secondary Community law, the case-law of the Court and academic legal writing.

(b) (1) With reference to the Treaty

First, it is clear from the provisions of the Treaty that a national measure constitutes a measure having an effect

equivalent to a quantitative restriction only if it is liable to affect intra-Community trade, if it produces effects otherwise than in a general and non-specific way and if it is of a nature such as to restrict that trade.

Secondly, by analogy with Community competition law, the prohibition of national measures having an effect equivalent to quantitative restrictions does not apply to every national measure but account must be taken of the effect they have on trade.

Thirdly, it would be practically impossible to apply Article 30 *et seq.* of the Treaty if every national measure were caught by those provisions without the use of a criterion of assessment, for every national measure affects trade in some way or other.

The conclusion it reaches is that "according to the letter and spirit of Article 30 *et seq.* of the Treaty only a national measure which a critical appraisal reveals is liable to affect trade in the Community to an extent comparable with a quantitative restriction can be regarded as a measure having an effect equivalent to a quantitative restriction."

(b) (2) With reference to secondary Community law: Commission Directive 70/50/EEC of 22 December 1969

The Government of the Federal Republic of Germany considers that this directive demonstrates that only national measures capable of affecting trade must be regarded as measures having an effect equivalent to quantitative restrictions.

The first observation it makes in this regard is that it is clear from the eighth, ninth, tenth and eleventh recitals in the preamble to the directive that measures which apply equally to national and imported products are not in principle measures having equivalent effect unless their restrictive effect exceeds the effects intrinsic to such measures or if imports are made impossible or more difficult or costly than the disposal of domestic production and this is not necessary for attaining an objective which must be legitimate and impossible to attain by means less restrictive to trade in goods.

In the second place it considers that the measures having equivalent effect listed in Articles 2 and 3 of the directive demonstrate that not all measures must be regarded as measures having an effect equivalent to quantitative restrictions but rather that it is necessary to apply criteria relating to the assessment of the adverse effect which the measure in question has on trade.

The conclusion reached by the Government of the Federal Republic of Germany is that the concept of a measure having an effect equivalent to a quantitative restriction on imports covers only measures which, after proper assessment, are shown to be liable to affect trade.

(b) (3) With reference to the case-law of the Court

The Government of the Federal Republic of Germany considers that it is clear

from a study of the case-law of the Court and in particular from the decisions which it cites (Joined Cases 51 to 54/71, *International Fruit Company NV, and Others* v *Produktschap voor Groenten en Fruit,* [1971] ECR 1107; Case 8/74, *Procureur du Roi* v *Benoît and Gustave Dassonville,* [1974] ECR 837; Case 15/79, *P. B. Groenveld BV* v *Produktschap voor Vee en Vlees,* [1979] ECR 3409; Case 113/80, *Commission* v *Ireland,* [1981] ECR 1625 and the judgment of 17 March 1983 in Case 94/82, *De Kikvorsch Groothandel-Import-Export BV,* [1983] ECR 947) that measures adopted by Member States to protect consumers or ensure fair trading are distinguished from those having an effect equivalent to quantitative restrictions by means of a value judgment, that is to say, by verifying whether a measure is an appropriate means of ensuring consumer protection and fair competition and evaluating beforehand the scope of the measure and the extent to which it will affect intra-Community trade.

(b) (4) With reference to academic legal writing

The Government of the Federal Republic of Germany considers that, though academic legal writers are not unanimous about the criteria for distinguishing a measure equivalent to a quantitative restriction, they do attach great importance to the adverse effect that a measure has on the market.

(c) In view of the definition thus given, Paragraph 17 of the Wein-Verordnung does not constitute a measure having equivalent effect

(c) (1) With regard to the Treaty

According to the Government of the Federal Republic of Germany, the rule in question does not affect trade, either actually or potentially, for the purposes of Article 30 of the Treaty because it prohibits only an indirect indication of origin confined to wine produced in a limited geographical area and having certain characteristic properties from being used for other domestic or foreign wine.

The provision does not restrict the marketing of wine produced in any particular wine-growing area of the Community or the bottling or sale of wine from other areas in the customary containers or in containers specially made for this purpose.

Article 30 *et seq.* of the Treaty protects only fair trading in the Community and not trade made possible by deceptive or misleading methods of presentation or the unlawful use of marks indicating geographical origin.

Such an interpretation is, moreover, borne out by the preamble to and the provisions of Council Regulation (EEC) No 337/79 of 5 February 1979 on the common organization of the market in wine.

(c) (2) With reference to Directive 70/50/EEC

The provision in question applies to domestic and foreign products alike and, according to the eighth recital in the preamble to the directive, is therefore lawful in principle.

Furthermore, the provision has no effect over and above that which it is intended to have, namely the protection of the traditional Bocksbeutel bottle as an indirect indication of origin, nor does it prevent wine produced in other areas of the Community from being marketed, or make imports impossible or more difficult or costly than the disposal of domestic products.

Lastly, the German rules on wine accord with Article 2 (3) (s) of the directive which provides that national provisions restricting the use of names indicative of origin or source, and therefore of a product's provenance from a specific area, do not constitute measures having equivalent effect.

In addition, unfair competition is prohibited by the domestic law of all the Member States as well as by international treaties such as for instance the bilateral agreements concluded between Member States for the protection of indications of origin and source and the Madrid Arrangement of 14 April 1981 for the Repression of False or Deceptive Indications of Source (as revised at Lisbon on 31 October 1958 and supplemented at Stockholm on 14 July 1967).

(c) (3) With reference to the case-law of the Court

The provision in question does not hinder fair trading which is the only kind of trading protected by the Treaty; it is merely intended to prevent unfair practices such as the use of an indirect indication of a product's origin for other products from other areas.

The measure is therefore "reasonable" within the meaning of the *Dassonville* judgment, for the prevention of the likelihood of confusion and "deception" is always "reasonable". The purpose of the measure is also to protect fair trading in the sense given to that term in the judgment in Case 113/80, the "Irish souvenirs" case.

