JUDGMENT OF THE COURT
OF 30 SEPTEMBER 1975 [1]

Procureur général at the Cour d'appel Bordeaux v Robert Jean Arnaud and Others (preliminary ruling requested by the Cour d'appel Bordeaux)

'Presumption of over-alcoholization of wine'

Joined Cases 89/74, 18 and 19/75

Summary

Agriculture — Common organization of the markets — Wine — Importation — Quantitative restrictions — Measures having equivalent effect — National control — Over-alcoholization — Presumption — Method of analysis — Permissibility — Conditions

(EEC Treaty, Article 30; Regulations Nos 816/70 and 817/70 of the Council; Regulation No 1539/71 of the Commission)

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 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, as a measure having an effect equivalent to a quantitative restriction, wines from other Member States.

In Joined Cases 89/74 and 18 and 19/75

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

PROCUREUR GÉNÉRAL AT THE COUR D'APPEL BORDEAUX

and

1. ROBERT JEAN ARNAUD, residing in Teuillac, Gironde, accused,

(Case 89/74)

1 — Language of the Case: French.

2. CLAUDE CAMILLE RABY, residing in Vignonet, Gironde, accused

and

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

SYNDICAT GIRONDIN DE DÉFENSE CONTRE LA FRAUDE, Bordeaux, plaintiff claiming damages,

LIGUE DES VITICULTEURS DE LA GIRONDE, Bordeaux, plaintiff claiming damages,

(Case 18/75)

3. ROGER GALLET, residing in Capian, Gironde, accused,

and

THE DIRECTOR GENERAL OF TAXES, Bordeaux, plaintiff claiming damages,

LIGUE DES VITICULTEURS DE LA GIRONDE, Bordeaux, plaintiff claiming damages,

(Case 19/75)

on the interpretation of certain provisions of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (OJ, English Special Edition 1970 (I) p. 234), Regulation (EEC) No 817/70 of the Council of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions (Official Journal English Special Edition 1970 (I) p. 252) and Regulation No (EEC) 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 presumption under French law of the over-alcoholization of wine,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. J. Mackenzie Stuart, Presidents of Chambers, A. M. Donner, R. Monaco, P. Pescatore, H. Kutscher, M. Sørensen (Rapporteur) and A. O'Keeffe, Judges,

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

gives the following

JUDGMENT

Issues of fact and of law

The orders 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. The two basic regulations are Regulation (EEC) No 816/70 laying down additional provisions for the common organization of the market in wine which contains provisions valid for all products in this sector, save as otherwise provided, and Regulation (EEC) No 817/70 laying down special provisions relating to quality wines produced in specified regions.

Regulation (EEC) No 816/70 contains Title IV headed '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 laid down in Articles 7 and 9 of Regulation (EEC) No 817/70.

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, 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 two other 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 2 of the French Order of 22 January 1974 on the category of local wines presupposes that this method is applicable for the purpose of determining the alcohol/dry extract ratio. It reads as follows:

'With the exception of the measurement of the dry extract which shall continue to be carried out at 100° C for the possible determination of the alcohol/reduced extract ratio referred to in Article 8 of the Code du vin, the analyses referred to in the preceding Article shall be carried out in accordance with the methods prescribed by the provisions of Regulation No 1539/71/EEC of 19 July 1971'.

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 wines and grape musts: 'The reduced extract is the total reduced dry extract less all the 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'.

Article 1 (1) of Regulation No 1539/71 of the Commission of 19 July 1971 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. Messrs Arnaud, Raby and Gallet are vine growers and wine producers in the Gironde département. Messrs Arnaud and Raby were prosecuted in 1971 and Mr Gallet was prosecuted in 1972 for having unlawfully enriched certain quantities of red wine either by fortification or chaptalization in the case of Mr Arnaud and by chaptalization in the case of Messrs Raby and Gallet.

Messrs Arnaud and Gallet were sentenced to fines by the Tribunal correctionnel, Bordeaux. The Court based its decision on the results of the analysis of the dry extract according to the 100° method.

Mr Raby was acquitted by the Tribunal de grande instance, Libourne, which took into consideration for this purpose the analysis of the dry extract according to the densimetric method and disregarded the result obtained by the 100° method.

Appeals were brought against these three decisions before the Cour d'appel, Bordeaux.

