JUDGMENT OF THE COURT
OF 9 DECEMBER 1975 [1]

Procureur Général at the Cour d'Appel Lyon v Henri Mommessin and Others (preliminary ruling requested by the Cour d'Appel Lyon)

Case 64/75

Summary

1. *Agriculture — Common organization of the markets — Wine — Analysis — Methods — Object — Commercial purposes — Method of control*
(Regulation No 1539/71 of the Commission)

2. *Agriculture — Common organization of the markets — Wine — Analysis — Method — Non-exhaustive nature — Competence of Member States*
(Regulation No 1539/71 of the Commission)

3. *Agriculture — Common organization of the markets — Wine — Importation — National control — Over-alcoholization — Presumption — Method of analysis — Permissibility — Conditions*
(Regulations Nos 816/70 and 817/70 of the Council; Regulation No 1539/71 of the Commission; EEC Treaty, Article 30)

1. The methods of analysis laid down by Regulation No 1539/71 are mandatory not merely when wine has to be analysed for commercial purposes but also whenever the determination of the elements referred to is necessary to establish fraud or adulteration.

2. Regulation No 1539/71 is not exhaustive but leaves to the Member States the choice of applying other methods of analysis for determining the constituent elements of wine which are not relevant to the application of Regulations Nos 816/70 and 817/70.

3. A Member State may in the present state of Community law apply as a national measure of control a presumption in law of over-alcoholization which is based on the proportion of alcohol to the dry extract measured by the 100° method, provided that that presumption is capable of being rebutted and that it is applied in such a way as not to place at a disadvantage, in law or in fact, wines from other Member States.

In Case 64/75,

Reference to the Court under Article 177 of the EEC Treaty by the Cour d'Appel, Lyon, for a preliminary ruling in the criminal proceedings pending before that court between:

1 — Language of the Case: French.

PROCUREUR GÉNÉRAL AT THE COUR D'APPEL, LYON

and

HENRI MOMMESSIN, residing in Charnay les Macon, accused,

JEAN-CLAUDE CHEVALIER, residing in Saint Etienne les Oullières, accused

and

INSTITUT NATIONAL DES APPELLATIONS D'ORIGINE, Paris, plaintiff claiming damages, and

DIRECTION GÉNÉRALE DES IMPÔTS DU DÉPARTEMENT DU RHÔNE, Lyon, plaintiff claiming damages,

on the interpretation of Regulation No 1539/71 of the Commission of 19 July 1971 determining Community methods for the analysis of wines (OJ, English Special Edition 1971 (II), p. 552) in connexion with a method of analysis which is the basis of a presumption under French law of the over-alcoholization of wine,

THE COURT

composed of: R. Lecourt, President, H. Kutscher, President of Chamber, A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen and Lord Mackenzie Stuart, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order for reference and the written 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

1. Wine is a product of the fermentation of fresh grapes or the juice of fresh grapes. The grapes contain sugar which naturally turns into alcohol in the presence of yeast.

The alcoholic strength of the natural product can be increased artificially ('enriched') by various techniques — by fortification, that is, the direct addition of alcohol to the wine or to the grape must or by chaptalization, that is, the direct addition of sugar to the grape must or to the grapes.

These different operations are either prohibited or strictly regulated.

2. Such rules are contained in the Community regulations which have established the common organization of the market in wine since 1 June 1970. Regulation (EEC) No 816/70 laying down additional provisions for the common organization of the market in wine contains the provisions valid for all products in this sector save as otherwise provided. Title IV of this Regulation is headed thus: 'Rules concerning oenological processes and conditions for release to the market'. Article 18 lays down the circumstances in which Member States may permit the natural alcoholic strength of fresh grapes, grape musts and wines to be increased. The following articles specify the conditions under which the alcoholic strength may be increased and in particular the methods to be used. The addition of alcohol in order to increase the alcoholic strength is not provided for and is therefore prohibited; this is confirmed by the fundamental prohibition laid down in Article 25 of the regulation.

Analogous provisions are set out in Articles 7 and 9 of Regulation No 817/70 laying down special provisions relating to quality wines produced in specified regions.

