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-

beutel bottles of the traditional kind, the prohibition was contrary to Article 30 of the EEC Treaty and should not be enforced. The public prosecutor appealed to the Landgericht at Munich.

That court found that there existed in Italy, particularly in the South Tyrol, traditional Italian Bocksbeutel bottles which had been used for more than a century, but which were rounder and had a shorter neck than the German bottle. The bottles seized, however, were found to be very similar in shape to the German bottle. On the banderole it was stated that the wine was from the winery, Karl Martini and Sohn, Girlan (which is in Italy). A distinctive label gave the name of the wine, "Bozner Leiten" (Bolzano Vineyards). It also stated that this was quality wine produced in a specified region, bottled in the area of production. The name of the winery was repeated on the label with the place of origin "South Tyrol". The last line of the label read "Italia".

The Landgericht has referred to the Court, pursuant to Article 177 of the Treaty, two 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 case, is paragraph 17 of the Wein-Verordnung applicable for the protection of the matters set out in Article 36 of the EEC Treaty?"

The German Government contends that the use of the instant bottles ("the Prantl bottles") was a violation of the paragraph, though a use of the traditional Italian bottle would not be, and that the regulation is either not in conflict with Article 30, alternatively is justified under Article 36. The Italian Government submits that this is a plain case which violates Article 30 and is outside Article 36. The Commission agrees, that if these questions really arise, the result arrived at by the trial court was correct.

The Commission submits, however, that there is an over-riding question as to the compatibility of the German regulation with the rules relating to the common organization of the market in wine, which ought to be decided first, even though it is not specifically asked, since it may affect both the relevance of the questions and the content of the answer. In my view this submission should be accepted. (Joined Cases 16-20/79 *Danis* [1979] ECR 3327).

The point taken is that only the Commission can regulate the use of containers intended to be distinctive of the quality and origin of wines, and that since 1976 Member States have not had the power to enact or maintain internal rules not found in or authorized under the regulations relating to the common organization of the market in wine. This position is said to arise from a combination of Article 40 (2) (b) of Council Regulation No 355/79 (OJ L 54, p. 99), replacing Regulation No 2133/74 (OJ L 227, p. 1), and Council Regulation No 1608/76 (OJ L 183, p. 1), which was superseded by Regulation No 997/81 (OJ L 106, p. 1).

The starting point is the regulation setting up the common organization of

the market in wine. This was initially Council Regulation No 24/62 (OJ 1962 p. 989) as complemented, *inter alia*, by Regulation No 816/70 (OJ L 99, p. 1). At the time with which the case is concerned it was Regulation No 337/79 (OJ L 54, p. 1) which consolidated with amendments the earlier provisions. Since the relevant articles are substantially the same it is sufficient to refer to the latter. The heading to Title IV of Regulation No 337/79 includes "conditions for release to the market". No detailed conditions relevant for present purposes are included. Instead Article 54 provides that the Council "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 . . ., the rules on this matter shall be those adopted by the Member States".

Rules on designation and presentation were included in Regulation No 2133/74, which on its repeal, were, so far as relevant, repeated in Regulation No 355/79. The title of the latter describes the regulation as "laying down general rules for the description and presentation of wines". Title II "Presentation" is said in Article 39 to lay down "general rules governing the containers, labelling and packaging". Article 40 deals with the containers in which wine may be stored or transported, and, though it is not clear from Article 40, it seems from the regulation as a whole that containers include bottles (e.g. Article 2 (1) (c) where a reference to containers is followed by a provision where wine is bottled).

Article 40 (2) 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".

In the general provisions, Title III, Article 43 provides that the description and presentation of wine "must not be liable to cause confusion as to the nature, origin and composition of the product". Article 46 (1) provides that wine originating in the Community, the description of which does not conform to the provisions of this regulation, may not be held for sale. Finally in Article 47 "transitional provisions shall be laid down in respect of: the placing on the market of products whose description and presentation do not conform to the provisions of this regulation".

In Regulation No 1608/76 the Commission adopted detailed rules for the description and presentation of wine in order to implement Regulation No 2133/74 (subsequently Regulation No 355/79). That Commission regulation applied until 30 April 1981 (including part of the period covered by the charge) when it was replaced by Regulation No 997/81.

Article 18 of both Commission Regulations contained a specific provision that "the use of the bottle known as the 'flûte d'Alsace' for wines made from grapes harvested on French territory shall be restricted to the following quality wines psr", including Alsace wines and Cassis. Regulation No 1608/76 in addition provided in Article 21 that until 31 August 1977 "wine . . . may be presented

in ways that do not conform to the said Regulation but which comply with the provisions of the Member States". There is no similar provision in Regulation No 997/81, only a provision that wine bottled in accordance with either of the two Commission regulations at a time when they were in force could continue to be sold even if the regulations were amended, so that the wine no longer complied.

