OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 17 April 1986 *

Mr President,
Members of the Court,

1. Introduction

This action for a declaration that the Federal Republic of Germany has failed to fulfil its obligations under Community law comes before the Court almost four years after the application was lodged and more than 13 years after the infringement procedure was commenced by the Commission. The Commission has repeatedly requested the Court not to set a date for the hearing because the parties were negotiating to resolve the dispute.

2. The alleged infringements

In its application the Commission has alleged that, by adopting and applying certain provisions of the Wine Law of 14 July 1971 (BGBl. I, 1971, p. 893) and the implementing order of 15 July 1971 (BGBl. I, 1971, p. 926), the Federal Republic of Germany has infringed Community rules on the common organization of the market in wine.

The alleged infringements are:

1. Infringement of the principle of the free movement of goods, which is the basis of the common organization of the market in wine, by prohibiting imports of wine which has not been produced in accordance with the legislation in force in the Member State in which it was produced (Paragraph 18 (1) 1 (a) and (b) of the Wine Law);

2. Infringement of Article 43 (4) of Regulation No 337/79 by prohibiting coupage of foreign liqueur wines with liqueur wines from different countries (Paragraph 23 (2) of the Wine Law);

3. Infringement of Article 2 (1) of Regulation No 1698/70 by continuing to grant authorizations to make quality wine psr outside the specified regions or their immediate proximity (Paragraph 64 of the Wine Law);

4. Infringement of Article 3 (1) of Regulation No 338/79 by failing to define precisely the regions suitable for the production of quality wines psr (Part I of Annex 4 to the Wine Order).

In its reply, the Commission abandoned its action with regard to the alleged first and second infringements since it considered that they had been cured by the Wine Law Amendment Law of 27 August 1982 (BGBl. I, 1982, p. 1177). Nevertheless, it maintained its claim for costs in respect of those two infringements. By letter of 18 December 1985 the Commission also abandoned its action with regard to the fourth infringement

but, once again, it requests the Court to order the Federal Republic of Germany to pay the costs. Consequently, my submissions relate solely to the alleged third infringement.

* Translated from the French.

3. The relevant Community legislation

Regulation (EEC) No 817/70 of the Council (Official Journal, English Special Edition 1970 (I), p. 252) laid down special provisions relating to quality wines produced in specified regions. The second recital in the preamble thereto refers to the development of a policy of encouraging the production of quality wine:

'Whereas the development of a policy of encouraging quality production in agriculture and especially in wine growing is bound to contribute to the improvement of conditions on the market and, as a result, to an increase in outlets; whereas the adoption of additional common rules in line with Regulation (EEC) No 816/70 which concern the production and control of quality wines produced in specified regions falls within the framework of this policy and can contribute towards the attainment of these objectives.'

The basic principle of this policy is to guarantee that the grapes have been obtained and processed in the correct manner. That principle is expressed most clearly in the French which refers to 'vins de qualité *produits* dans une région déterminée' as opposed to the German text which reads: 'Qualitätsweine bestimmter Anbaugebiete' [1].

Only in exceptional cases is it possible to take into account traditional practices, as is indicated by the fourth recital:

'Whereas, even though it is necessary to take into account traditional conditions of production, a common attempt to harmonize quality requirements must nevertheless be made.'

1 — The expression 'wines produced in' is contained in all the language versions except the Danish and German language versions.

As regards the obtaining and processing of grapes, Article 5 provides as follows:

'1 (a) Quality wines psr may be *obtained* only from *grapes* of vine varieties which have been *harvested within the specified region* and which appear in the list provided for in Article 3 (1).

This provision shall not prevent quality wines psr from being obtained under the conditions specified in Article 3 (3) or produced according to *traditional practices.*

(b) ...

2. The *processing* of the grapes referred to in paragraph 1 (a) into must and from must into wine *shall be carried out within the specified region where the grapes were harvested.*

However, subject to adequate provisions as regards control, *such processing may take place outside that region,* where the rules of the producer Member State permit it.

3. *Detailed rules for the application* of this Article shall be adopted in accordance with the procedure laid down in Article 7 of Regulation No 24.

They shall cover in particular:

(i) provisions by which Member States may authorize derogations from the rules which lay down that the processing of grapes into must and of must into wine should take place within specified region;

(ii) the list of quality wines psr which may be produced according to the traditional practices referred to in paragraph 1.'

In essence that provision corresponds to Article 6 of Council Regulation (EEC) No 338/79 of 5 February 1979 (Official Journal 1979, L 54, p. 48) which replaced and extended Regulation No 817/70.