3. Before the Community regulations were implemented, the addition of alcohol to wine was prohibited under French law. The Law of 24 July 1894 on fraudulent practices in the sale of wines introduced a provision to this effect. This provision was re-enacted in Article 8 of the Decree of 1 December 1936, called the Code du Vin. Following the establishment of the Community organization of the market in wine, Decree No 72/309 of 21 April 1972 stated that the Law of 24 July 1894 was repealed in so far as it related to the addition of alcohol to wine.

Chaptalization was also controlled under French Law before the establishment of the Community organization of the market in wine. It was prohibited in certain areas and authorized in others.

4. With the object of effectively preventing breaches of these laws, the French Decree of 19 April 1898 on the over-alcoholization of wine, which was re-enacted in Article 8 of the Code du Vin, introduced a provision concerning a presumption of over-alcoholization of wine which reads as follows:

'Red wines in respect of which the proportion of alcohol to reduced extract is in excess of 4·6 and white wines in respect of which this proportion is in excess of 6·5 shall be presumed to be over-alcoholized. However, this presumption may be rebutted when a comparison of the various constituent elements of the wines, their taste, the conditions of their production and their place of origin enable it to be established that they result exclusively from the fermentation of fresh grapes.'

The presumption is based on the following premises: Wine contains, first, volatile substances (few in number, but plentiful in volume, such as alcohol and volatile acids) and secondly non-volatile substances (such as salts, acids, glycerol and pectins). The non-volatile substances make up the 'dry extract' of the wine.

Fortification and chaptalization create an imbalance between the constituents of

the wine. They have the effect of increasing the quantity of alcohol without however increasing the quantity of most of the other substances. Therefore the dry extract does not increase in the same proportion as the alcohol. Experience has shown that there is a certain ratio between the weight of the reduced dry extract and the weight of alcohol contained in the wine. Therefore, it may be presumed that the wine has been enriched by fortification or chaptalization when the alcohol/reduced dry extract ratio is in excess of certain limits fixed by the Law.

5. In order to apply this presumption it is necessary to determine the method to be used to calculate the dry extract. [1]

Several methods of analysis have been worked out for the calculation of the dry extract. One is the '100° method' which consists in weighing what is left after evaporating the volatile substances in the wine at 100°. Another is the '70° vacuum method' which consists in weighing what is left after evaporating the volatile substances in the wine at 70° in a vacuum. A third method is the 'densimeter method' which consists in calculating the dry extract indirectly from the specific gravity of the wine from which the alcohol has been removed and which has been brought up to the initial volume by adding water.

The choice between the various methods of calculating the dry extract is of practical importance because it appears that the results obtained vary according to the different methods. (The dry extract obtained by the 100° method is less than that obtained by the other two methods because evaporation at 100° causes some particles of the unresistant constituents to disperse into the atmosphere.)

The 100° method was laid down in France for establishing the alcohol/dry extract ratio by Order of 18 January 1907 and set out in detail in an Order of 22 April 1908.

Article 1 (1) of Regulation (EEC) No 1539/71 of the Commission of 19 July 1971 (OJ, English Special Edition 1971, p. 552) determining Community methods for the analysis of wines provides:

'The methods of analysis for the application of Regulations (EEC) Nos 816/70 and 817/70 shall be those set out in the Annex to this Regulation.'

Heading 3 of the Annex provides that:

'The total dry extract shall be measured by a densimeter and calculated indirectly from the specific gravity of the residue without alcohol.'

6. Mr Henri Mommessin, Chairman and Managing Director of the Mommessin limited company, and Mr Jean-Claude Chevalier, vine grower, were convicted, by a judgment of 12 June 1973 of the Tribunal de Grande Instance, Villefranche-sur-Saône, of having, in 1971 and 1972, enriched wine unlawfully by chaptalization, in the case of Mr Chevalier, and of having offered for sale or sold this wine under the description 'Beaujolais Villages', in both cases.

Appeals were brought against this decision before the Cour d'Appel, Lyon.

