OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 26 September 1996 *

1. 'And Noah he often said to his wife when he sat down to dine, "I don't care where the water goes if it doesn't get into the wine."' [1] The addition of water to wine, perhaps the simplest of all frauds in the wine trade, is naturally also one of the most difficult to detect. This preliminary reference from an Italian court essentially concerns the compatibility with Community law of the use by German authorities of one particular test for the discovery of added water. However, the relative lack of information contained in the order for reference and the degree of consensus among the parties to the main proceedings have caused doubts to be raised regarding the existence of a genuine dispute and, alternatively, the admissibility of at least some of the questions referred.

I — Legal and factual context

A — *The relevant Community legislation*

2. Wine is listed in Annex II to the Treaty [2] as an agricultural product within the meaning of Article 38 of the Treaty [3] and has long been subject in Community law to a common organization of the market. [4] The governing regime is now found in Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine (hereinafter 'the 1987 Regulation'), [5] as amended by Council Regulation (EEC) No 1972/87 of 2 July 1987 amending Regulation (EEC) No 822/87 on the common organization of the market in wine. [6] Article 1(4) of the 1987 Regulation refers to its Annex I for the definition, *inter alia*, of wine. Point 10 of that annex defines wine as follows:

'*Wine*; the product obtained exclusively from the total or partial alcoholic fermentation of fresh grapes, whether or not crushed, or of grape must.'

3. Article 15(4) of the 1987 Regulation provides that the watering down of wine 'shall be prohibited', unless otherwise authorized by the Council. Article 73(1) provides

* Original language: English.

1 — G. K. Chesterton, 'Water and Wine', *Poems for all Purposes* (1913).

2 — The relevant heading in Annex II reads 'Wine of fresh grapes; grape must with fermentation arrested by the addition of alcohol'.

3 — Under Article 38(1) agricultural products are defined as 'the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products'.

4 — See Council Regulation (EEC) No 816/70 of 28 April 1970 laying down additional provisions for the common organization of the market in wine (hereinafter 'the 1970 Regulation'); OJ, English Special Edition 1970 (I), p. 234.

5 — OJ 1987 L 84, p. 1.

6 — OJ 1987 L 184, p. 26.

(subject to a similar possibility of derogation by the Council) that wine which has 'undergone oenological practices not allowed by Community rules or, where such rules do not exist, by national rules, may not be offered or disposed of for direct human consumption'. It imposes the same restrictions on wine which is 'not of sound and fair merchantable quality' or which does not 'comply with the definitions appearing in Annex I or those adopted in implementation of this Regulation'.

4. These prohibitions reflect the earlier rules laid down under the 1970 Regulation. Article 28 originally set out the conditions which wines had to meet before they could be 'released for direct human consumption'. It was replaced by Article 28a, which was inserted by Article 28 of Council Regulation (EEC) No 1160/76 of 17 May 1976 amending Regulation (EEC) No 816/70 laying down additional provisions for the common organization of the market in wine. [7] Pursuant to Article 28a, wines which had 'undergone oenological practices not allowed by Community rules or, where such rules [did] not exist, by national rules or by rules which [did] not conform either to the provisions of this Regulation or to those adopted in implementation thereof' could not 'be offered or disposed of for direct human consumption'. Under Article 2 of Council Regulation (EEC) No 1678/77 of 19 July 1977 supplementing Regulation (EEC) No 816/70 by introducing new provisions relating to oenological practices and processes, [8] 'only those oenological practices and processes referred to in this Regulation, and in particular in Annex IIa (inserted by Article 4) or in other Community rules applicable to the wine sector', were authorized. Annex IIa (as amended) never permitted the addition of water to wine. In this respect Commission Regulation (EEC) No 1972/78 of 16 August 1978 laying down detailed rules on oenological practices (hereinafter 'the 1978 Commission Regulation'), which is still in force, [9] provides in the first paragraph of Article 1 that 'wines which under Article 28a of Regulation (EEC) No 816/70 are not fit for direct human consumption may not be held without legitimate cause by a producer or trader'. [10] The 1978 Commission Regulation confers a choice where it is established that wines are unfit for human consumption: they may be 'destroyed' or they may be moved but then only 'to distilleries, vinegar factories or establishments where they will be industrially processed'. Furthermore, under the second paragraph of Article 1, Member States may, in order to ensure that they do not reach consumers, 'have denaturing agents or indicators added to such wines to make them more easily identifiable'.