The rule contained in the first subparagraph of Article 5 (2) embodied the provisions of French and Italian law which until then had been customary. The detailed rules for the application of the exception provided for in the second subparagraph were laid down in Regulation (EEC) No 1698/70 of the Commission on certain derogations concerning the production of quality wines produced in specified regions (Official Journal, English Special Edition 1970 (II), p. 579).

Article 1 of that regulation provides as follows:

'When a quality wine psr is being produced, the processing of grapes into musts or of musts into wine under the conditions provided for in the second subparagraph of Article 5 (2) of Regulation (EEC) No 817/70 may take place only if authorized.'

Article 2 (1) provides as follows:

'The competent authorities of the producer Member State may grant authorization for the processing referred to in Article 1 only to wine makers using grapes or grape musts intended for processing into a quality wine psr and if their establishment is situated *in the immediate proximity of the specified region* in question.'

Such regions, situated in the immediate proximity of the specified region in question may be in different wine-growing areas or completely outside the wine-growing areas. The requirement that they should be 'in the immediate proximity' was adopted, according to the third recital in the preamble to the regulation, on account of the risk of fraud involved in processing.

4. The German provisions at issue and the real object of the action

Paragraph 5 of the Wine Law provides as follows:

'Verarbeitung zu Qualitätswein außerhalb des bestimmten Anbaugebietes

1. Bei der Herstellung eines Qualitätsweines b. A. kann nach Maßgabe des Artikels 5 Abs. 2 Unterabsatz 2 der Verordnung (EWG) Nr. 817/70 und der zu seiner Durchführung erlassenen Verordnungen des Rates oder der Kommission der Europäischen Gemeinschaften genehmigt werden, daß die Verarbeitung von Weintrauben zu Traubenmost und des Traubenmostes zu Wein auch außerhalb des bestimmten Anbaugebietes vorgenommen wird, in dem die Weintrauben geerntet worden sind. Die Landesregierungen der weinbautreibenden Länder, in deren Gebiet die Verarbeitung vorgenommen werden soll, bestimmen die für die Erteilung der Genehmigung zuständigen Stellen.'

That provision may be translated into English as follows:

'Processing into quality wine outside a specified wine-growing region

1. In accordance with the second subparagraph of Article 5 (2) of Regulation (EEC) No 817/70 and the implementing regulations adopted by the Council and the Commission of the European Communities, the *processing* of grapes into must and of must into wine for the production of a quality wine psr *may also be authorized outside the specified region* where the grapes were harvested. The governments of the wine-growing *Länder* on whose territory the processing is to take place shall designate the authorities empowered to grant such *authorization.*'

In appearance that provision does not conflict with Article 2 (1) of Regulation No 1698/70 since it states that it applies only in accordance with (nach Maßgabe) the implementing regulations adopted by the Council and the Commission.

However, in the written procedure the Commission emphasized that the position was different in practice since Paragraph 5 of the Wine Law had to be read in the light of the facts upon which Paragraph 64 of the Law was based (der dem § 64 unterliegende Sachverhalt).

Paragraph 64 provides as follows:

'Verarbeitung

Bis zum 31. August 1976 kann eine Genehmigung nach § 5 bei Qualitätswein (§ 11) auch für eine Verarbeitung innerhalb des deutschen Weinanbaugebietes (§ 10 Abs. 8) erteilt werden, sofern dies traditioneller Praxis im Sinne des Artikels 5 Abs. 1 Buchstabe a zweiter Unterabsatz der Verordnung (EWG) Nr. 817/70 entspricht.'

That provision may be translated into English as follows:

'Processing

The *authorization* provided for in Paragraph 5 in respect of quality wines (Paragraph 11) may be granted *until 31 August 1976* even for processing carried out within the German wine-growing region (Paragraph 10 (8)) provided that it accords with a traditional practice within the meaning of the second subparagraph of Article 5 (1) (a) of Regulation (EEC) No 817/70.'

At this point it is necessary to make two comments.

(1) Paragraph 64 of the Wine Law is clearly based on a misunderstanding since it establishes a link between the 'processing' of wine outside the 'specified regions' referred to in Paragraph 5 of the Wine Law and 'traditional practices' within the meaning of the second subparagraph of Article 5 (1) (a) of Regulation No 817/70. The 'traditional practices' in question do not in fact relate to the question of the locality where grapes are processed into must or must into wine but to certain methods of obtaining wine.

In the course of the oral procedure the Government of the Federal Republic of Germany stated in fact that it did not intend to limit the processing of quality wines psr to places situated outside the 'specified regions' where such processing is traditionally carried out.