The three accused maintained *inter alia* that the provisions of Community Regulations Nos 816/70, 817/70 and 1539/71 led to the repeal of Article 8 of the Code du vin on which the prosecutions are based and to the prohibition of the use of the method of analysis involving dry extract at 100° to establish the presumption in law of over-alcoholization and the Cour d'appel, Bordeaux, decided by orders of 22 May 1974 to stay the proceedings and, under Article 177 of the EEC Treaty, to ask the Court of Justice:

'1. Whether Regulations Nos 816/70 and 817/70 and the provisions adopted in implementation thereof authorize on the national level the retention of the provisions of Article 8 of the Code du vin (Decree of 19 April 1898 and in implementation of Article 2 of the Law of 24 July 1894);
2. Whether the use of the method of analysis involving dry extract at 100°, which is necessary for the application of Article 8, is compatible with the provisions of Regulation No 1539/71 which exclude that method;
3. Whether Article 2 of the Order of 22 January 1974 conflicts with Regulation No 1539/71'.

7. The orders for reference were entered in the Court Register on 7 November 1974 in Case 89/74 and on 11 February 1975 in Cases 18 and 19/75. Mr Arnaud and Mr Gallet, represented by Mr J. Rozier, Advocate at the Cour d'appel, Bordeaux, Mr Raby, represented by Mr J. Froidefond, Advocate at the Libourne Bar, the Procureur général at the Cour d'appel, Bordeaux, the French Government, represented by Mr R. Pisani, Chief Inspector in the Service de la répression des fraudes at the Ministry of Agriculture, the Government of the Italian Republic, represented by Ambassador A. Maresca, assisted by Mr I. M. Braguglia, vice avvocato dello Stato and the Commission, represented by its Legal Adviser, Mr G. Marenco, submitted written observations.

By order of 26 February 1975, the Court, having heard the report of the Judge-Rapporteur and the views of the Advocate-General, decided to join Cases 18 and 19/75 for the written procedure, and, by order of 28 May 1975, to join the three cases for the oral procedure.

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.

However, the Court invited the parties to provide more detailed explanations with regard to the possibility or otherwise of transposing the alcohol/dry-extract ratios obtained by using the densimetric method into ratios resulting from the use of the 100° method.

II — Written observations submitted to the Court

1. The observations of Messrs Arnaud, Raby and Gallet

Messrs Arnaud, Raby and Gallet claim that Regulations Nos 816/70 and 817/70 do not authorize the retention of Article 8 of the Code du vin.

Since all Community regulations have the effect of repealing conflicting provisions of national law and even provisions of national law which are in accordance with them, and since Article 25 of Regulation No 816/70 prohibits the addition of alcohol to wine, there is no doubt that this article repeals the Law of 24 July 1894. However, as the rule of the presumption of over-alcoholization of wine was adopted under that very Law, by the Decree of 1898, it follows that this Decree, which was re-enacted in Article 8 of the Code du vin, is also repealed.

They refer to the articles of Regulations Nos 816/70 and 817/70 concerning the chaptalization of wine and to the definitions of 'wine suitable for yielding table wine', 'table wine' and 'quality wine produced in a specified region' (quality wines p.s.r.) and claim that the legality of chaptalization was not made subject to the result of the alcohol/dry extract ratio and that none of the Community Regulations provides that a wine does not answer the definition of 'wine suitable for yielding table wine' etc., if its alcohol/dry extract ratio is in excess of 6·5 in respect of white wines and in excess of 4·6 in respect of red wines.

The presumption of the addition of alcohol becomes a discriminatory measure with regard to the wines referred to by this regulation if it is applied to them and not to other wines produced in the Community. It may cause wines which are considered good and merchantable in other Member States to be considered in France as adulterated.

They conclude from this that the presumption cannot be applied in a single Member State on the basis of a Decree of 1898 when it does not exist in any of the other Member States.

In this connexion they recall the difficulties which the application of the presumption raises each time the enrichment is legal and in particular where French wine is blended with wine from another region of the Community which has been legally chaptalized.

Moreover, they recall that the French legislation in this sphere has given rise to much criticism from oenological experts particularly because of the development in wine-making conditions and the uncertainty of the results of the method of analysing the dry extract obtained by evaporation at 100°. The French Government must make allowances and even allow an alteration of the maximum ratio, as it did for example by Circular No 424 of 2 March 1965 and by the Circular of 25 March 1974 (the latter relaxing the ratio in respect of Beaujolais wines from the 1973 harvest which were claimed to have been subject to a shortened wine-making process).