5. Article 74(1) of the 1987 Regulation (as amended) provides for the adoption by the Commission, pursuant to a management committee procedure, of 'the methods of analysis for determining the composition of [... wine] ... whereby it may be determined

7 — OJ 1976 L 135, p. 1.
8 — OJ 1977 L 187, p. 10.
9 — OJ 1978 L 226, p. 11.
10 — Reference should now be made to Article 73 of the 1987 Regulation.

whether those products have undergone processes contrary to authorized oenological practices'. Article 74(2) prescribes the methods of analysis which may be applied in the absence of harmonized Community rules. They are:

'(a) those recognized by the General Assembly of the International Vine and Wine Office (IWO) and published by that Office; or

(b) where an appropriate method of analysis does not appear amongst those referred to in point (a), a method of analysis complying with the standards recommended by the International Organization for Standardization (ISO); or

(c) in the absence of one of the methods referred to in points (a) and (b) and by reason of its accuracy, repeatability and reproducibility:

— a method of analysis allowed by the Member State concerned,

or

— if necessary, any other appropriate method of analysis.'

6. The first two subparagraphs of Article 79(1) of the 1987 Regulation provide that:

'Member States shall take all necessary measures to ensure compliance with Community provisions in the wine sector. They shall designate one or more authorities which shall be responsible for verifying compliance with those provisions.

They shall inform the Commission of the names and addresses of:

— the authorities referred to in the first subparagraph,

— the laboratories authorized to carry out official analyses, in the wine sector.

The Commission shall forward that information to the other Member States.'

7. On the basis of Article 74 of the 1987 Regulation, the Commission adopted Commission Regulation (EEC) No 2676/90 of 17 September 1990 determining Community methods for the analysis of wines (hereinafter 'the 1990 Commission Regulation'). [11] Article 1 of the 1990 Commission Regulation provides for a large number of official Community methods of analysis with a view to unmasking impermissible oenological practices. These are set out in the voluminous Annex to that Regulation. Article 2 sets out certain rules regarding the concepts of 'repeatability' and 'reproducibility'. Article 3 permits, subject essentially to the conditions of accuracy, repeatability and reproducibility, the use of automated analytical methods but, in the event of a dispute, provides that the methods listed in the Annex should prevail. That Annex, however, contains no method for testing whether water has been added to wine.

8. Article 3(1) of Council Regulation (EEC) No 2048/89 of 19 June 1989 laying down general rules on controls in the wine sector (hereinafter 'the 1989 Regulation') [12] obliges Member States to take 'the necessary measures to improve control of compliance with the rules in the wine sector notably in the particular fields listed in the Annex'. The Annex refers, *inter alia*, to 'oenological practices ...' and 'the verification of the composition of wine products'. Article 3(2) provides:

'The controls in the areas referred to in the Annex *shall be carried out either systematically or by sampling*. In the case of sampling, Member States shall ensure by their number, nature and frequency that controls are representative of the whole of their territory and correspond to the scale of the wine-sector products marketed or held with a view to their marketing.' [13]

The first paragraph of Article 13 provides that 'the laboratories designated to carry out analyses pursuant to this Regulation shall be chosen from those referred to [i. e. those designated by the Member State] in Article 79(1) [of the 1987 Regulation]'. [14] The second paragraph provides that 'the methods of analysis shall be those referred to in Article 74 of the same Regulation'.