Lastly, the rule at issue is not out of proportion to its purpose, for opinion polls carried out in the Federal Republic of Germany show that a label alone, stating the product's name, would not prevent confusion if the traditional Bocksbeutel bottle were used for other wines.

Besides, such a practice would be likely to create a contradiction between the indication regarding the product's origin indirectly provided by the shape of the bottle and the indication given on a label.

In the view of the Government of the Federal Republic of Germany, it is clear from its foregoing observations that the rule at issue cannot be replaced by another provision less restrictive of intra-Community trade.

(d) It states further that its view that the rule at issue does not constitute a measure having an effect equivalent to a quantitative restriction is borne out by the Commission's attitude during the preparation of the Community wine regulations.

After setting out in detail the draft regulations on which the Commission has worked since 1975 with a view to protecting the use of the "Bocksbeutel" as well as its own representations in this behalf the Government of the Federal Republic of Germany claims that the Commission has been aware for a long time of the existence of the provision in question and that it has never considered it a measure having equivalent effect within the meaning of Article 30. If it had, it would have taken action against it a long time ago. Confirmation of this is moreover provided by the Commission's answer to Written Question No 998/80

(reply of Mr Gundelach of 4 December 1980, Official Journal 1980, C 338, 29. 12. 1980, p. 5).

2. Paragraph 17 of the German Wein-Verordnung is in any event justified under Article 36 of the Treaty

As a preliminary point the Government of the Federal Republic of Germany stresses that in its view there are at present no definitive rules of Community law which would preclude Article 36 from being invoked in justification of the national measure.

The applicable Community Regulations (Nos 337/79, 343/79 and 355/79) contain only general rules prohibiting wine from being marketed with misleading names or put up in a misleading way and there are no Community rules governing the special situation where wine is misleading put up in traditional Bocksbeutel bottles serving as an indirect indication of origin.

Furthermore, there are no Community rules regarding the penalties to be imposed in cases where wine is put up in a manner likely to mislead so that the imposition of the penalties laid down by the German wine legislation and under German private law is not ruled out by Community law.

In any event the Government of the Federal Republic of Germany considers that the relevant German wine legislation is justified under Article 36 of the Treaty on the grounds of public policy and the protection of industrial and commercial property and because it cannot be considered a means of arbitrary discrimination or a disguised restriction on trade between Member States.

(a) Grounds of public policy

(a) (1) The Government of the Federal Republic of Germany considers that, however imprecisely defined the concept of public policy referred to in Article 36 of the Treaty may be, the relevant German wine legislation comes within it for the simple reason that the legislation carries criminal penalties.

Hence the fact that a Member State makes a particular practice subject to prosecution brings the relevant legislative provision within the ambit of its public policy.

(a) (2) It further considers that in so far as consumer protection is also considered part of public policy, as was held to be so in the *Dassonville* judgment — in this respect contrary to the later decisions of the Court such as for instance the "Irish souvenirs" judgment — the relevant German wine legislation is justified on this ground as well.

To support that argument the Government of the Federal Republic of Germany, recalling the argument advanced in part 1 (b), contends that a consumer who is only vaguely aware that the use of the traditional Bocksbeutel is an indirect indication of origin for wine produced in Franconia may act upon a "fleeting impression" and be misled by that shape of bottle.

(a) (3) In so far as fair trading is also considered part of public policy, paragraph 17 of the Wein-Verordnung is justified in this regard too.

To support that argument the Government of the Federal Republic of Germany repeats the arguments advanced in part 1 (b)

(b) Justification on the grounds of the protection of industrial and commercial property

The first point made by the Government of the Federal Republic of Germany in this regard is that the putting up of wine in traditional Bocksbeutel bottles as an indirect designation of origin is an industrial or commercial property right belonging to the wine producers in the specific geographical area to which the mark relates.

Article 1 of the Paris Convention for the Protection of Industrial Property (as revised at Stockholm on 14 July 1967) expressly provides that indications of source or appellations of origin form part of industrial property.

The protection afforded covers, besides the indirect indication of origin in a limited geographical area and the characteristic wine produced there, the business premises and equipment and business activity of every producer in that area.

In Community law industrial and commercial property comprises in addition "marks of origin and sources as well as the right to an established business actually carried on".

Since Paragraph 17 protects such marks and that right, the provision is therefore also justified in Community law as well.

In the view of the Government of the Federal Republic of Germany, there can be no doubt that bottle shapes *per se* may be the subject of an exclusive right excluding their use by persons other than those entitled to use them.

According to a Commission proposal for a Council regulation on the Community trade mark, such shapes are also to be permitted to be used as trade marks.

If used together with additional distinctive features by third parties an indication of source would no longer have the same expressive force and the very nature of the distinctive mark would be affected.

Secondly, the Government of the Federal Republic of Germany points out that on 4 June 1978 the Vereinigung Frankenwein-Frankenland eV registered a collective mark consisting of a picture of a traditional Bocksbeutel bottle bearing an illustrated label. The mark takes that form because in German law, though not under the Community trade-mark law proposed by the Commission, three-dimensional shapes cannot be registered as trade marks.

Consequently the value of the German association's mark would also be diminished if the traditional Bocksbeutel bottle could be used for wines from another source.

(c) Absence of arbitrary discrimination or disguised restriction on trade between Member States

The Government of the Federal Republic of Germany contends that the rule in question involves no discrimination between national and foreign products and since it applies without distinction to all traders, whatever their nationality, cannot be regarded as a disguised restriction on trade between Member States.

What is more, the rule in question, which is merely intended to ensure fair trading and protect the interests of consumers, does not restrict trade

between Member States in wine put up either in the usual or in specially-shaped containers.

For all those reasons the Government of the Federal Republic of Germany considers that the questions submitted by the Landgericht should be answered as follows:

"1. Paragraph 17 of the Wein-Verordnung of 15 July 1971 does not have an effect equivalent to a quantitative restriction on imports prohibited by Article 30 of the EEC Treaty.