There is, thus, no provision dealing with the Bocksbeutel. Attempts were made to reach an agreement to include it as a protected bottle for uses including wines from the South Tyrol (on which Germany agreed), but they foundered on a disagreement about the inclusion of wines from almost all regions of Portugal.

The Commission relies heavily on the Court's judgments in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347 and Case 56/80 *Weigand* v *Schutzverband Deutscher Wein* [1981] ECR 583. In the former case the Court ruled that once the Community has legislated for the establishment of the common organization of the market in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it. A common organization of the market is based on the concept of the open market to which every producer has access and the functioning of which is regulated solely by the instruments provided for by those organizations. National provisions or practices which might alter the pattern of imports or exports or influence the formation of market prices by preventing producers from buying and selling freely in Member States "in conditions laid down by Community rules and from taking advantage directly of ... any other measures for regulating the market laid down by the common organization are incompatible with the principles of such organization". In the latter of the two cases it was said that with the objective of ensuring the transparency and supervision of the market and in regard to the presentation of wines and advertising "Regulation No 355/79 applies systematically to all practices capable of affecting fair trading". Article 43 serves "the same purpose, namely the prevention in the marketing of wine of all practices which are of such a nature as to create false appearances".

There is, thus, no doubt that, once the Community has made clear regulations in a particular area, Member States may not make or retain legislation which conflicts with Community provisions or which undermines the essential objectives of the common organization of the market. The question is whether that is the position in this case.

The Commission argues that, at the latest when Regulation No 1608/76 came into force, the Member States could no longer maintain their own legislation in respect of the shape of wine bottles. Rules were established; the Community system was exclusive. Article 54 of Regulation No 377/79 no longer

applied. The question of presentation was conclusively settled even if only one bottle was dealt with.

There are factors in the Commission's favour. Rules were to be made and both general rules and detailed rules were made. It may be possible to make a Community exception for only one bottle and to exclude national rules as to the rest. The fact that only one wine bottle was protected, the flûte d'Alsace, does not mean that the system is incomplete. Protection can in any event be given subsequently by amendment on a Community basis, national rules having gone. The transitional provisions until August 1977 and the particular arrangements to cover amendment in Regulation No 997/81 suggest that a final scheme had been adopted. Article 46 (1) of Regulation No 355/79 prohibits the sale of wine, the description of which does not conform to the regulations, and Article 39 indicates that the general rules laid down in regard to presentation are exclusive. It can also be said that Article 43 of Regulation No 355/79 is providing a general rule for the Community, prohibiting presentation which may cause confusion as to the nature, origin and composition of the wine, and that this replaces national rules.

I would not accept the Commission's arguments. They read too much into the regulations and into the Court's judgments. In my view, by virtue of Article 54 of Regulation No 337/79, and its predecessors, national provisions apply until "rules relating to the description and presentation of wine have been made". Article 40 (2) of Regulation No 2133/74 and Regulation No 355/79 does not adopt such rules. It does no more than provide that the use of containers *may* be subject to conditions *to be laid down.* The power must be exercised before a rule is adopted.

The rule actually made in Article 18 of Regulation No 1608/76 and Regulation No 997/81 is not, in my opinion, to be construed as a rule meaning "this bottle is protected; no others are protected under Community rules", as a consequence of which under Article 54 other national rules than those relating to the flûte cease to apply. On its proper construction this was a rule dealing only with the flûte d'Alsace. Subject to any subsequent arguments as to its validity, national rules in respect of the bottling of specified wines made, but made only, from grapes harvested in France ceased to apply. Other national rules continued to apply.

I do not consider that the transitional provisions undermine this result, even if they show that the Commission thought it had set up a complete system. If that is the position, the objective was not achieved by sufficiently clear language.

Nor do I consider that the general provision of Article 43, prohibiting confusion as to origin in method of presentation, is a rule within the meaning of Article 54, which of itself replaces all relevant national provisions. That is an important general protection, but Article 40 (2) made it clear that conditions on the use of containers to ensure that

origin was distinguished are to be made. It is the rules making those conditions which might displace national provisions.

In my view none of these conclusions conflicts with anything said by the Court in *Pigs Marketing Board* or *Weigand.* The particular matter in issue has not been dealt with by the rules of the common organization of the market; the retention of existing rules pending Community rules does not undermine the objectives of the market in the light of Article 54 (1).

On this basis the questions referred remain to be answered.

It was found as a fact by the referring court that the traditional Italian "Bocksbeutel" is in the respects mentioned different from the German Bocksbeutel; it is not said that there are any other differences. The Prantl bottle is very similar to the German bottle. From the description given and bottles produced to the Court, it is clear that all three, for want of a better description, squat and chubby, are on a superficial examination similar. The Italian bottle is acceptable to the German authorities, so is the Bocksbeutel type of bottle which contains Portuguese "Mateus" wine. No complaint has been made of the use of a comparable though not entirely similar shaped bottle used for armagnac. The Prantl bottle is apparently used for selling this red wine in Italy. It is not suggested that the bottles, although bought in Germany and Austria, were bought exclusively for the German market; if they were the possibility of a wish to pass off or mislead might fall for consideration. It was also found as a fact that the wine in the Prantl bottles was red. It is agreed that the great majority of Franconian wine in the German Bocksbeutel is white.