Finally they recall that experts hope that the 100° method will be replaced by the densimetric method and that the 1954 International Convention for the Unification of Methods for the Analysis and Appraisal of Wines laid down the 70° vacuum method as the reference method and the densimetric method as

the customary method and expressly prescribed the 100° method for directly measuring the extract of wines containing sugars.

As regards the second question, Messrs Arnaud, Raby and Gallet claim that Regulation No 1539/71 rules out the use of the 100° method and makes the densimetric method compulsory and that the question should therefore be answered in the negative. This is all the more so since the results obtained by one method are not comparable with those obtained by the other. The two methods are totally different. It is impossible to transpose the result of one method into the other. There is no correcting factor or table which enables one result to be converted into the other. Moreover, for several reasons, the results obtained by the 100° method are not reliable. The densimetric method is a more accurate and reliable method.

As regards the third question, Messrs Arnaud, Raby and Gallet claim that Article 2 of the Order of 22 January 1974 conflicts with Regulation No 1539/71 since its aim is to retain a method of analysis which has been repealed.

2. Observations of the Procureur général at the Cour d'appel, Bordeaux

The Procureur général examines the relevant French legislation and claims that all these provisions show the obvious desire of the Minister of Agriculture to retain in force the presumption of the over-alcoholization of wine which is based on the 100° method in order to measure the dry extract.

In his opinion, this is in accordance with Regulations Nos 816/70 and 817/70 which impose upon Member States the obligation to control vine products. Therefore it would be difficult to conceive that the objective of these regulations was to make it impossible for the Member States actually to exercise such control. Measurement of the alcohol/dry extract ratio is, moreover, the only means at the disposal of the supervising authorities, in respect of imported wines, of investigating adulteration due to over-alcoholization.

The Procureur général also refers to the fact that Regulation No 1539/71 was adopted in application of Articles 20 and 39 of Regulation No 816/70 and in application of Article 11 (4) of Regulation No 817/70. He claims that all these articles concern the identification of table wines or quality wines p.s.r. and that the sole objective of Regulation No 1539/71 is to lay down the methods of analysis whereby this identification can be established.

He adds that it is impossible to transpose with sufficient accuracy the value of the alcohol/dry extract ratio obtained by the densimetric method into the alcohol/dry extract ratio obtained by the 100° method since the two techniques are very different in their principles and their results. There can be no constant relationship between these two methods of measurement.

3. The observations of the French Government

The French Government first of all 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, analyists 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 veriability in the quantity of the substances of the types mentioned above in different wines which makes it impossible in practice to transpose the 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.

As regards the other two questions, the French Government claims that if the answer given is that the provisions of Article 8 of the Code du vin remain in force this necessarily involves giving an answer to the same effect in respect of Article 2 of the Order of 22 January 1974.

In the opinion of the French Government, it must first be emphasized that no Community provision has been made on the investigation of fraudulent practices and adulteration except to call upon the Member States to take all appropriate measures to ensure compliance with the Community rules. In this connexion, it quotes in particular Article 39a of Regulation No 816/70 introduced by Regulation (EEC) No 2680/72 of the Council of 12 December 1972 (OJ, English Special Edition 1972 (9-28 December) p. 30) which provides that Member States shall take all appropriate measures to verify compliance with the provisions of that Regulation.

With regard to the provisions of Regulation No 1539/71, the French Government observes that in the title thereof refers to 'methods for analysis' ('des méthodes d'analyse') and therefore does not lay down all the methods of analysis. 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 adulteration. Therefore, it appears that the provisions of the Decree of 19 April 1898 (Article 8 of the Code du vin) are not contrary to Community law or in conflict with it. Finally, the French Government claims that it would be paradoxical to make Member States responsible for adopting checks appropriate to implement these regulations and at the same time to deprive them of the means of carrying out such checks.

4. Observations of the Government of the Italian Republic

The Italian Government examines the French rules in the field in question and

points out that the presumption of over-alcoholization is a measure for checking the existence of certain material properties which wine must possess. It is thus not concerned with specifying these conditions but checking that they exist.

In its opinion, an examination of the provisions of Community law reveals that the task of checking that the material properties of the wine are present is left to Member States, with some exceptions. In this connexion, it refers to Article 39a of Regulation No 816/70 and to Article 9 of Regulation No 1594/70 (OJ, English Special Edition 1970 (II), p. 558).