2. Secondarily — and in the event of the first question's being answered in the affirmative, the second question should be answered to the effect that Paragraph 17 of the Wein-Verordnung is justified in the present case by the protection of matters referred to in Article 36 of the EEC Treaty."

C — Observations of the Government of the Italian Republic

The Government of the Italian Republic is of the view that Paragraph 17 of the Wein-Verordnung has an effect equivalent to a quantitative restriction on imports, prohibited by Article 30 of the Treaty and which is not covered by the provisions of Article 36.

1. A quantitative restriction on imports prohibited by Article 30 of the Treaty

In the first place the disputed provision prohibits the use of the Bocksbeutel bottle for wines imported from other Member States or for German wines produced in various regions.

Secondly, although the disputed provision does not absolutely prohibit the importation of wine from other Member States, it none the less prohibits the marketing of such wines in the Federal Republic of Germany when they are presented for sale in bottles resembling the "Bocksbeutel", that is to say, in a form in which those wines are marketed in the country in which they are produced and in countries to which they are exported.

Thirdly, the Government of the Italian Republic refers to the case-law of the Court in which it has been held that national measures which impose a certain form of presentation for the marketing of a product fall within the scope of Article 30 of the Treaty (judgment of 19 February 1981 in Case 130/80, Criminal Proceedings against *Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV,* [1981] ECR 527; judgment of 10 November 1982 in Case 261/81, *Walter Rau Lebensmittelwerk,* [1982] ECR 3961).

2. The disputed provision does not fall within the exceptions provided by Article 36

The Government of the Italian Republic is of the view that despite the vagueness of the order for reference, the national court probably intended to refer to consumer protection and fair trading. However, in its opinion, those exceptions cannot be relied upon in the present case.

(a) In the first place it is agreed that in Italy, and above all in Trentino Alto Adige, the bottle known as a "Bocksbeutel" has a tradition going back for more than a century.

As the Court held in its judgment of 15 March 1983 (Case 319/81, *Commission and the United Kingdom* v *Italy,* [1983] ECR 601), there is an obligation not to distort markets and it is not, therefore, possible to justify the measure in question solely by reference to the German consumer.

(b) Secondly, in the opinion of the Government of the Italian Republic, even if the shape of the bottle may help the consumer to identify the type of wine which is contained in it, it is, above all, the information shown on the label of the bottle which is decisive in that respect. From that point of view there are at present in existence detailed Community rules relating to the description and presentation of wines and grape musts whose purpose is, in particular, to enable the various types of wine to be correctly and swiftly identified by the consumer and to avoid any confusion on his part.

Thus, when a wine is produced in the Community in accordance with those rules, it should be able to circulate freely in all the Member States without the possibility of that freedom of movement being hindered by national measures relating to the determination of the shape of the bottle.

Support is lent to that argument by Article 18 of Commission Regulation (EEC) No 997/81 which protects the use of the bottle known as the "flûte d'Alsace" "for wines made from grapes harvested on French territory [and] restricted to [certain] quality wines psr", but which quite clearly does not exclude the use of that type of bottle for the presentation of wines produced in other Member States.

The Government of the Italian Republic concludes that according to the Community rules, it is above all compliance with the requirements as to the information and details to be shown on the label which enables the consumer to be protected and ensures fair trading. It is not therefore possible to permit other methods of protection unilaterally laid down by Member States, even a national measure which is less "disproportionate" than that provided by Paragraph 17 of the German Wein-Verordnung.

For the above reasons the Government of the Italian Republic suggests that the questions submitted by the court making the reference be answered as follows:

"A national measure of the type laid down in Paragraph 17 of the Wein-Verordnung constitutes a measure having an equivalent effect to a quantitative restriction prohibited by Article 30 of the EEC Treaty; such a measure may be justified neither by Article 36 of the Treaty nor by reasons associated with fair trading or with consumer protection."

D — Observations submitted by the Commission

1. By way of introduction, the Commission summarized the relevant Community legislation and the provisions of German municipal law

(a) Community legislation

Since 1974, in the context of the common organization of markets, there have existed rules relating to the description and presentation of wines and grape musts (Council Regulation (EEC) No 2133/74 of 8 August 1974, replaced by Council Regulation (EEC) No 355/79 of 5 February 1979, Official Journal L 54, 5. 3. 1979, p. 99). Article 40 (2) (b) of the latter regulation provides that "use of the containers may be subject to certain conditions to be laid down for the purpose of ensuring in particular that: ... (b) the quality and origin of the products may be distinguished".

Furthermore, Commission Regulation (EEC) No 1608/76, adopted for the implementation of Regulation No 2133/74, was replaced by Commission Regulation (EEC) No 997/81 of 26

March 1981 laying down detailed rules for the description and presentation of wines and grape musts (Official Journal L 106, 16. 4. 1981, p. 1).

At present, only the bottle known as the "flute d'Alsace" is protected under Community law and in particular by Article 18 of the aforementioned Regulation No 997/81, which, however, only guarantees the protection of the "flute d'Alsace" when it is used for certain quality wines produced in France.

According to the Commission it follows that the "flute d'Alsace" may also be used for wine produced in the territory of other Member States or in the territory of non-member countries and that those wines may be marketed lawfully in France.

The Commission states that, in the context of that implementing regulation, it submitted several proposals whose purpose was to ensure the protection of "Bocksbeutel" bottles.

Although one of those proposals was approved by the majority of Member States, it did not however receive the endorsement of the German Government and, since the withdrawal of that proposal, there have been exchanges of views on the subject which have not led to any concrete result.

(b) German municipal law

The Commission summarizes the provisions of Paragraph 17 of the Wein-Verordnung and the judgments of the Bundesgerichtshof which have clarified the scope of the protection accorded to the Bocksbeutel bottle.