The German regulation forbids the use of the bottle both for wines made in other parts of Germany and abroad. It is argued by the German Government that the regulation does not restrict quantitatively the import of wine because the wine can always be sold in other bottles. The object is only to protect an indirect designation of origin and quality, and to protect the consumer, thereby ensuring fair competition in the Community. The limitation is reasonable and necessary. It is not a measure which affects trade, so it cannot be a measure having an effect equivalent to a quantitative restriction. Moreover there is no restriction arising out of higher costs because the Italian producers can use local bottles and avoid the expense of buying in Germany and Austria.

In my view, a provision such as Article 17 does constitute an actual or potential, direct or indirect restriction on imports which amounts to a measure of equivalent effect to a quantitative restriction. Italian wine can be and is sold in the Prantl bottles in Italy. To sell the same wine in Germany it must either be bottled in different containers for the German market or be rebottled. In Case

261/81 *Rau* v *De Smedt* [1982] ECR 3961, the Court held that a requirement that a product be sold in a container of a particular shape can constitute a measure of equivalent effect for the purposes of Article 30. The same must apply to a prohibition on the use of a container.

This restriction has not been shown to be justified in the interests of consumer protection. In the *Rau* case it was held that a requirement that margarine be sold in cubic containers was not justified in order to ensure that the consumer did not confuse it with butter, since that objective could readily be achieved by other less restrictive means such as labelling. It is true, as the German Government argues, that a cubic container does not necessarily indicate origin, whereas the bottle is alleged to do so. Nonetheless, this shape of bottle is already accepted to indicate more than one place of origin. Moreover it is open to question whether a consumer can claim to be justified in assuming that wine is of a particular origin merely by the shape of the container, without paying any regard to the label or other features, any more than in Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, the Court was prepared to accept that a souvenir of Ireland held itself out as being manufactured in that country merely because it depicted something typically Irish. Labelling here seems to me to be a perfectly acceptable way of indicating origin and other characteristics, not least, if common experience can be relied on, when bottles of red and white wine look different in all but very opaque bottles, which these are not suggested to be. Although it is a matter for the national court as to whether the labelling was sufficient to prevent confusion, it seems to me that the label used in this case made it abundantly plain to even the casual shopper where the wine came from.

The claim based on the prevention of unfair competition stands or falls with the claim based on consumer protection, since the unfairness is said to result from consumer confusion. Equally here labelling is an adequate protection.

It is also claimed that Article 36 takes the German regulation out of the provisions of Article 30. The first grounds relied on are the maintenance of fair competition and the protection of the consumer. As held in Case 113/80, these are not grounds falling within Article 36. Then it is said that the fact that a breach of Article 17 is a criminal offence justifies the derogation on the grounds of public policy. That fact in itself cannot be sufficient, or any restriction could be exempted by its being made a criminal offence. There is nothing to indicate that it could otherwise be justified here on the grounds of public policy.

Finally it is argued that this regulation is justified for the protection of industrial and commercial property, on the basis that these bottles, without more, are an indirect indication of origin. I do not consider that in themselves they are so distinctive as to be an indication of origin, and it is of some significance that in the trade mark registered by the Franconian producers the picture of the

bottle includes the distinctive label. Other wines than Franconian wines — those which have acquired rights to use this shape of bottle through long use — may be found on the shelves beside the German Bocksbeutel, even if there are some minor differences between them. It is accordingly unnecessary to decide whether an indirect indication of origin can constitute "industrial and commercial property". Even, however, if the bottle is such an indication, and does constitute such property, the present restriction does not seem to me to be justified. Confusion can be sufficiently avoided by means of adequate labelling. The restriction sought as I see it in any event is capable of constituting a disguised restriction on trade between Member States.

For these reasons I conclude that the questions referred should be answered on the following lines:

1. The application of a measure adopted by a Member State, which prohibits the use of bottles of a specified shape for wine other than that from a defined growing area in that Member State, for imports of wine lawfully marketed in similar bottles in another Member State, constitutes a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 of the Treaty where the consumer may be protected and informed and fairness in commercial transactions secured by means which hinder the free movement of goods to a lesser degree.

2. In the particular circumstances of the present case nothing has been shown to establish that a measure of the kind in question is justified on any of the grounds set out in Article 36 of the Treaty.

Mr Prantl's costs of the reference fall to be dealt with as a step in the proceedings in the national court. No order should be made as to the costs of the parties intervening in the reference.