11 — OJ 1990 L 272, p. 1.

12 — OJ 1989 L 202, p. 32; see Article 1(1), first subparagraph.

13 — Emphasis added owing to the importance of these words for issues raised in this reference.

14 — Quoted in paragraph 6 above.

9. Article 71(1) of the 1987 Regulation provides that wine may only be put into circulation in the Community where it is transported with an official accompanying document. The detailed rules concerning this document are now set out in Article 3 of Commission Regulation (EEC) No 2238/93 of 26 July 1993 on the accompanying documents for the carriage of wine products and the relevant records to be kept (hereinafter 'the 1993 Commission Regulation'), [15] which was not in force at the time of the events giving rise to this reference. They are, however, similar to the previous rules contained in Commission Regulation (EEC) No 986/89 of 10 April 1989 on the accompanying documents for carriage of wine products and the relevant records to be kept, as amended. [16] Article 3(1) of Regulation No 986/89 provided that 'All carriage within the customs territory of the Community of unpackaged wine products within the scope of Article 9(2) of the Treaty, in quantities of more than 60 litres, shall be effected under cover of the original of ... [from 1 January 1991] an approved commercial document ...'. Such a document had to be drawn up in accordance with the model and instructions set out in Annexes I and II and had to contain (for carriage in bulk) information, *inter alia*, regarding 'the actual alcoholic strength' of the wine. Moreover, Article 6(1) provided:

'All natural or legal persons, groups of persons or traders not holding stocks who have their domicile or registered place of business within the customs territory of the Community, and who carry out or have carried out a carriage operation involving a wine product in bulk or small quantity must complete on their own responsibility:

— an approved commercial document ...'.

B — *Facts and proceedings before the national court*

10. The order for reference has been made in the present case by the Tribunale Civile e Penale di Ravenna, Sezione Civile (Civil and Criminal District Court, Civil Chamber, Ravenna, hereinafter 'the national court'), which states that by a writ served on 23 June 1993, the company Angelo Celestini (hereinafter 'the plaintiff') summoned the company Saar-Sektkellerei Faber (hereinafter 'the defendant') to appear before the national court to answer the plaintiff's application that the national court should:

'(a) declare that, by rejecting the consignment of wine made by Celestini because allegedly, on the evidence of analyses conducted in the form of isotopic tests for oxygen (magnetic-resonance), that wine was watered down, and by failing to appeal against the measures adopted by the German administrative authority, the defendant is liable in the plaintiff's

15 — OJ 1993 L 200, p. 10.

16 — OJ 1989 L 106, p. 1. Regulation No 986/89, as amended, was repealed with effect from 1 September 1993 by Article 21 of the 1993 Commission Regulation.

regard within the meaning of Article 2043 of the Civil Code; [17]

and

(b) authorize Celestini to disregard the measures adopted by the German administrative authority and allow it to market as table wine, on the basis of the analysis conducted, those batches of the product which did not undergo distillation, so as to avoid further losses in addition to those already suffered on account of the distillation.'

11. The national court then refers to the contention of the plaintiff that the magnetic-resonance method of analysis used by the German authorities in the present case 'is not among those expressly listed in Community legislation (Regulation (EEC) No 2676/90), from which it follows that the actions of both the authorities mentioned and the defendant company were unlawful'. The national court states that it is important to resolve the question of whether the method of analysis used is lawful. It says that 'a finding that the method of analysis is lawful would entail the dismissal of all the plaintiff's submissions, both in relation to the damages claimed from the defendant and with respect to its request to be allowed to disregard the measures adopted by the German administrative authority, so as to release on to the market the batches of wine which have been declared unfit for sale'. It therefore decided to make a reference to the Court 'in the form of [the three] questions raised by the plaintiff'. Those questions are worded as follows:

'1) Is Article 30 of the EEC Treaty to be interpreted as prohibiting a Member State from adopting measures which prevent the importation and marketing on its territory of a quantity of wine coming from another Member State, if that wine is accompanied by bona fide certificates of analysis issued by research institutes lawfully authorized in the Member State of origin, stating that analysis of the wine confirmed its full conformity with the relevant Community legislation?