The Commission concludes that the characteristic feature of the German regulation which protects Bocksbeutel bottles lies in the fact that it protects the producers of a whole region of the German market against competitors from all other wine-growing regions.

That protection is therefore considerably more extensive than that which certain producers might obtain individually for the presentation or the shape of certain wine bottles by the effect of legislation relating to the protection of trade marks and designs.

Such individual protection, therefore, consists only of an application for an injunction in civil law based upon the registration of the trade mark or design and capable of being brought against an illegal use of a Bocksbeutel bottle.

2. In its main submission the Commission is of the view that Member States are no longer competent to enact legislation such as Paragraph 17 of the German Wein-Verordnung, since there now exist over-riding provisions of Community law in the context of the common organization of the market in wine

Thus, and although the court making the reference has limited itself to asking the Court of Justice about the compatibility of the disputed provisions with Articles 30 and 36 of the EEC Treaty, in the Commission's view it appears necessary to give the national court a comprehensive account of the relevant provisions of Community law in the context of the collaboration between the courts of Member States and the Court of Justice which is provided for by Article 177 of the Treaty.

In support of its contention, the Commission sets out an argument in four stages.

(a) In the first place it points out that Article 54 (1) of Council Regulation No 337/79 on the common organization of

the market in wine (Official Journal L 54, 5. 3. 1979, p. 1), provides that the Council "shall adopt, as necessary", the rules relating to the designation and presentation of products relating to that organization; according to the second subparagraph of that paragraph "until entry into force of the rules referred to in the first subparagraph, the rules on this matter shall be those adopted by the Member States".

The Commission is of the view that, subject to any provision to the contrary, it may be inferred that from the time of its entry into force the Community regulation excludes the retention in force of internal provisions in the area concerned.

It adds that after Regulation No 2133/74 had established, for the first time, general rules for the designation and presentation of wines, which were complemented by implementing provisions in Regulation No 1608/76, it was for the Community authorities alone to decide upon the retention of the national rules in force in the sector concerned, if necessary on a provisional basis.

(b) Secondly, and with more particular regard to the question of the powers required to adopt provisions relating to the use of certain containers with a view to distinguishing wines by their quality and their origin, the Commission stresses that Article 40 (2) (b) of Regulation No 355/79, contains, in addition, an express power enabling provisions of Community law to be adopted.

The Commission has used that power in an exhaustive manner by adopting Regulation No 997/81 which replaced Regulation No 1608/76.

The Commission cites two facts which in its view support and confirm that statement. On the one hand the fact that Article 18 of Regulation No 997/81 includes a provision which protects the "flûte d'Alsace" and on the other hand the fact that the negotiations relating to the protection of the Bocksbeutel bottle were carried out in the context of the common organization of the market in wine which are still in progress at the present day.

(c) Thirdly, the Commission, referring to the case-law of the Court and in particular to the judgment of 25 November 1978 (in Case 83/78, *Pigs Marketing Board* v *Redmond*, [1978] ECR 2347), is of the view that the same conclusion may be drawn from the fact that access to a market which is subject to a common organization must, in order to enable the objectives laid down in Article 39 of the Treaty to be achieved, be open to all producers who comply with the rules laid down by the Community for that market.

Thus the Member States no longer have the power to make access to the market subject to provisions which are stricter than those laid down by the relevant Community law.

Such is the case of Paragraph 17 of the Wein-Verordnung and Paragraph 67 of the German Weingesetz, the combined provisions of which limit the use of the Bocksbeutel bottle and provide penalties for any infringement of that rule and which, consequently, restrict access to the market in a way which is neither provided for nor authorized by the provisions of the common organization of the market in wine.

(d) Finally, the Commission wishes to stress that in the context of the common organization of the market in wine, Community law had already taken into consideration the requirements of fair

trading and of consumer protection, as the Court ruled in its judgment of 25 February 1981 (Case 56/80, *Weigand* v *Schutzverband Deutscher Wein eV,* [1981] ECR 583).

The aforementioned regulations give in minute detail all the rules applicable to labelling, provisions to which the Court of Justice ascribes decisive importance with regard to guaranteeing fair trading and consumer protection, as it decided in its judgment of 10 November 1982 (Case 261/81, *Walter Rau,* [1982] ECR 3961).

In conclusion, the Commission believes that it must be admitted that the present rules of Community law are exhaustive and that there is no room for internal rules designed to protect the goods in question.

It is therefore only at the level of Community law that provisions, in addition to those in force relating to the "flute d'Alsace", may be laid down in order to ensure a better protection of the "Bocksbeutel" type of bottle, while taking into consideration the legitimate interests of other users of that type of bottle.

In the opinion of the Commission, the Member States therefore are no longer competent to adopt or to retain in force provisions on the use of containers which enable wines to be distinguished with regard to their quality or origin.

3. It is therefore only as a secondary consideration that the Commission deals with the answers to be given to the questions submitted by the court making the reference

It takes the view that, according to the case-law of the Court (judgment of 6 November 1979 in Joined Cases 16 to 20/79, *Openbaar Ministerie* v *Joseph Danis and Others,* [1979] ECR 3327), in the case of agricultural products subject to a common organization of the market, the compatibility of internal measures which govern the markets in question with the provisions of the Treaty must be assessed, above all, by reference to that organization.

(a) The application of Article 30 of the Treaty

The Commission points out that Paragraph 17 of the Wein-Verordnung, according to the interpretation which the national court seeks to give it and which, moreover, may not be in conformity with that of the Bundesgerichtshof, is also applicable to wine originating from other Member States put up in bottles which closely resemble the "Bocksbeutel" used in Franconia.

That provision therefore imposes a marketing prohibition on a foreign producer who wishes to export wine contained in bottles of that type to the Federal Republic of Germany.

Other Member States, in particular Italy, authorize the distribution of wine contained in such bottles whatever its origin.

From this the Commission concludes that producers in those Member States, in order to be able to market their wines in the Federal Republic of Germany, must therefore provide a special presentation for the German market. Such an obligation to use a special bottling procedure involves additional costs for those producers.