Holding that 'the disparity which has been pointed out between the Community and national rules on the obtaining of the dry extract makes the arguments of the defence relevant to the decision and makes it necessary to inquire whether the methods of analysis laid down by the regulation are mandatory in all spheres, including that of the investigation of adulteration, as

1 — Article 8 of the Code du Vin uses the expression 'reduced extract', the definition of which is annexed to the Order of 24 June 1963 on official methods for the analysis of wine and grape musts: 'The reduced extract is the total reduced dry extract less all the total sugars in excess of 1 gramme, potassium sulphate in excess of 1 gramme, mannitol, if any, and all chemical substances which may have been added to the wine'.

Mommessin maintains, or whether, on the contrary, as the prosecution claims, the application is limited to identifying wines for commercial purposes' and that 'although it is true that the preamble to the regulation specifies that the methods laid down therein "should be compulsory for all commercial transactions and *all verification procedures*", nevertheless Regulations Nos 816/70 and 817/70 in implementation whereof Regulation No 1539/71 was adopted, refer to Article 43 of the Treaty of Rome, which deals solely with the working out and implementing of a common agricultural policy, and relate to the common organization of the market in wine', the Cour d'Appel, Lyon, decided, by a judgment of 23 May 1975, to stay the proceedings and, under Article 177 of the EEC Treaty, to ask the Court of Justice:

'Whether the Community methods for the analysis of wines laid down in Regulation (EEC) No 1539/71 of 19 July 1971 are mandatory for the investigation into and punishment of fraud relating to wine.'

7. The order for reference was entered in the Court Register on 21 July 1975.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the French Government and the Commission.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without instituting a preparatory inquiry.

8. By judgments of 30 September 1975 given in Joined Cases 89/74, 18 and 19/75 and Joined Cases 10 to 14/75 the Court replied to questions referred by the Cour d'Appel, Bordeaux, and by the Cour d'Appel, Aix-en-Provence, which were in substance identical to that referred in the present case.

II — Written observations submitted to the Court

1. Observations of the French Government

The French Government emphasizes, first, that the title of Regulation No 1539/71 refers to 'methods for analysis' ('des méthodes d'analyse') and therefore does not lay down all the methods of analysis. The regulation only lays down methods of analysis to ascertain the elements which are capable of being adopted in application of Article 11 of Regulation No 817/70 and in particular of enabling quality wines produced in specified regions to be recognized. The French Government maintains that the scope of Regulation No 1539/71 must be considered as limited to the identification and characterization of wines and is not at all concerned with the investigation of fraudulent practices and adulterations.

It recalls that this point of view seems moreover to be shared by the Commission which, in a reply of 29 May 1974 to a written question in the Parliament made known its intention to submit proposals to the Council for provisions for common methods or rules for the purpose of discovering infringements of the rules relating to oenological practices.

With regard more especially to the maintenance in force of the provisions of Article 8 of the Code du Vin, the French Government points out that 'the proportion of alcohol by weight to the reduced extract' is not a rule for the analysis of wine but the expression of an oenological principle the results of which enable over-alcoholization of wine in a given case to be determined, by comparison with constants which have been established by experiment.

It is obvious that to apply such a rule it is necessary to refer to the elements

expressly stated by these constants and to the quantities which they adopt.

In connexion with the dry extract, the confusion which may arise by reason of the existence of similar descriptions which however apply to different groups of constituents must be avoided. Until the Order of 24 June 1963 defined the total dry extract, French regulations only recognized the dry extract obtained on the basis of measurement at 100°. This extract differs from the total dry extract because some of the dry substances are burned away when the wine is boiled at 100°. This dry extract is generally called 'dry extract at 100°'. In some cases it corresponds to the reduced extract referred to in Article 8 of the Code du Vin (where there are no sugars in excess of 1 gramme per litre and there is no potassium sulphate present), but it can never be considered as the total dry extract.

In other respects, analysts agree that it is impossible to find a transposition coefficient which enables the total dry extract to be converted into the dry extract. When measurements are taken according to the French concept of the dry extract at 100°, most of the dextrans and pectic derivatives and some of the glycerine are not taken into account; therefore, for the same wine the number expressing the value of the extract given by the 100° method is smaller than that obtained by the densimetric method. It is just this great variability in the quantity of the substances of the types mentioned above in different wines which makes it impossible in practise to transpose results of one method into the other.