2) Does Article 36 of the EEC Treaty allow the importing Member State in a case such as that described in Question 1 to disregard the results of the analyses of the wine conducted in the exporting Member State and to consider itself entitled to meet the fundamental requirements of that article

17 — Article 2043, which appears in Title IX of the Code, is entitled 'Dei fatti illeciti' ('Unlawful Acts') and provides as follows: '*Compensation for unlawful acts.* — Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages'; see *The Italian Civil Code*, translated into English by Beltramo, Longo and Merryman, Oceana Publications, Inc. (New York, 1969).

by using a method of analysing wine based on isotopic tests for oxygen and specified in Question 3?

3) Does Article 74(2)(c) of Council Regulation (EEC) No 822/87 in relation to the provisions of Regulation (EEC) No 2676/90 allow to be considered as lawful and reliable in terms of being accurate, repeatable and reproducible within the meaning of that article the results of an analysis conducted on a batch of wine in isolation, using the method termed "isotopic test for oxygen 16/18" in cases where: (a) no data bank exists to supply the characteristics of the wine of a given area, systematically compiled over the course of several vintages and suited to serve as a genuine basis for comparison; (b) the only supporting data used are the analytic values of the magnesium, the ash content etc. which, other considerations apart, seem difficult to compare and inconsistent with the results of the analyses performed?'

12. Consideration of the documents transmitted with the order for reference and of the observations which have been submitted to the Court permits, in my view, the following additional facts and details regarding the main proceedings to be taken into account by the Court, subject to the reservation that the establishment of all issues of fact is ultimately within the responsibility of the national court.

13. In January 1991, the plaintiff, a wine producer with its registered office at Barbiano, Italy, entered into a contract to supply 60 000 hl of white table wine and 10 000 hl of red table wine to the defendant, which has its head office in Trier, Germany and which specializes in the production of sparkling wines. This case is concerned only with the red wine. The red wine was supplied in two equal consignments. The supply of the first consignment passed off without incident and was not, so far as appears from the facts available, subject to any particular controls in Germany.

14. The second consignment was shipped in a sealed tanker. The precise identity of the certificates of analysis which accompanied this consignment remains unclear. The written observations of the plaintiff, which is the only source of information, speaks of several analyses as having been effected following that carried out by the German authorities in July 1991 (referred to below). One of these, annexed as Document 4 to the plaintiff's observations, was described at the hearing by Italy as a 'classic customs accompanying document'. Document 4 appears to be dated (from a barely legible copy) 4 July 1991. It is described as Report of Analysis (Relazione di Analisi) N 327/91, signed on behalf of 'Enot. Alvise TOFFOLETTO'. Among the listed analytical results are a measurement of alcoholic percentage by volume at 9.25% and, as emphasized by the agent representing Italy, of ash at 2.32 g/l. The date of Document 4 is consistent with its having accompanied the goods. Before referring to it

further, I must mention Documents 5 and 6 annexed to the plaintiff's observations. These appear on their face to emanate from the Oenological Laboratory (Laboratorio Enochimico) at Verona. Both are dated 21 March 1991. One deals with a test for added sugar, and the other with the quantitative presence of a number of chemicals but not that either of water or of alcohol.