That excess cost may be of such a nature as to lead them to refrain from exporting to that country and to lead to a partitioning of the German market.

The Commission adds that, by virtue of Article 30 of the Treaty, Member States are not free unilaterally to lay down rules for the presentation of wine imported from other Member States which have an effect equivalent to a quantitative restriction upon imports.

Referring to the case-law of the Court (judgments of 20 February 1979 in Case 120/78, *Rewe-Zentrale AG* v *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649; 17 June 1981, *Commission* v *Ireland*, [1981] ECR 1625 and the *Walter Rau* case, cited above), the Commission expresses the view that the present case concerns a measure which is capable of impeding imports from other Member States directly or indirectly, actually or potentially, and that consequently the disputed regulation constitutes a measure having an effect equivalent to a quantitative restriction on imports to the extent to which it cannot be justified by an over-riding requirement as defined by the case-law of the Court.

The Commission then undertakes an examination of the question whether over-riding requirements connected with fair trading and with the protection of the consumer against abuses may justify the adoption of the provision in question.

It emphasizes that although a Member State may lawfully take action to prevent the public from being misled, it is necessary that that concern should not involve the enactment of unilateral measures which unduly restrict the free movement of goods.

That would be the case in particular if other less drastic measures would enable the same result to be achieved.

The Commission observes on this point that it would suffice to make the labelling of products subject to appropriate conditions in order to achieve the required objective, namely the protection of consumers.

In the circumstances of the present case, the Commission is of the view that, even if the bottles concerned in the proceedings against Mr Prantl strongly resemble the traditional "Bocksbeutel", the labelling gives the consumer all necessary information, as is apparent from the order making the reference.

The Commission concludes that in those circumstances, neither fair trading nor consumer protection authorizes a Member State unilaterally to establish its own rules relating to the shape of the bottles in which wine is imported from other Member States.

(b) On the application of Article 36

The Commission states that the provisions of Article 36 of the Treaty, which are to be strictly interpreted, are not applicable in the present case since fair trading and consumer protection do not come within the exceptions listed in Article 36 but, on the contrary, must be assessed directly in the context of the application of Article 30 (reference to the judgment of the Court of 10 June 1981 in Case 113/80, *Commission* v *Ireland*, [1981] ECR 1625).

(a) Conclusion

For those reasons the Commission suggests that the questions referred by the national court be answered as follows:

"1. Article 40 (2) (b) of Regulation No 355/79, which replaced the identical provisions of Article 40 (2) (b) of Regulation (EEC) No 2133/74 confers upon the Community powers to adopt all provisions relating to the use of containers intended to distinguish the quality and origin of wines. Since the entry into force of Regulation (EEC) No 1608/76, now replaced by Regulation (EEC) No 997/81, the Member States no longer have the power, in that area to adopt or to retain in force internal provisions which are not prescribed or authorized by the provisions of the common organization of the market in wine which are applicable in that field.

2. Leaving aside the question of competence, the rule unilaterally laid down by a Member State by virtue of which the marketing of wines in bottles of a particular shape is reserved to one or more wine regions of that State is to be considered as a measure having an effect equivalent to a quantitative restriction on imports prohibited by Article 30 of the EEC Treaty. Such a measure cannot be considered as vitally necessary in order to ensure fair trading and the protection of the consumer against abuses since those objectives may be attained by means of labelling in such a way as to present less of an obstacle to the free movement of goods.

3. Article 36 of the EEC Treaty cannot justify the adoption of internal rules restricting the free movement of goods between Member States unless those rules are based on one of the exceptions which are exhaustively listed in that article. It is not applicable to internal rules laid down in order to guarantee fair trading or with the objective of protecting the consumer".

III — Replies to questions put by the Court

A — Replies of the Commission

1. On the first question relating to the results of the inquiry undertaken by the Commission in order to discover whether comparable measures or practices were recognized by the national law of other Member States, the Commission mentioned, on the one hand, Italian legislation protecting the "Pulcianella", the "bottiglia Marsala" and the "fiasco Toscano", which reserves the use of those bottles or containers to certain wines and, on the other hand, the existence of French legislation which contains provisions protecting the so-called "Clavelin" bottle.

In reply to Question 2 relating to the work carried out and the negotiations undertaken to date with a view to ensuring protection for the Bocksbeutel bottle, the Commission gave a very full summary of the negotiations and other efforts undertaken between 1974 and

1983 with a view to providing protection for that bottle. It concludes that it may be observed that the failure of negotiations on the protection of the Bocksbeutel bottle in 1976, when the prospects of reaching an agreement were good, is attributable to the position taken at that time by the German Government. The subsequent attempts which were made in order to reach agreement, particularly in 1980, demonstrated that the respective positions of other interested Member States had also hardened, so much so that in the meantime it had not been possible to reach a consensus.

B — Replies of the Government of the Federal Republic of Germany

1. On the objective of the "Frankenwein-Frankenland eV" association

The objective of that association is "to give publicity to the wine of Franconia and of its wine-growing region and the protection of the exclusive right to use the 'Bocksbeutel' for the bottling of Franconian wine".

2. On the reasons for which that association registered a collective mark

The use of the Bocksbeutel bottle for a wine of different origin constitutes an infringement of Paragraph 3 of the German Law of 7 June 1909 relating to unfair competition. Since Paragraph 3 of that law confers no exclusive right and since unfair competition must be proved in each individual case, a collective mark to a certain extent facilitates action against unfair competitors. It was therefore in the hope that in the future the procedure in cases relating to the protection of the trade mark may be organized in a more economical and simple way that the mark was registered.

3. On the German legal provisions under which the association registered the collective mark

A collective mark may be registered by associations which have legal capacity and which pursue industrial or commercial objectives pursuant to Paragraph 17 *et seq.* of the German Law on trade marks in the version published on 2 January 1968. Subject to any contrary indication contained in Articles 17 to 23 of the law on unfair competition, the provisions relating to trade marks are applicable to collective marks.