It also stated that it did not even intend to limit such processing to places situated within the German wine-growing region, contrary to what is suggested in Paragraph 64 of the Wine Law.

(2) For its part, the Commission stated in the oral procedure that the purpose of its application was to obtain a declaration that, by continuing to grant, after the date on which Commission Regulation (EEC) No 1698/70 came into force, namely 29 August 1970, new authorizations allowing undertakings not 'situated in the immediate proximity of the specified region in question' to make quality wines psr, the Federal Republic of Germany had failed to fulfil its obligations under the EEC Treaty.

Authorizations granted prior to that date are not therefore at issue.

Therefore, in my view, the Court need not dwell on the question of 'traditional practices', on Paragraph 64 of the Wine Law (which is, nevertheless, clearly contrary to Community law) or on the formulation of the Commission's complaint in paragraph 22 of its application of 31 March 1982 (where it indicated that it was seeking a declaration that the maintenance beyond 31 August 1976 of the derogating rules for quality wines constituted an infringement of the Treaty).

It remains to examine the reaction of the Federal Republic of Germany to the Commission's application as so defined.

The Federal Republic of Germany contends that the derogations granted are wholly in accordance with Article 5 (2) of Regulation No 817/70.

It maintains that Article 2 (1) of Regulation No 1698/70, which provides that such derogations may be granted only to estab-

lishments situated in the immediate proximity of the specified region in question, is invalid because it:

(i) goes beyond the limits of the powers conferred on the Commission;

(ii) is contrary to the principle of proportionality; and

(iii) contravenes certain fundamental human rights.

I shall examine those three submissions in turn.

5. The first and second submissions: overstepping of the limits of the powers conferred and breach of the principle of proportionality

In the view of the Federal Republic of Germany, Article 5 (2) of Regulation No 817/70 unreservedly confers on the Member States the power to authorize wine-making outside the specified regions. The Commission's task under Article 5 (3) (which provides for the adoption of detailed rules for the application of Article 5) is solely to ensure that that power is not abused. By adopting Article 2 (1) of Regulation No 1698/70, the Commission largely deprived that power of the Member States of its substance and therefore exceeded the limits of its powers.

In addition, the 'immediate proximity' criterion adopted by the Commission is not proportionate to the aim in view.

The risk of fraud arising from the transport distances involved, referred to by the Commission to justify that criterion, is just as great within the specified regions.

In the opinion of the German Government, other, less coercive means, such as greater supervision of the undertakings concerned and of transport, could have been adopted to achieve the intended purpose.

What is to be made of that argument?

The derogation provided for in Article 5 (2) of Regulation No 817/70 (or in Article 6 (2) of Regulation No 338/79 which is formulated differently but whose substance is the same) must be viewed in the context of the whole regulation of which it forms part.

The Council's intention in adopting that regulation was to develop a policy of encouraging quality in wine production and to that end it created a special category of wines defined as 'quality wines *produced in* specified regions'.

If it had wished to do so, the Council could just as well have adopted another definition such as 'quality wines produced *from grapes harvested in* a specified region'.

It did not do so and the Member State must comply with that decision in which they participated.

The Council did, however, provide for the possibility of derogating from the principle that the processing of grapes into must and of must into wine must be carried out within the specified region where the grapes were harvested.

In so doing the Commission clearly created a problem since, if a substantial proportion of the wines labelled 'quality wine produced in a specified region' were not in fact produced in the region in question, the controlled appellation could be deprived of much of its substance and the effect it was meant to have on the public would be lost.

In view of the definition and appellation adopted, the consumer is normally entitled to expect that quality wines psr are in fact produced in the region in question. Rightly or wrongly, the consumer even tends to associate that appellation with the idea of wine being produced by methods typical of the region and even in small family undertakings where traditions are handed down from father to son.

The main reason why the Council nevertheless provided for the possibility of derogating from the principle that wine must be produced in the region where the grapes were harvested is without doubt that it wished to protect the interests of undertakings situated outside those regions but which had obtained authorization to make quality wines prior to the adoption of Regulation No 817/70.

In my view, the Commission would have been better advised to refer expressly to those undertakings in Regulation No 1698/70 laying down detailed rules for applying the derogation. In any event, it should be noted that the Commission does not dispute that those 'old cases' qualify for derogation.

However, what cannot be accepted, for the reasons explained above, is for the Member States to be able to continue, after the adoption of the Council regulation, to grant such authorizations derogating from Community law without any geographical or quantitative restriction.

It is true that, since the second subparagraph of Article 5 (2) of Regulation No 817/70 does not limit the possibility of obtaining a derogation to undertakings possessing, as it were, acquired rights, the possibility of granting new derogations cannot be excluded in principle.