15. The second consignment was subjected to controls by German authorities in so far as certain samples of the wine were tested by the Chemisches Untersuchungsamt Trier (Chemical Examination Office of Trier, hereinafter, for brevity, 'the CUT'). The circumstances which led to this analysis were explained to the Court for the first time at the hearing. The agent representing Germany was at pains to point out that the objection of the German authorities was not based in the first instance on the test carried out at the CUT. Rather, he said, the wine had initially been tested by traditional methods. At 9.1% (Document 4 says 9.25%) the alcohol content and the contents of magnesium, ash and residual extracts were viewed as being too low. In addition, four out of five tasters considered the wine to be watery and thin and rejected it. It was only as a support for these results that the isotopic method was used. The tests that were carried out by the CUT, with the assistance of an institute based in Jülich, Germany, included one based upon a method of analysis which will hereinafter for convenience be described as the 'magnetic-resonance' or 'Oxygen 16/18' 'test' or 'method'. [18] According to the report drawn up by the CUT, the magnetic-resonance test demonstrated that water had been added to the wine, whereupon the wine was impounded, apparently on the instructions of the Staatsanwaltschaft (Regional Public Prosecutor's office), on 24 July 1991.

16. The plaintiff was informed in writing by the defendant by telefax on 13 August 1991 of the impounding of the wine and was asked to arrange for its repatriation to Italy. The plaintiff had asked a specialist laboratory at Faenza in Italy to carry out a new test, while on 7 October 1991 the defendant sent certain samples of the wine to be tested by the German-based Fresenius laboratory. On 31 July 1991 the Faenza laboratory, without having applied the magnetic-resonance test, found that the wine did not contain any added water. On 3 January 1992 the Fresenius Institute declared that it did not possess the experience necessary to verify the accuracy of the magnetic-resonance method. The Fresenius Institute also stated that the

18 — It appears from the observations of the Commission that the Oxygen 16/18 test turns essentially upon an analysis of the isotopes of oxygen contained in the water molecules present in wine. Oxygen atoms occur in three different isotopic forms, namely O^{16} which is the most widespread (99.8% of the total), O^{17} (0.04%) and O^{18} (0.16%). The mass of oxygen atoms and, consequently, that of the water molecules containing them varies proportionally with their isotopic composition. The proportion of O^{18}/O^{16} isotopes varies in accordance with the origin of the water; water of vegetable origin contained in grapes is richer in O^{18} than either rainwater or spring water. The Oxygen 16/18 test permits the level of O^{18} isotopes to be measured. Sea water is taken as a point of reference and divergences from it of the levels contained in water of different origins is expressed in terms of 'delta' units. The addition of water to wine effects a decrease in the initial delta-unit value of the wine, which has permitted the application of the Oxygen 16/18 test to the detection of watering of wine.

CUT had (as confirmed by Germany at the hearing) also relied upon other more traditional indicators such as sensory tests, the low alcohol level of the wine, and its magnesium and ash content. In its opinion, these indicators were not sufficiently probative to show that the wine had been watered down.

II — Observations submitted to the Court

17. On 21 January 1992 the plaintiff wrote to the defendant demanding that it bring proceedings to secure the release of the wine. However, the defendant decided to seek the opinion of two further laboratories, which used the magnetic-resonance method, with the following results: on 12 February 1992 the Landwirtschaftlich-chemische Bundesanstalt based in Austria took the view that the wine was not fit to be marketed while, on 13 February 1992, the French-based Eurofins laboratory concluded that the isotopic content of the sample submitted indicated the addition of exogenous water of the order of 15%. The defendant then asked the German authorities to proceed with the restitution of the wine to Italy. Pursuant to this request, the Ministry of Agriculture of the region of Rhineland-Palatinate called upon the plaintiff on 5 March 1992 to provide the name of an Italian distillery to which the wine could be sent for the purposes of distillation. The plaintiff nominated a distillery by letter of 11 May 1992 and, on 9 July 1992, the wine was sent back to Italy by the German authorities. However, only a part of the wine was, according at least to the Commission, [19] sent for distillation, while the remainder was allowed by the Italian customs authorities to return to the plaintiff's cellars, without being labelled, sealed or marked in any special way.

18. Written observations were submitted by the plaintiff, the defendant, the Italian Republic, the United Kingdom of Great Britain and Northern Ireland, and the Commission. All of these, except for the United Kingdom, appeared at the oral hearing. The Federal Republic of Germany also appeared at the oral hearing. Not having submitted any written observations, it relied largely on those of the United Kingdom and the Commission.