Thereafter the collective mark no longer serves to distinguish goods originating from a particular commercial undertaking but to distinguish the goods of all of the members of the association. According to German law that presupposes that the mark constitutes a flat surface, as that law does not provide trade mark protection for three-dimensional figures.

Consequently the Bocksbeutel bottle may not be protected as a bottle but solely as a reproduction presenting a flat surface.

IV — Oral procedure

At the hearing on 6 December 1983 oral argument was presented by the following: Dr H. G. Strohm, Rechtsanwalt, for Mr Prantl; Professor Rudolf Lukes, acting as Agent, for the Government of the Federal Republic of Germany; I. M. Braguglia, Avvocato, acting as Agent, for the Government of the Italian Republic; and Bernhard Jansen, acting as Agent, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 24 January 1984.

Decision

1 By an order dated 12 January 1983, which was received at the Court of 28 January 1983, the Landgericht München [Regional Court, Munich] II referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 30 and 36 of the EEC Treaty to enable it to decide whether Paragraph 17 of the Verordnung über Wein, Likörwein und Weinhaltige Getränke [regulation on wine, liqueur-wine and wine-based beverages] of 15 July 1971 (Bundesgesetzblatt 1971, Part I, p. 926) — hereinafter referred to as "the Wein-Verordnung" — is compatible with Community law.

2 Those questions were raised in criminal proceedings brought against an Italian national, Karl Prantl, a dealer in beverages, who was charged with making improper use of "Bocksbeutel" bottles by persistently importing into the Federal Republic of Germany and selling and holding in stock for sale there between 3 December 1980 and 10 September 1981 Italian red wine originating from the Martini cellars in Girlan (Province of Bolzano — Trentino Alto Adige).

3 The Bocksbeutel bottle has a characteristic bulbous shape and quality wine psr produced in Franconia, Baden-Franconia and four municipalities located in central Baden is marketed in Bocksbeutel bottles. In Franconia Bocksbeutel bottles have been used for several centuries.

4 In Italy, in the province of Bolzano, the use of the Bocksbeutel bottle has a tradition going back more than one hundred years. The traditional Italian Bocksbeutel bottle is somewhat rounder and has a shorter neck than the Franconian Bocksbeutel bottle.

5 In the version applicable to the facts which are the subject of the main proceedings, Paragraph 17 of the Wein-Verordnung provides as follows:

"Only quality wine psr from the specific growing area of Franconia, the Taubertal in Baden, the Schüpfergrund and the municipalities of Neuweier, Steinbach, Umweg and Varnhalt may be marketed in Bocksbeutel bottles of the traditional kind."

The second subparagraph of Paragraph 23 provides that:

"Pursuant to Paragraph 67 (5), Point 2, of the Weingesetz [Wine Law] any person who contrary to Paragraph 17 hereof markets in Bocksbeutel bottles products other than those enumerated in that provision shall be guilty of an offence."

6 On 6 July 1982 the Amtsgericht [Local Court] Miesbach acquitted Mr Prantl. It was of the opinion that, although the bottles used by Mr Prantl were traditional Bocksbeutel bottles within the meaning of Paragraph 17 of the Wein-Verordnung, that provision was not applicable by virtue of Articles 30 and 36 of the EEC Treaty.

7 The Public Prosecutor appealed against that decision to the Landgericht München II arguing, on the one hand, that Paragraph 17 of the Wein-Verordnung did not constitute a quantitative restriction on imports contrary to Article 30 of the Treaty and, on the other hand, that the provision was justified in the interests of consumer protection and fair trading.

8 The Landgericht considers that owing to their shape the Bocksbeutel bottles used by Mr Prantl's company "looked very much like Franconian Bocksbeutel bottles" and is inclined to think that they are traditional Bocksbeutel bottles within the meaning of Paragraph 17 of the Wein-Verordnung. However, it wonders whether in the case of imports of wine from another Member State Paragraph 17 is compatible with Articles 30 and 36 of the Treaty.

9 The Landgericht München II therefore decided that before it delivered judgment in the criminal proceedings it must obtain from the Court of Justice a preliminary ruling on the following questions:

"1. Does Paragraph 17 of the Wein-Verordnung of 15 July 1971 have an effect equivalent to a quantitative restriction on imports prohibited by Article 30 of the EEC Treaty?

2. In the particular circumstances of the present case, can Paragraph 17 of the Wein-Verordnung be applied in order to protect the interests mentioned in Article 36 of the EEC Treaty?"

10 As the Government of the Federal Republic of Germany has correctly pointed out, the Court cannot, in the context of Article 177 of the EEC Treaty, give a ruling on the interpretation and validity of provisions of national laws or regulations. However, the Court may, as it has held on many occasions, provide the national court with the criteria for the interpretation of Community law which will enable it to decide for itself the issue before it.

11 Understood in that sense the questions submitted ask in effect whether Articles 30 and 36 of the Treaty must be interpreted as prohibiting provisions of the kind enacted in the national legislation in question.

The application of the Community rules on the common organization of the market in wine

12 It is first necessary to consider the main submission of the Commission to the effect that in the common organization of the market in wine there are exhaustive Community rules containing all the necessary provisions regarding the presentation of wines and use of certain containers for the purpose of distinguishing between wines according to their quality and origin. The Commission accordingly concludes that there are now over-riding provisions of Community law and that since the entry into force of the aforesaid rules the Member States may no longer maintain in force or enact measures of domestic law in this field.

13 It is true that, once rules on the common organization of the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless Community law expressly provides otherwise.