Then the French Government claims that there has been no Community provision defining the method of measuring the dry extract or the reduced extract. Consequently, a provision of national law which is neither contrary to nor concurrent with a provision of Community law cannot be considered as repealed.

Thus it appears that the method of determining the dry extract at 100°, which is necessary for the application of Article 8 of the Code du Vin, is compatible with the provisions of Regulation No 1539/71.

2. Observations of the Commission

The Commission replies first of all to the question whether the methods set out in Regulation No 1539/71 are mandatory for the investigation into and punishment for the adulteration of wine and subsequently to the question whether that regulation allows Member States to prescribe the 100° method of analysis for determining the dry extract of wine, which is necessary for establishing the alcohol/dry extract ratio.

As to the first of these questions, the Commission recalls that the question has been raised with regard to the specific fraudulent practice of over-chaptalization, which is governed by Community provisions. The Commission takes the view that where the Member States investigate and punish infringements of these rules committed by individuals they are acting in application of Regulations Nos 816/70 and 817/70. Furthermore, since Article 39a of Regulation No 816/70 and Article 9 of Regulation No 1594/70 give to the Member States the task of taking any appropriate measures to ensure adherence to the relevant Community provisions, the States' methods of investigation and punishment of fraudulent practices incontestably fall within the ambit of Regulations Nos 816/70 and 817/70.

Consequently, while accepting that by adopting Regulation No 1539/71 the Community legislature was essentially concerned to define the methods of analysis for the measurement of those substances contained in wine which are expressly mentioned in the Community regulations, nevertheless the operative

part of the regulation appears to indicate a wider scope.

This is confirmed by the reasons contained in the preamble to Regulation No 1539/71. In this connexion the Commission refers in particular to the third recital. It is true that the articles expressly mentioned as being the legal basis of the regulation militate in favour of a restrictive interpretation. But this fact cannot in the Commission's opinion prevail over the unequivocal statements in the operative part of the regulation and the statement of reasons.

As to the second question, the Commission maintains that Regulation No 1539/71 does not permit the Member States to prescribe any method of analysis of the dry extract other than the densimetric method for the determination of the dry extract of wine necessary for establishing the alcohol/reduced dry extract ratio.

The Commission emphasizes in this connexion that the regulation's provisions are mandatory, since only those methods of analysis set out in the annex may be used for determination of the substances listed in the annex.

The Commission further states that for the purposes of the presumption of over-alcholization the total dry extract must be determined and not any other matter, such as the reduced dry extract or just the dry extract, as certain parties have stated. In the context of French law it is not possible to maintain that the 100° method determines anything other than the total extract, whilst French legislation itself defines the reduced extract as being derived from the total extract.

At the public hearing on 20 November 1975, the French Government, represented by R. Tinlot, Chief Inspector in the Service de la Répression des Fraudes of the Ministry of Agriculture, and the Commission, represented by its Legal Adviser, G. Marenco, presented oral argument.

The Advocate-General delivered his opinion at the hearing on 26 November 1975.

Law

1 By a judgment of 23 May 1975 which was received at the Court on 21 July 1975, the Cour d'Appel, Lyon; referred a question to the Court of Justice under Article 177 of the EEC Treaty on the interpretation of Regulation No 1539/71 of the Commission of 19 July 1971 determining Community methods for the analysis of wines (OJ, English Special Edition, 1971 (II), p. 552).

2 It appears from the judgment making the reference that the question was raised during criminal proceedings brought against a vine grower and a wine merchant accused of having illegally enriched certain quantities of red wine and having offered those quantities for sale under the appellation 'Beaujolais Villages'.

3 The prosecutions are based on Article 8 of the Code du Vin which re-enacts the provisions of the Decree of 19 April 1898 and creates a presumption of over-alcoholization of wine if the proportion of alcohol to reduced extract is in excess of 4·6 in respect of red wines and 6·5 in respect of white wines, subject to certain adjustments which were introduced to take account of particular methods of wine-making.