19 — The Commission bases this contention on evidence which it obtained during inspections carried out during an official Commission mission in Italy between 1 and 4 September 1992. The declaration sought by the plaintiff in its action before the national court implicitly supports the veracity of the Commission's claim.

III — Analysis

A — *Admissibility of the questions referred*

19. The Commission, supported at the hearing by Germany, questions the admissibility of the reference made by the national court. It advances four supporting arguments: (i) that the referring court lacks jurisdiction; (ii) that the national court's description of the factual and legal situation underlying the reference is too imprecise and incomplete; (iii) that the proceedings before the national court appear to be artificial; (iv) that the questions referred do not appear to be relevant having regard to the dispute giving rise to the main proceedings.

20. In relation to the jurisdiction of the national judge, the Commission refers to the 'extra-contractual' nature of the proceedings and argues that it is the German courts which, pursuant to Article 2 of the Brussels Convention, are competent as the courts of the place of the defendant's domicile. [20] The Commission acknowledges that under Italian civil procedure it is generally for the defendant to object to the jurisdiction of the Italian courts and that no such objection was raised here. However, it submits that the manifestly inadmissible nature of the reference in the present case cannot be denied and, indeed, that the failure of the defendant to object to the jurisdiction of the Italian court underlines the contrived nature of the dispute.

21. Article 177 of the Treaty refers only to the jurisdiction of the Court to give preliminary rulings. The division of functions between the Court and the national courts and tribunals which may (and in some cases, must) make references to it under Article 177 does not, in my opinion, permit the Court to question whether a national court, which has decided to make a reference under Article 177, should, in law, have declined jurisdiction. The jurisdiction of national courts to entertain and adjudicate upon disputes submitted to them is, in accordance with the division of functions between such courts and this Court, a matter to be determined by national courts in accordance with rules of national law. This Court cannot question the jurisdiction of national courts in

20 — Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters, as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, OJ 1978 L 304, p. 77, by the Convention of 25 October 1982 on the accession of the Hellenic Republic, OJ 1982 L 388, p.1, and by the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic, OJ 1989 L 285, p. 1.

their own domain. [21] As the Court held in *Balocchi*, [22] where the jurisdiction of the national court in tax matters was challenged:

'... it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organization of the courts and their procedure.

The Court must therefore abide by the decision from a court of a Member State requesting a preliminary ruling in so far as it has not been overturned in any appeal procedures provided for by national law.'

Moreover, the Court stated in *Bosman* that 'where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a preliminary ruling'. [23] However, it may be, as, indeed, is contended by the Commission and Germany in this case, that an apparently extremely broad appreciation by a referring court of its own jurisdiction should alert the Court to the possibility that any ensuing reference might, in fact, constitute a misuse of the Article 177 reference procedure. Obviously, it is of some note that, as a consequence of events in Germany, the Italian court in the main action is effectively asked to rule upon the permissibility of the action in Germany of a German administrative authority. Questions of jurisdiction of this type are not, however, matters of Community law, except when raised by means of a question of interpretation under the Brussels Convention.

22. The next submission of the Commission is that the action underlying the reference in this case is wholly artificial. It advances three reasons to support its contention that the principle established by the Court in *Foglia* v *Novello I* ought to be applied in this case. [24] Firstly, it refers to the large degree of 'identity of view' between the parties as to both the issues in dispute and the decision to refer questions to the Court. Secondly, it claims that the *real* object of the main litigation is not the demand of the plaintiff to be compensated by the defendant but, rather, to question the legality of the German decision finding the wine 'unfit for human consumption'. Thirdly, the minutes of the oral hearing before the national court on 15 October 1993 demonstrate, at least according to the

21 — See Opinion of Advocate General Jacobs and the judgment of the Court in Case C-39/94 *Syndicat Français de l'Express International (SFEI) and Others* v *La Poste and Others* [1996] ECR I-3547; paragraph 30 of the Opinion and paragraph 24 of the judgment.