But if the danger of depriving the appellation 'quality wine produced in a specified region' of its substance is to be avoided, that possibility must be circumscribed.

In my opinion, the wording of the enabling provisions, Article 5 (3) of Regulation No 817/70, allows the Commission to do just that and not simply to define the scope of the derogation, as the German Government maintains. That provision is worded as follows:

'Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 7 of Regulation No 24.

They shall cover in particular:

(i) provisions by which Member States may authorize derogations from the rules which lay down that the processing of grapes into must and of must into wine should take place within the specified region;

(ii) the list of quality wines psr which may be produced according to the traditional practice referred to in paragraph 1.'

The powers conferred are therefore very wide since they cover all the detailed rules for the application of Article 5.

The Council was concerned to place particular emphasis not on procedural rules or supervisory measures relating, for example, to the transportation, recording or storage of grapes, which the Commission has, moreover, also adopted, but to 'provisions by which Member States may authorize derogations from the rules'.

It should also be noted that the second indent of the second subparagraph of

Article 5 (3) empowers the Commission to adopt rules concerning the scope of the other derogation provided for in Article 5, namely that contained in the second subparagraph of Article 5 (1) (a). That constitutes an additional argument showing that the power referred to in the first indent may also bear on the scope of the provision to which it relates.

In view of the wording of that enabling provision and the fact that the principle that Community law should be applied uniformly precludes any discretion of the Member States to determine the limits of such a derogation themselves, I am therefore of the opinion that the Commission was empowered to determine those limits.

The criterion adopted by the Commission has the following two specific advantages:

(i) a wine produced in the immediate proximity of a specified region may be regarded as a wine produced 'almost' within that region; the consumer therefore has less ground for complaint;

(ii) the danger of fraud with regard to the origin of grapes in the course of transportation (mixing with other grapes, for example) is less great since, subject to certain exceptions, the distance covered is generally shorter than if grapes are processed far away from the specified region.

It is therefore my view that the Commission has not exceeded the limits of the powers conferred upon it and that the solution it adopted is reasonable and proportionate to the aim in view.

6. The third submission: infringement of fundamental rights

Finally, the Federal Republic of Germany contends that the measure at issue infringes the fundamental rights of the undertaking concerned, in particular the right to property and the freedom to pursue a trade or a profession.

With regard to the right to property, it suffices, in my opinion, to point out that the Commission's complaint relates solely to authorizations granted after 29 August 1970 and to refer to the Court's judgment of 13 December 1979 in Case 44/79, *Hauer* v *Land Rheinland-Pfalz*, [1979] ECR 3727. As the Court stated in that judgment, a measure such as the one at issue in this case must be considered in the context of the common organization of the market. The adoption of the criterion of 'immediate proximity' forms part of a policy of encouraging the production of quality wines which constitutes an integral part of the common organization of the market. That organization is intended to achieve the objectives set out in Article 39 of the EEC Treaty. Considered in that light, such a measure is justified by the objectives of general interest pursued by the Community and does not impinge upon the substance of the right to property, as recognized and guaranteed in the Community legal order.

With regard to the freedom to pursue a trade or profession, in this case the right to produce quality wines psr outside the region where the grapes were grown, it should be noted first of all that an individual cannot derive rights from authorizations granted by a Member State in contravention of Community law.

Secondly, I should like to remind the Court not only of its judgment in the *Hauer* case but also of its judgment of 14 May 1974 in Case 4/73, *Nold* v *Commission*, [1974] ECR 491, in which the Court ruled that it was

legitimate for the right freely to choose and practice a trade, occupation or profession to be subject to certain limits justified by the objectives of general interest pursued by the Community, provided that the substance of that right is left untouched.

In this case undertakings which process wine and which are not situated in the immediate proximity of a specified region may continue to make table wine and to store, bottle and sell both quality wines and table wine.

7. Conclusions

In view of the foregoing I propose that the Court should:

(1) Declare that, by continuing to grant, after 29 August 1970, authorizations to make quality wines psr outside the specified regions or their immediate proximity, the Federal Republic of Germany has infringed Article 2 (1) of Regulation (EEC) No 1698/70 of the Commission of 25 August 1970 and thereby failed to fulfil its obligations under the EEC Treaty;

(2) Order the Federal Republic of Germany to pay the costs relating to the four breaches of its obligations alleged by the Commission in its application of 31 March 1982 since the Federal Republic of Germany did not remedy the first, second and fourth breaches until after the judicial proceedings had commenced.