REPORT FOR THE HEARING
in Case C-289/91 *

I — Facts and procedure

A — *Legislative framework*

1. Council Regulation (EEC) No 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions (OJ 1987 L 84, p. 59) consolidates the rules governing the wines at issue (hereinafter 'quality wines psr'). The 15th recital in the preamble to that regulation states that 'in order to maintain the quality standard of the wines in question and to avoid excessive yields liable to disrupt the market, Member States should fix a maximum yield per hectare for each quality wine psr'.

2. Article 11(1) thus provides that a yield per hectare expressed in quantities of grapes, of grape must or of wine is to be fixed for each quality wine psr by the Member State concerned. Under Article 11(2):

'Use of the designation claimed shall be prohibited for the entire harvest if the yield referred to in paragraph 1 is exceeded, save where derogations are provided for, on a general or individual basis, by Member States under conditions which they shall lay down, if appropriate, according to wine-growing area; these conditions shall relate in particular to the use to which the wines or products in question are to be put.'

3. In the Federal Republic of Germany the rules on the yield per hectare are the subject of Paragraph 2a of the Weingesetz (Wine Law), which is worded as follows:

'1. ... the Governments of the *Länder* in which vines are grown shall fix ... the permissible yield per hectare for all wines produced on vineyard plots acknowledged as suitable for producing quality wines psr. The permissible yield per hectare is the maximum quantity of wine and grape must in fermentation which may be disposed of to other persons, used or processed per year ...

2. Where the quantity harvested in a wine-growing undertaking exceeds the permissible quantity in terms of the permissible yield per hectare fixed for that undertaking, the surplus quantity may be disposed of to other persons, used or processed only as basic wine intended for producing wine fortified for distillation or wine vinegar, or as grape juice for the production of grape juice or to be used as grape must for the purpose of wine-making in the undertaking itself ...

3. Any surplus quantity ... may be stored beyond the year of harvest. Where, during one of the subsequent wine-growing years,

* Language of the case: German.

the amount harvested by the undertaking is below the permissible quantity, a quantity of the stored surplus corresponding to the difference may, by way of derogation from subparagraph 2, be disposed of to other persons, used or processed as wine, grape must in fermentation or basic wine for products other than those listed in that subparagraph. The surplus quantity stored may also be disposed of to other persons, used or processed in whole or in part in place of the permissible quantity harvested in any year.'

B — *The main proceedings*

4. Mr Kuhn, a wine-grower in the *Land* of Rheinland-Pfalz, applied for an official control number for 1 500 litres of 1989 Heuchelheimer Herrenpfad Kerner Auslese and, hence, the right to market it. By decision of 26 June 1990, the Landwirtschaftskammer (Chamber of Agriculture) granted him a control number for 75 litres, since the remaining 1 425 litres exceeded the permissible per hectare yield for his undertaking. Following an unsuccessful objection to that decision, Mr Kuhn brought an action with the aim of securing a control number for all the wine at issue. In his action he contends that Paragraph 2a of the Weingesetz does not comply with Article 11 of Regulation (EEC) No 823/87.

5. The Verwaltungsgericht (Administrative Court) shares Mr Kuhn's doubts. First, it points out that Article 11 of the regulation requires a Member State to lay down a production scheme intended to restrict the quantity of grapes produced per hectare and thus to improve the quality of quality wines psr, whereas Paragraph 2a of the Weingesetz lays down only a marketing scheme and restricts only the quantity of wine and grape must which may be sold every year. In its view, such a scheme has no direct influence on the quality of the wine.

6. In this respect, the Verwaltungsgericht points out that Paragraph 2a(2) enables surplus quantities to be marketed either in a subsequent year under certain conditions or as grape juice in the year of harvest. It doubts whether such a scheme is a sufficient long-term encouragement to wine-growers to adjust their yields to the permissible quantities thereby contributing to an improvement in the quality of the harvest.

7. Secondly, it points out that all wines produced from vineyard plots acknowledged as suitable for producing quality wines psr, including table wines, are covered by Paragraph 2a, whereas Regulation (EEC) No 823/87 concerns only quality wines.

8. Thirdly, the Verwaltungsgericht points out that the Federal legislation made it possible for the governments of the *Länder* to choose the vineyard plots capable of serving as reference plots for fixing the yield per hectare as was done in the Rheinland-Pfalz production area. It states that the choice of the vineyard plots suitable for serving as the basis of calculation for the reference quantities enables the wine-grower to obtain high yields from areas actually planted with vines, which is not compatible with a quality objective.