Therefore the Italian Government claims that Member States are still free to undertake checks intended to ensure that the Community rules are observed, so that where the national court considers that the presumption of over-alcoholization constitutes a similar check, it is compatible with the system of Community law to keep it in force.

The Italian Government claims that the answer to the second question follows from Regulation No 1539/71 determining Community methods for the analysis of wines. Some of the grounds upon which Regulation No 1539/71 is based, and especially the third recital in the preamble thereto ('... consequently, these methods should be compulsory for all commercial transactions and all verification procedures') make it necessary for the regulation to be considered as also applicable to the methods of analysis which are required to verify the existence of the material properties which are required by the Community rules in respect of the product in question. This view is supported by the provisions of Article 1 of the regulation itself, since Regulation No 816/70 includes Article 39a which imposes upon Member States the obligation to take all appropriate measures to verify compliance with the provisions of Community law. Moreover, if a different view were taken, the aim of the common organization of the market would be jeopardized since a product which was regarded in one country and according to a certain method of analysis as a table wine fulfilling the required conditions might not be regarded as such in another country which had adopted a different method of analysis.

Since amongst the Community methods of analysis there is one method, that is, the densimetric method, the aim of which is to carry out the same verification procedure as that which the national method of dry extract as 100° aims to do, the Italian Government concludes that the Community method of analysis must be applied.

5. The observations of the Commission

The Commission recalls that the Court only has jurisdiction to interpret Community law within the context of the procedure referred to in Article 177 of the EEC Treaty and taking into consideration the fact that the second and third questions raise the same problem as regards the interpretation of Community law, it considers that the questions should be worded thus:

'1. Do Regulations Nos 816/70 and 817/70 and the implementing regulations made thereunder authorize Member States to apply a presumption of over-alcoholization to wines which is based upon the alcohol/reduced extract ratio?
2. If the first question is answered in the affirmative, does Regulation No 1539/71 authorize Member States to prescribe the 100° method of analysis for measurement of the dry extract which is necessary to determine the alcohol/reduced extract ratio?'

In the Commission's opinion, the first question poses the problem to what extent the Member States may apply provisions of national law to verify and enforce compliance with the Community provisions concerning oenological processes.

The Commission's conclusion is that Member States not only may but must take all appropriate measures to ensure that the provisions of Community law are observed. In this connexion, it refers in particular to Article 9 of Regulation No 1594/70 and Article 13 of Regulation No 817/70. The Commission observes that the provisions of Community law on the harmonization of verification procedures which have been adopted up to the present are not exhaustive and that none of the provisions of the Community rules prevents the application of the presumption of over-alcoholization which is based on the alcohol/dry extract ratio.

However it adds that the action of the Member States conflicts with the limit which the prohibition on measures having an effect equivalent to quantitative restrictions on imports constitutes. If the controls imposed by a Member State on the products of other Member States were carried out more rigorously than on home-manufactured products, this would be such a measure.

In the Commission's opinion, it is impossible to raise the objection to this answer that the presumption in question causes the Community rules on the enrichment of wine to be replaced by the mere conformity of the results of the chemical analysis with the values laid down by national legislation. This objection would only be well-founded if the presumption were irrebuttable. On the other hand, although it is fully possible to give evidence in rebuttal, the presumption in question must be considered as a true method of verification.

Moreover, a distinction must be made between the question of the permissibility of the presumption in question in the abstract and the permissibility of the determination *in concreto* of the values which give rise to the presumption. To fix values for the alcohol/extract ratio which are valid for all Community wines and which penalize wines from other Member States by contrast with home-produced wines is, for example, a measure having an effect equivalent to a quantitative restriction on imports. Although the Commission cannot within the context of these proceedings, commit itself as to whether the values laid down in French law are fair in respect of all Community wines, there is nothing in its opinion to make it believe *a priori* that these values penalize wines from other Member States.

Then the Commission dismisses another objection which may be made to the conclusion set out above. The presumption of over-alcoholization is not in conflict with the opportunities of enriching wine legally because simple mathematical operations are sufficient for the person concerned to show that the enrichment is legal, if such is really the case.