22 — Case C-10/92 [1993] ECR I-5105, paragraphs 16 and 17 of the judgment.

23 — Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 59 of the judgment.

24 — Case 104/79 [1980] ECR 745.

Commission, the existence of *agreement* between the parties on the desirability of referring questions to the Court.

23. The principles established in the *Foglia* v *Novello I* and *Foglia* v *Novello II* cases should be applied with great care, since they not only question the validity of an order made by a national court but also put at issue the bona fides of the parties to the main action. [25] The essential facts of those cases are well-known: Foglia, an Italian wine merchant, agreed to sell some wine to Novello, an Italian customer, which was to be delivered to an address in France. However, the contract was made subject, *ab initio*, to a clause whereby the purchaser would not have to pay any duties claimed by either the Italian or French authorities that were 'contrary to the free movement of goods between the two countries or at all events not due.' [26] Certain taxes were levied on the importation of the wine into France which Novello, relying principally on Article 95 of the Treaty, subsequently refused to pay. This led to an action in Italy by Foglia and ultimately a reference to the Court. The Court stated that the parties had inserted the clause 'in order to induce the Italian court to give a ruling on the point'. [27] Referring to 'the *artificial nature* of this expedient', the Court held that its 'duty' under Article 177 was 'to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle *genuine disputes* which are brought before them'. [28] The Court thus ruled that it had 'no jurisdiction to give a ruling on the questions asked by the national court'. The national court thereupon made another preliminary reference to the Court. [29] The Court held in the second case that, while it is primarily for national courts to determine the need for a preliminary ruling, their 'power of appraisal' is not unlimited. [30] In particular, the Court stressed that 'the duty assigned to the Court by Article 177 is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States' and continued that:

'It accordingly does not have jurisdiction to reply to questions of interpretation which were submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute.' [31]

25 — See *Foglia* v *Novello I*, loc. cit., ibid., and Case 244/80 *Foglia* v *Novello II* [1981] ECR 3045.

26 — Ibid., *Foglia* v *Novello I*, paragraph 3 of the judgment.

27 — See paragraph 10 of the judgment.

28 — See paragraph 11 of the judgment, emphasis added.

29 — See *Foglia* v *Novello II*, loc. cit., footnote 25 above. The defendant challenged the interpretation of Article 177 made by the Court in *Foglia* v *Novello I* and, on hearing her claims, the national judge considered it necessary to refer certain questions to the Court 'on the interpretation of Article 177 ... in order to obtain a clearer and more precise appraisal of the scope and meaning of the judgment [in *Foglia* v *Novello I*]'; *Foglia* v *Novello II*, paragraphs 8 and 9 of the judgment.

30 — *Foglia* v *Novello II*, paragraphs 15 and 16 of the judgment.

31 — See paragraph 18 of the judgment.

24. As Advocate General Lenz stated in his Opinion in *Bosman*, the basis of the Court's judgments in the *Foglia* v *Novello* cases is that preliminary rulings ought not to be given where there has been a 'misuse' of the Article 177 procedure. [32] This principle is, in my view, one which should be applied most sparingly and with the utmost caution by the Court. It certainly emerges clearly from a perusal of the case-file and from the observations submitted by the parties in the present case that there is a significant convergence of viewpoints between the plaintiff and the defendant regarding the need for a reference and the desired outcome of that reference. It can also be noted that, though it was the action of the German authorities which prevented the object of the contract from being achieved, neither party was willing to challenge that action by contesting its legality before the appropriate German courts. The parties would appear to have a common interest in the sale of Italian wine in Germany and even in contesting the appropriateness of the Oxygen 16/18 test. However, they did not pre-arrange a contract designed, at a later stage, to induce a court in one Member State to seek a reference concerning the compatibility with Community law of certain legal provisions of another Member State. Instead, the plaintiff has brought in Italy an action for damages against the defendant under Article 2043 of the Italian Civil Code, the success of which appears to depend, at least to some degree, upon the validity of the method of testing used in Germany. At the hearing the defendant stated that it had not contested the jurisdiction of the Italian court because it was confident that it would ultimately win the case. It also stated that, as there are at present other cases pending before courts in Germany (though not apparently involving the defendant) concerning the confiscation by German authorities of Italian wines on the basis of results obtained using the Oxygen 16/18 test, there is now 'a need to establish clarity in this matter by a judgment of this Court'.