9. The Verwaltungsgericht therefore decided by order of 31 October 1991 to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Can Article 11 of Regulation (EEC) No 823/87 be interpreted in such a way that a scheme under Paragraph 2(a) (1), (2) and (3) of the Weingesetz (Wine Law) — inserted by the Sixth Gesetz zur Änderung des Weingesetzes (Law amending the Wine Law) of 11 July 1989 (BGBl. I, p. 1424), and amended by the Gesetz zur Änderung des Weingesetzes und des Weinwirtschaftsgesetzes (Law amending the Wine Law and the Law on trade in wine) of 30 August 1990 (BGBl. I, p. 1863), is permissible on the basis thereof?'

C — *Procedure before the Court*

10. The order for reference was received at the Court Registry on 18 November 1991.

11. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 20 March 1992 by the Government of the Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs and Joachim Karl, Regierungsdirektor at the said Ministry, acting as Agents, and on 19 March 1992 by the Commission of the European Communities, represented by Ulrich Wölker, of its Legal Service.

12. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted to the Court

13. The *Commission's* observations concentrate on the various issues raised by the Verwaltungsgericht.

14. First, it considers that a marketing scheme which does not restrict the quantities produced per hectare but merely subjects the surplus quantities to certain restrictions is incompatible with Article 11 of Regulation (EEC) No 823/87.

15. According to the Commission, it is clear from the use of the word 'yield' that the quantity referred to is that produced from a given area. Moreover, such a construction seems to the Commission to be consistent with the objectives of Article 11, namely to maintain the quality level of the quality wines psr. It considers it undeniable that an increase in the per hectare yield results in a reduction in the quality of the wine. While accepting that the 15th recital also refers to the need to avoid disruption of the market, it contends that that objective is always secondary to that of maintaining quality. According to the Commission, it follows that Article 11(1) of Regulation (EEC) No 823/87 requires a production scheme and not a marketing scheme as introduced by Paragraph 2a of the Weingesetz.

16. The Commission then points out that Article 11(2) of Regulation (EEC) No 823/87 lays down the principle that wherever the yield is exceeded, use of the designation claimed is to be prohibited for the entire harvest. The possibility of derogation granted to the Member States cannot lead to a complete denial of that principle and, in any event, any derogation measure must have an impact at least equivalent to the loss of the designation claimed for the entirety of the quantity harvested. For the Commission, provisions such as those in Paragraph 2a of the Weingesetz fall short of those requirements. Not only do they disregard the ordinary penalty of downgrading the whole quantity, but they also fail to make any provision for an alternative penalty.

17. Under Paragraph 2a, the wine-grower retains the right to use the quality designation claimed for the permissible harvest, whatever the surplus amount. The surplus may even be sold as quality wine psr where, during a subsequent year, the actual harvest is below the permissible quantity.

18. Secondly, unlike the Verwaltungsgericht, the Commission considers that including table wines in domestic rules such as Paragraph 2a of the Weingesetz is compatible with Article 11 of Regulation (EEC) No 823/87. In particular, it points out — whilst noting that the question raised by the national court concerns only quality wines psr — that Article 2(3)(i) of Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts (OJ 1989 L 232, p. 13) provides that certain table wines originating in the Federal Republic of Germany may be described as 'Landwein' where the German authorities have laid down the rules for use in accordance with the conditions specified in Article 4(3) of that regulation. That provision lays down that the rules at issue must provide that the term 'Landwein' is reserved for table wines 'meeting certain production requirements'. Those requirements might include a maximum yield per hectare.

19. Thirdly, the Commission considers that it follows from the objective of quality sought by Article 11(1) that yields per hectare must be fixed on the basis of productive vineyards, that is to say vineyard plots which are actually cultivated and in production. It explains that taking account, for the calculation of the permissible yield of a vineyard, of the vineyard plots of the undertaking which are cultivable but are not actually cultivated enables the wine-grower to redistribute the quantity thus calculated to areas which are actually used and thus to dispose of a quantity produced from areas which exceed the maximum yield. According to the Commission, the 'grounds of plant health' which led the German legislature to permit recourse to the concept of cultivable vineyard plots bear no relation to the problem of fixing the yield per hectare. Furthermore, it considers that the choice of cultivable vineyard plots of an undertaking, as a reference, constitutes an arbitrary disparity of treatment and, accordingly, a prohibited discrimination as regards the wine-growers who planted the whole of their area and who cannot, therefore, give

the impression that their harvest per hectare is less than it really is. It adds that the applicable rules of the Rheinland-Pfalz include an even more arbitrary aspect inasmuch as the productive area is retained as the reference area for four regions, whilst in two other regions the calculation takes account of the entirety of the cultivable area.