Finally the Commission points out that the effect which Community law has of repealing contrary provisions of national law consists essentially in rendering inapplicable provisions of national law to the extent to which their contents are contrary to the contents of the provisions of Community law. Indeed, a Member State may and sometimes must go further than this and formally repeal provisions of national law. But repealing provisions in this way is then the action of the Member State. In this case, although it is true that Article 25 of Regulation No 816/70 by its wording precludes the applicability in a Member State of a rule the content of which is similar to that of Article 2 of the Law of 24 July 1894, this article, on the other hand, has no effect on the presumption of over-alcoholization unless it is proved that a contradiction exists between these two rules.

As regards the second question, the Commission first points out that the answer that the 100° method must be

replaced by the densimetric method would require a modification of the values of the alcohol/dry extract ratio. But there are no formulae for converting the values of the extract obtained by the different methods. Besides, the science of oenology does not appear to have developed an alcohol/extract ratio based on the extract obtained by the densimetric method. Therefore an answer to this effect would have the result of making the task of the Services de répression des fraudes more difficult.

The Commission claims moreover that by adopting Regulation No 1539/71 the Community legislature was essentially aiming at defining some methods of analysis to measure the substances contained in wine expressly mentioned in the Community regulations.

Apart from that, however, the regulation appears to be wider in scope. In fact it lays down the methods of analysis 'for the application of Regulations (EEC) Nos 816/70 and 817/70'. In order to be able to conclude that Regulation No 1539/71 is not applicable to the methods of verification which come within the discretionary power of Member States, the phrase 'for the application of Regulations (EEC) Nos 816/70 and 817/70 must be interpreted as relating solely to cases where the two regulations expressly mention the substances for which a method of analysis is laid down. This restrictive interpretation, which is in general difficult to support, seems all the more unjustified since, according to Article 39a of Regulation No 816/70 and Article 9 of Regulation No 1594/70, national measures of control are expressly adopted in application of Regulations Nos 816/70 and 817/70.

Nor is a restrictive interpretation lent support by the reasons which appear 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.

Because of these considerations, the Commission believes that the second question submitted by the Cour d'appel, Bordeaux, must be answered in the negative.

At the oral proceedings on 11 June 1975, Messrs Arnaud, Raby and Gallet, represented by Mr J. Rozier, the French Government represented by Mr R. Tinlot, Chief Inspector in the Service de la répression des fraudes, and the Commission, represented by its Legal Adviser, Mr G. Marenco, presented oral argument.

During this hearing, the parties adduced new arguments which are summarized below:

According to the *French Government,* Regulation No 1539/71 cannot be referring to methods of investigating fraudulent practices and adulteration because such methods do not exist internationally since the International Office for Vines and Wine has only established methods of analysis for determining the constituents of wine.

The French Government denies in addition that it had let the rule of presumption fall into disuse and claims that from 1965 to 1974, 54 cases of offences concerning over-alcoholization were brought before the courts, 45 of these cases relating to French wines, 8 to Italian wines and 1 to Spanish wine. Of these 54 cases, 18 were brought before 1970.

Messrs Arnaud, Raby and Gallet emphasize in particular that the rule of presumption is a rule which affects the very composition of the product; therefore it does not merely constitute a

verification measure but rather the definition of a novel and additional feature which has been superimposed on Community regulations. They recall the difficulties raised for those concerned by the need to supply evidence in rebuttal and claim that for traders and in particular importers of wine it is sometimes even impossible to adduce such evidence.

The *Commission* claims that the 100° method is not the only method by which a ratio showing over-alcoholization may be determined. It is true that the present ratio in France is determined on the basis of the 100° method, and it is true that at present there is no alcohol/dry extract ratio based on another method. But, in the Commission's opinion, it is certain that on the basis of experiments based only on the densimetric method a new alcohol/dry extract ratio could be formulated.

The *French Government* replies that it might be possible to create a new rule of presumption based on the alcohol/total reduced dry extract ratio, the total dry extract being calculated by densimeter and making the reduction in proportion to this total dry extract calculated by densimeter. But to work out such a rule requires a great deal of effort and time. Several years at least would be needed to obtain enough experience.

The Advocate-General delivered his opinion at the hearing on 8 July 1975.

Law

1 By judgments of 22 May 1974 which were received at the Court on 7 November 1974 with regard to Case 89/74 and on 11 February 1975 with regard to Cases 18 and 19/75, the Cour d'Appel, Bordeaux referred under Article 177 of the EEC Treaty certain questions on the interpretation of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (OJ, English Special Edition 1970 (I) p. 234), Regulation (EEC) No 817/70 laying down special provisions relating to quality wines produced in specified regions (OJ, English Special Edition 1970 (I) p. 252) and Regulation No (EEC) 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 Since the three cases have the same subject-matter, they must be joined for the purposes of the judgment.