4 By virtue of provisions adopted by the French authorities to prevent fraud and adulteration in connexion with wines, the method of analysis known as the 100° method is used to measure the dry extract in order to determine the proportion of alcohol to reduced extract mentioned in Article 8 of the Code du Vin.

5 The Cour d'Appel, Lyon, asks 'Whether the Community methods for the analysis of wines laid down in Regulation (EEC) No 1539/71 of 19 July 1971 are mandatory for the investigation into and punishment of fraud relating to wine'.

6 Article 1 of that regulation provides that the methods of analysis set out in the annex to the regulation shall be used for the application of Regulation No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine and Regulation No 817/70 of the Council laying down special provisions relating to quality wines produced in specified regions (OJ, English Special Edition, 1970 (I), p. 234 and p. 252).

7 Item 3 in the annex provides that 'The total dry extract shall be measured by a densimeter and calculated indirectly from the specific gravity of the residue without alcohol'.

8 In order to decide whether this method, and also the other methods of analysis laid down by the regulation, are mandatory for the investigation into and punishment for fraud relating to wine, it must first be observed that they were laid down primarily in order to determine the amounts of the various constituent elements which wine must contain in order to be given the description table wine or quality wine produced in a specified region under Regulation Nos 816/70 and 817/70.

9 Nevertheless, the third recital in the preamble to Regulation No 1539/71 provides that 'these methods should be compulsory for all commercial transactions and all verification procedures'.

10 It must be concluded that they are mandatory not merely when wine has to be analysed for commercial purposes but also whenever the determination of the elements referred to is necessary to establish fraud or adulteration.

11 On the other hand it must be noted that the methods of analysis laid down in Regulation No 1539/71 only serve to determine the constituent elements of wine listed in the annex to the regulation.

12 It follows that the regulation is not exhaustive but leaves to the Member States the choice of applying other methods of analysis for determining the constituent elements of wine which are not relevant to the application of Regulations Nos 816/70 and 817/70.

13 In order to provide the national court with all those elements of interpretation of Community law which may be of use to it in determining the effects of the Community provisions at issue the Court must nevertheless examine whether the latter prevent the use of the 100° method of analysis for the purposes of a presumption in law as provided by Article 8 of the Code du Vin.

14 In this respect it must first be ascertained whether such a presumption in law for the determination of cases of over-alcoholization is compatible with Community rules, leaving aside the question of the method of analysis used.

15 It must be observed in this respect that, whilst the Community rules have not, up to now, been extended to cover all oenological practices, Regulation No 816/70 contains in Title IV detailed provisions relating to the enrichment of wine to which Articles 7 and 9 of Regulation No 817/70 refer.

16 Article 39 (a) of Regulation No 816/70, which was introduced by Article 12 of Regulation No 2680/72 of the Council of 12 December 1972, provides that the Member States shall take all appropriate measures to ensure compliance with that regulation.

17 Moreover, this rule aims to strengthen and to extend the application of that laid down in Article 9 of Regulation No 1594/70 of the Commission of 5 August 1970 which provides that pending the adoption of Community provisions in this matter, Member States shall take all necessary measures to ensure that the provisions relating to enriching, acidifying and de-acidifying are observed.

18 It follows from this that the Member States must take effective measures of control whilst retaining the power to choose the measures which they consider appropriate for that purpose within the limits which have been laid down by other rules of Community law.

19 Thus, when a Member State adopts or maintains, for the detection of illegal enrichment operations, a presumption in law of over-alcoholization based, like Article 8 of the Code du vin, on the proportion of alcohol to reduced extract, the problem arises whether this provision must be considered as a measure of control which comes within the national jurisdiction or as a rule of analysis which might be incompatible with the Community rules on that subject.

20 Such a presumption in law must be described as a measure of control and not as a rule of analysis when it is not irrebuttable but may be invalidated.

21 It must therefore be concluded, as is recognized moreover by the national court, that in the present state of the Community rules, the latter do not in principle prevent a Member State from applying a presumption in law as a measure of control in order to detect cases of over-alcoholization.

22 It is necessary then to consider whether, notwithstanding this, the provisions of Community law on the methods of analysing wine prohibit the application in a Member State of such a measure of control because it requires resort to a method of analysis which is not authorized by Community rules.