14 It is also true that at the time of the events which the national court must consider, the provisions of Community law on the common organization of the market in wine (in particular Council Regulation No 337/79 of 5 February 1979 on the common organization of the market in wine — Official Journal L 54, p. 1; Council Regulation No 355/79 of 5 February 1979 laying down general rules for the description and presentation of wines and grape musts — Official Journal L 54, p. 99; Commission Regulation No 2164/80 of 8 August 1980 amending for the seventh time Regulation No 1608/76 laying down detailed rules for the description of wines and grape

musts — Official Journal L 214, p. 1 and Commission Regulation No 997/81 laying down detailed rules for the description and presentation of wines and grape musts — Official Journal L 106, p.1) could be regarded as forming a complete system, especially as regards prices and intervention, trade with non-member countries, rules on production and oenological practices and as regards requirements relating to the designation of wines and labelling.

15 However, it must be observed that Article 54 (1) of Regulation No 337/79 expressly provides that: "The Council, acting by a qualified majority on a proposal from the Commission, shall adopt, as necessary, the rules relating to the designation and presentation of the products listed in Article 1. Until entry into force of the rules referred to in the first subparagraph, the rules on this matter shall be those adopted by the Member States". Regulation No 355/79 merely provides that use of the containers may be subject to certain conditions to be laid down for the purpose of ensuring in particular that the quality and origin of the products may be distinguished (Article 40) and that the designation and presentation of wines must not be liable to cause confusion as to the nature, origin and composition of the product (Article 43). On the question of the protection to be given to certain shapes of bottle Article 18 of Regulation No 997/81 merely protects the use of the bottle known as the "flûte d'Alsace".

16 As regards the question of bottle shapes and the protection which they may possibly enjoy, which is of secondary importance in relation to the fundamental principles of a common organization of the market, it is not possible to deduce from the provisions regarding the protection of the "flûte d'Alsace" that the Community legislation has exhausted its competence under Article 54, mentioned above. In this regard it may also be noted that negotiations have been conducted at the Community level for several years with the aim of introducing rules for potecting the Bocksbeutel bottle and that to that end several draft regulations have been prepared but without success. It thus appears that the Community legislature protecting the "flûte d'Alsace" is not exclusive. Therefore Article 54 (1) of Regulation No 337/79 allows the rules adopted by the Member States to be maintained in this field provided that they do not contravene Article 30 *et seq.* of the EEC Treaty.

17 In those circumstances the Commission's main argument must be rejected and the questions of the national court on the interpretation of Articles 30 and 36 of the Treaty must therefore be answered.

Article 30 of the EEC Treaty (first question)

18 By this question the national court asks in substance whether Article 30 of the EEC Treaty must be interpreted as meaning that the application by a Member State to imports of wine originating in another Member State of legislation allowing a specific shape of bottle to be used only by certain national producers and making it an offence for any other supplier to use a similar bottle constitutes a measure having an effect equivalent to a quantitative restriction.

19 The Government of the Federal Republic of Germany has argued that the contested provision of the Wein-Verordnung does not come within the scope of Article 30 of the EEC Treaty as it:

does not constitute a national measure capable of having an appreciable effect on intra-Community trade;

applies to national and imported products alike;

makes only the use of traditional Bocksbeutel bottles an offence and normally does not therefore affect importers using similar bottles if these are only slightly different from the traditional bottles; and

is justified on the grounds of consumer protection and fair trading, as the traditional Bocksbeutel must be regarded as an indirect designation of geographical origin.

20 It must be borne in mind in the first place that Article 30 of the EEC Treaty prohibits all measures having an effect equivalent to a quantitative restriction in trade between Member States. For there to be a breach of that prohibition it is sufficient that the measures in question are liable to impede, directly or indirectly, actually or potentially, trade between the Member States. It is not necessary that they should have an appreciable effect on intra-Community trade.

21 Secondly, it should be pointed out that, as the Court has already held on many occasions, even national legislation on the marketing of a product which applies to national and imported products alike falls under the prohibition laid down in Article 30 of the EEC Treaty if in practice it produces protective effects by favouring typical national products and, by the same token, operating to the detriment of certain types of products from other Member States.

22 A provision such as Paragraph 17 of the Wein-Verordnung, allowing a specific shape of bottle to be used only by certain producers of domestic wine, has protective effects inasmuch as it favours those producers compared to producers in other Member States who traditionally bottle their wine in bottles of identical or very similar shape.

23 If producers in the exporting Member State wish to market their wine in the Member State in which the legislation at issue in the main proceedings was enacted, they must bottle their wine destined for that specific market in bottles different from those which they traditionally use in the country of origin as well as on the markets of the other Member States. The marketing of that wine would thus be made more difficult or costly owing in particular to the additional costs entailed by the need to bottle those products in a specific way in order to make them comply with the requirements of the market for which they were intended. Moreover, those producers would be deprived of the commercial advantages which they may derive from using on the market in which the legislation in question applies the bottle traditionally used in the country or region of origin.

24 It thus appears that, although such legislation applies to national and imported products alike, in practice it has protective effects. It therefore comes within the scope of the prohibition laid down by Article 30 of the EEC Treaty.

25 Thirdly, it is true, as the Court has held many times, that in the absence of comprehensive Community legislation on the bottling of the products in question, obstacles to free trade within the Community owing to disparities between national rules must be accepted in so far as such rules, applicable to domestic and imported products alike, may be justified on the ground that it is necessary to satisfy mandatory requirement relating in particular to consumer protection and fair trading.

26 In principle, the justification for adopting legislation designed to prevent customers from confusing wines of different quality and origin cannot be denied. That concern is particularly worthy in the case of wines, for traditions and pecularities play an important role in this field. Moreover, the second recital in the preamble to Regulation No 355/79 states in this regard that: "... the purpose of any description and presentation should be to supply potential buyers and public bodies responsible for organizing and supervising the marketing of the products concerned with information which is sufficiently clear and accurate to enable them to form an opinion of the products; ... rules should therefore be drawn up to ensure that this purpose is served" the third recital in the preamble to the regulation than states that: "... steps should be taken to ensure that the information provided is as complete as possible and that it takes account of the different customs and traditional practices in the Member States and in third countries and complies with Community law."