3 It follows from the judgments making the reference that the questions were raised during prosecutions brought against French wine traders in particular for having illegally enriched certain quantities of red wine.

4 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.

5 The Cour d'appel, Bordeaux asks essentially whether the Community rules in the wine sector enable the Member States to apply a presumption in law of over-alcoholization such as that laid down in Article 8 of the French Code du vin.

6 Under Regulation No 816/70 certain processes such as the increase of the alcoholic strength by vinification, addification, deacidification and sweetening are only authorized under the conditions laid down in Articles 18 to 21, whilst the addition of alcohol to wine is prohibited by Article 25.

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

8 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 deacidifying are observed.

9 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.

10 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.

11 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.

12 It must therefore be concluded that in the present state of the Community rules, a Member State may in principle apply a presumption in law as a measure of control in order to detect cases of over-alcoholization.

13 However, a presumption in law of over-alcoholization would not be permissible as a national measure of control if its application could put at a disadvantage wines from other Member States and therefore constitute a measure having an effect equivalent to a quantitative restriction, which is prohibited by Article 30 of the EEC Treaty and Article 31 (1) (b) of Regulation No 816/70.

14 This would be the case for example if the possibility of rebutting the presumption in respect of wines originating in another Member State were not available in law and in fact to the same extent and under the same conditions as in respect of home-produced wines.

15 The same could apply if the legal provision were so applied that its effect was merely to reverse the burden of proof relating to the special circumstances of the case in question, without accepting that the data relating to the climatic conditions of the producer region, to the methods of wine-making and to the other factors of a general nature having an effect on the proportion of alcohol to dry extract, may be sufficient to rebut the presumption of over-alcoholization.

16 It is, in the first place, for the national court to check whether such is the case.

17 It is necessary then to consider whether the provisions of Community law on the methods of analysing wine prohibit the application in a Member State of

a measure of control based on a presumption of over-alcoholization whenever the proportion of alcohol to dry extract is in excess of certain values.

18 Article 1 of Regulation No 1539/71 of the Commission of 19 July 1971 determining Community methods for the analysis of wines, which came into force on 1 September 1971, provides that the methods of analysis 'for the application of Regulations (EEC) Nos 816/70 and 817/70' are those set out in the annex to that regulation".

19 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'.

20 Therefore, in order to decide whether this method of analysis 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, as the case may be, of Regulation No 817/70 relating to quality wines produced in specified regions which, however, contains no particular provisions prohibiting the addition of alcohol to wine.

21 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 prohibition on adding alcohol to wine.

22 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, 39 a, which provides that 'Member States shall take all appropriate measures to ensure compliance with this regulation'.

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

24 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.

25 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.

26 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.

27 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.

28 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.

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

30 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.

31 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.

32 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.

Costs

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

34 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 questions referred to it by the Cour d'appel, Bordeaux, by judgments of 22 May 1974, hereby rules:

Regulations 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 Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 30 September 1975.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 8 JULY 1975 [1]

Mr President,
Members of the Court,

1. Nature and art are required to cooperate in creating a product which is part of the history of civilization and is still one of its glories.

In the specific appreciation of wine, considerable importance attaches to the rules for identifying the good qualities of the various types which have become classics by their traditional name and presentation; the same applies to the rules which in fact restrict the way in which the artistic fantasies involved mingle with the natural element.

Hence the rules laid down by the Community itself in establishing a single market in wine and concerning the designation of origin reserved to wines which have certain specific characteristics; hence the rules controlling both the description of the products and the guarantee of adequate general authenticity.

For the purposes of the interpretation which we have been called upon to give of the Community rules, they must be viewed as a whole, even though inter-State trade is not of direct concern in the specific cases in which we have to give an interpretation.

The rules of the common market must of necessity aim at a uniform basis on which to ensure the free movement of goods. Consequently, the Community rules also try to establish common standards of control and even of methods of verifying the fulfilment of the conditions prescribed for the right to a description or for a guarantee against infringement of the production rules.

Inasmuch as the Community has not yet laid down standard rules and methods of

1 – Translated from the Italian.