20. The *German Government* considers that the question raised by the Verwaltungsgericht calls for an affirmative reply.

21. First, it argues that Article 11(2) of Regulation (EEC) No 823/87 does not prohibit exceeding the yield per hectare fixed, but merely provides that the entirety of the harvest is to lose the designation claimed. The harvest may always be marketed but without the designation claimed. That construction seems to the German Government to be shared by other Member States (such as, for example, Italy) which permit the harvest to be marketed as table wine.

22. Paragraph 2a of the Weingesetz is therefore stricter than Article 11(2) of Regulation (EEC) No 823/87: even if the domestic provision does not provide for the loss of the designation where the permissible quantity is exceeded, in principle it prohibits the marketing of the surplus. Paragraph 2a of the Weingesetz thus makes use of the possibility granted to the Member States by Article 11(2) of Regulation (EEC) No 823/87 to provide for a measure other than the loss of the designation.

23. The German Government maintains that, contrary to the opinion expressed by the Verwaltungsgericht, Paragraph 2a of the Weingesetz is consistent with the objective of Article 11 of Regulation (EEC) No 823/87. It claims that the loss of the designation claimed does not by itself ensure that the aim of Article 11, namely the production of a quality wine from quality vineyards, is achieved. The wine-grower may decide to exceed the maximum permissible quantity for the quality wine psr and market his harvest as table wine. Paragraph 2a of the Weingesetz does not provide the wine-grower with the possibility of marketing his harvest under another designation and thereby contributing in the medium term to an adjustment of the harvest to the yield per hectare fixed. The German Government states that that objective is not affected by the possibility of storing and using the surplus amounts, since the possibility of storing those surpluses is restricted by the producers' limited storage capacity. It adds that the possibilities of using the surpluses permissible by Paragraph 2a of the Weingesetz are not generally profitable. Furthermore, it states that the possibility of marketing surpluses in place of a poorer quality wine from a subsequent year does not lead to an increase of the yield per hectare, since a substitution is involved.

24. Secondly, the German Government considers that the yield per hectare is closely linked to production areas, which follows, in particular, from the third paragraph of Article 11(1) of Regulation (EEC) No 823/87 under which the yield per hectare may be fixed at different levels according to the production areas (sub-region or local administrative area) from which the grapes come. It states that, for that reason, the concept of 'quality wine' must be understood as

relating to the wine-growing areas for quality wine. It follows that the yield per hectare concerns all the production areas for quality wine, for which a yield per hectare for table wine is also fixed. Since all German vineyards are, in accordance with Article 4(4)(a) of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine (OJ 1987 L 84, p. 1), recognized as being suitable for the production of quality wines psr, it is therefore necessary, in the German Government's view, to restrict the production of table wine and local wine in order to avoid the marketing without restriction, as table wine or local wine, of quantities exceeding the yield per hectare for quality wine psr.

25. Thirdly, the German Government states that Paragraph 2a of the Weingesetz does not expressly govern the choice of reference vineyard plots. Originally, it had been intended to fix the permissible yield in hectolitres per hectare of productive vines (that is to say, all the cultivated vineyard plots, whatever their maturity), but that solution was abandoned in order to enable the *Länder* to take cultivable vineyard plots as a reference. That solution was preferable in certain production areas of the Rheinland-Pfalz on grounds of plant health and, in particular, in order to encourage wine-growers not to replant immediately after grubbing up in order to stop the spread of virus-bearing nematodes. For production areas where the cultivable vineyard plots of the undertaking are taken as a basis for calculating the yield per hectare, compensation is provided: uncultivated vineyard plots must not exceed 12% of the totality of the vineyards of an undertaking and the yields per hectare fixed for those areas are, on average, 3% below the 10-year average.

26. The *Commission* also points out that if the method of fixing the yield per hectare is contrary to Community law, there can be no question of the straightforward non-application of domestic law owing to its incompatibility with Community law since, in this case, such non-application would have a more favourable effect on the wine-grower, which would be in its turn contrary to superior rules of Community law.

D. A. O. Edward
Judge-Rapporteur