27 Where, however, it is a matter of determining whether the legislation of a Member State may, in order to protect an indirect designation of geographical origin in the interests of consumers, prohibit the marketing of wines imported in a certain type of bottle, it must be observed that in the system of the common market consumer protection and fair trading as regards the presentation of wines must be guaranteed with regard on all sides for the fair and traditional practices observed in the various Member States.

28 In this regard the arguments advanced before the Court have revealed that bottles which are identical in shape to the Bocksbeutel bottle or differ from it only in ways imperceptible to the consumer are traditionally used to market wines originating in certain regions of Italy. An exclusive right to use a certain type of bottle granted by national legislation in a Member State may not therefore be used as a bar to imports of wines originating in another Member State put up in bottles of the same or similar shape in accordance with a fair and traditional practice observed in that Member State.

29 The Government of the Federal Republic of Germany maintains that consumers might be misled if wines from different regions were marketed in the same type of bottle. In answer to that point it must be observed,

however, that the provisions of Community law on the labelling of wines, particularly Articles 12 to 18 of Regulation No 355/79 concerning the labelling of quality wines psr, are particularly comprehensive and enable the feared confusion to be avoided.

30 The answer to the first question must therefore be that Article 30 of the EEC Treaty must be interpreted as meaning that the application by a Member State to imports of wine originating in another Member State of national legislation allowing only certain national producers to use a specific shape of bottle when the use of that shape or a similar shape of bottle accords with a fair and traditional practice in the State of origin constitutes a measure having an effect equivalent to a quantitative restriction.

Article 36 of the EEC Treaty (second question)

31 This question of the national court is in substance whether one of the exceptions laid down in Article 36 of the EEC Treaty to the fundamental principle of the free movement of goods may justify the application of a provision allowing only one group of national producers to use a specific shape of bottle.

32 In this connection the Government of the Federal Republic of Germany has submitted first of all that Paragraph 17 of the Wein-Verordnung is justified on grounds of public policy within the meaning of Article 36 of the EEC Treaty since it carries penal sanctions.

33 In answer to that point it must be stated that legislation does not come within the ambit of the concept of public policy within the meaning of Article 36 of the Treaty merely because it carries penal sanctions.

34 The Government of the Federal Republic of Germany has secondly argued that the presentation of Franconian wine and Baden wine in the "traditional Bocksbeutel bottle" is an indirect indication of geographical origin and therefore constitutes an industrial or commercial property right which belongs to the wine producers in the specific region and which the rules at issue may legitimately protect.

35 In this regard it need merely be observed, without its being necessary to resolve the questions of law raised by that argument, that producers who traditionally use a bottle of a specific shape may not in any event successfully rely upon an industrial or commercial property right in order to prevent imports of wines originating in another Member State which have been bottled in identical or similar bottles in accordance with a fair and traditional practice in that State.

36 Lastly, the Government of the Federal Republic of Germany has pointed out that on 4 June 1978 a German association called "Frankenwein — Frankenland eV", whose object is *inter alia* to protect the right of exclusive use of the Bocksbeutel for bottling Franconian wine, registered a collective mark consisting of a picture of a traditional Bocksbeutel bottle bearing an illustrated label. It concludes from that fact that the association is the owner of an industrial or commercial property right and that the value of the registered mark would be impaired if it were permissible to use the "traditional Bocksbeutel" for wines from other regions.

37 The fact that an association of producers has registered a mark depicting a specific shape of bottle bearing an illustrated label and the protection which such registration provides are, however, irrelevant as regards the question whether national legislation allowing only wine producers in certain regions to use a bottle of the same shape is justified under Article 36 of the EEC Treaty.

38 The answer to the second question of the national court must therefore be that Article 36 of the EEC Treaty must be interpreted as meaning that measures having an effect equivalent to quantitative restrictions on imports arising from the fact that national legislation permits a specific shape of wine-bottle to be used only by certain national producers or dealers cannot be justified on grounds of public policy, whether or not the legislation carries penal sanctions; nor can they be justified by the protection of industrial and commercial property on the ground that such a bottle is traditionally used by

national producers if identical or similar bottles are used in another Member State in accordance with a fair and traditional practice for marketing wines produced in that State.

Costs

39 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Italian Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Landgericht München II by order of 28 January 1983, hereby rules:

1. **Article 30 of the EEC Treaty must be interpreted as meaning that the application by a Member State to imports of wine orginating in another Member State of legislation allowing only certain national producers to use a specific shape of bottle when the use of that shape or a similar shape of bottle accords with a fair and traditional practice in the State of origin constitutes a measure having an effect equivalent to a quantitative restriction.**

2. **Article 36 of the EEC Treaty must be interpreted as meaning that measures having an effect equivalent to quantitative restrictions on imports arising from the fact that national legislation permits a specific shape of wine-bottle to be used only by certain national producers or dealers cannot be justified on grounds of public policy, whether or not the legislation carries penal sanctions; nor can they be justified by the protection of industrial and commercial property on**

the ground that such a bottle is traditionally used by national producers if identical or similar bottles are used in another Member State in accordance with a fair and traditional practice for marketing wines produced in that State.

Mertens de Wilmars Koopmans Galmot Pescatore

Mackenzie Stuart O'Keeffe Bosco Due Everling

Delivered in open court in Luxembourg on 13 March 1984.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 24 JANUARY 1984

My Lords,

Mr Prantl, an Italian national, is the director of a company carrying on business in the Federal Republic of Germany. He was charged before the Amtsgericht in Miesbach, with selling or holding for sale in Germany, between 3 December 1980 and 10 September 1981, red Italian wine contained in bottles known as Bocksbeutel, contrary to paragraph 17 of the Wein-Verordnung of 1971. This prohibits the marketing of wine in such bottles of the traditional Bocksbeutel kind, other than quality wine psr from Franconia and other specified wine growing areas. Breach of such prohibition is an offence which may lead to imprisonment or a fine.

He was acquitted on the basis that, although the bottles used were Bocks-