23 It appears from Article 1 of Regulation No 1539/71 that the densimetric method prescribed in the annex for measuring the total dry extract was introduced, together with the other methods contained in the annex, 'for the application of Regulations (EEC) Nos 816/70 and 817/70'.

24 Therefore, in order to decide whether the densimetric method is obligatory, it must first be examined whether the national measure of control in question comes within the application of Regulation No 816/70 or of Regulation No 817/70.

25 In this respect it is important to remember that although Regulation No 816/70 leaves to the Member States the choice of the necessary measures of control, it nevertheless requires them to ensure compliance with the provisions concerning oenological processes, including the enrichment of wine.

26 In any case, this has been the situation since Regulation No 2680/72 of 12 December 1972, which came into force on 1 January 1973, introduced into Regulation No 816/70 an article, 39a, which provides that 'Member States shall take all appropriate measures to ensure compliance with this regulation'.

27 It must be concluded from this that a national measure of control which is intended to detect cases of the enrichment of wine in violation of the Community provisions comes within the field of application of Regulation No 816/70 and consequently within that of Regulation No 1539/71 on methods of analysis.

28 However, in order to answer the question which has been referred it is also necessary to inquire whether a presumption in law based on the proportion of alcohol to dry extract may be applied in practice if only the densimetric method laid down by Regulation No 1539/71 is permissible for the measurement of the total dry extract.

29 The presumption in question is based on an oenological rule, which is drawn from experience, according to which natural fermentation results in a certain relationship between the weight of the alcohol and that of the reduced dry extract contained in the wine.

30 The concept of reduced dry extract which is relevant in this context appears to differ from the concept of total dry extract prescribed by the provision of Community law not only in that certain substances are deducted but also in

that it implies that recourse may only be had to the so-called 100° method in order to extract the dry substances from the wine.

31 It seems in fact that the reduced dry extract cannot be calculated from another method of analysis, in particular the densimetric method, and that experience shows that no coefficients exist which enable the values of the dry extract obtained by other methods to be transposed into those which would be the result of the 100° method.

32 In spite of the criticism of this method in scientific and professional circles, no other method has been found until now to replace it for the purposes of the presumption in law of over-alcoholization.

33 It follows that this presumption would be rendered impracticable if the densimetric method were obligatory to the exclusion of the 100° method, but that on the other hand the latter may only be applied with caution.

34 The use of the densimetric method laid down by the Community regulation is not an aim in itself but a means intended to ensure compliance with Community rules on oenological processes and on the quality of wines.

35 In the absence of Community measures of control, it would therefore be contrary to the aims of the Community rules on this subject to require that this method be used at the cost of invalidating the only method of control which is at present acknowledged to be appropriate for the detection of over-alcoholization.

36 It must be concluded from this that until more appropriate methods have been worked out, the Community rules in the wine sector do not prohibit Member States from using the 100° method to measure the dry extract of wine in order to apply a presumption in law of over-alcoholization based on the proportion of alcohol to dry extract.

37 It must be added that, as was stated in the judgments of the Court of 30 September 1975 in Joined Cases 89/74 and 18 and 19/75 and in Joined Cases 10 to 14/75, in the case of wines coming from other Member States, such a presumption must be applied in such a way as to avoid any discrimination.

Costs

38 The costs incurred by the French Government and the Commission of the European Communities which have submitted observations to the Court are not recoverable.

39 Since the proceedings are, so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, it is for that court to make an order as to costs.

On those grounds,

THE COURT

in answer to the question referred to it by the Cour d'Appel, Lyon, by judgment of 23 May 1975, hereby rules:

Regulation Nos 816/70, 817/70 and 1539/71 must be interpreted as meaning that:

A Member State may in the present state of Community law apply as a national measure of control a presumption in law of over-alcoholization which is based on the proportion of alcohol to the dry extract measured by the 100° method, provided that that presumption is capable of being rebutted and that it is applied in such a way as not to place at a disadvantage, in law or in fact, wines from other Member States.

Lecourt Kutscher Donner

Mertens de Wilmars Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 9 December 1975.

A. Van Houtte
Registrar

R. Lecourt
President