25. There is a distinction between a reference by way of a test case arising out of a genuine legal dispute and an artificially induced reference. I am satisfied that this case falls into the former category. In this respect, I would regard as crucial the fact that while in the *Foglia* v *Novello* cases it was clear that the parties had consciously created an artificial dispute by means of contractual provisions designed to induce the Italian court to make the desired reference,

32 — See paragraphs 83 and 84 of the Opinion. To support this interpretation, he refers, in particular, to paragraph 23 of the judgment in Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, where the Court ruled that the autonomy of national courts to decide on the need for a preliminary ruling should be qualified 'where either it appears that the procedure has been misused and been resorted to, in fact, in order to elicit a ruling from the Court by means of a spurious dispute or if it is obvious that the provisions of Community law submitted for the interpretation of the Court cannot apply'. This interpretation is also consistent with the view articulated by Advocate General Sir Gordon Slynn in his Opinion in *Foglia* v *Novello II* where he stated that the Court had refused jurisdiction in *Foglia* v *Novello I* 'on the basis that it was satisfied that as between the parties there was no real issue as to Community law. The proceedings in the Italian court, indeed maybe the whole transaction, had been set up in order to obtain a ruling on a matter as to which the parties agreed. Since there was no question between them, the Court was neither obliged nor empowered to rule on the matter'; [1981] ECR 3045, p. 3069.

no such statement can be made about the present case. I do not therefore propose to the Court that it should decline jurisdiction on the basis that the dispute in the main proceedings which led to the reference represents an attempt to misuse the Article 177 procedure.

26. It is next necessary to consider whether the national court has provided enough information in its order for reference to enable the Court to provide a meaningful answer to the questions referred. The Commission submits that the statement of facts and the summary of the legal issues and procedure made by the national court in its reference are laconic and fail to establish the precise legal context which led the national court to make its reference. Referring, *inter alia*, to the judgments of the Court in *Lourenço Dias*, *Meilicke* and *Telemarsicabruzzo*, [33] the Commission contends that the reference in the present case does not establish the need to provide an interpretation of Community law which will be useful to the national court. As they are closely linked, I shall deal with this issue together with the Commission's fourth argument on admissibility, i. e. that the questions referred do not appear to have any connection with the dispute in the main action. [34] The Commission says that the legality or otherwise of the German measures has manifestly no connection with the main dispute.

27. While I would not disagree with the statement made at the hearing by the plaintiff that the order for reference in this case 'is not of exemplary clarity', I do not think that it is so devoid of information as to make it impossible for the Court to ascertain the reasons underlying it. It has proved possible, with the aid of the observations of the parties and consultation of the file accompanying the order for reference, to ascertain the underlying facts in sufficient detail so as to give guidance to the national court. As the Court stated in *Foglia* v *Novello II*, under Article 177 of the Treaty 'the spirit of cooperation which must govern the performance of the duties assigned to the national courts on the one hand and the Court of Justice on the other requires the latter to have regard to the national court's proper responsibilities'. [35] In *Bosman*, Advocate General Lenz stated that 'the national court is best able to assess whether a preliminary ruling from the national court is required' and that 'the Court should depart from that assessment only in well-founded exceptional cases'. [36] What is required, in my view, is an assessment of whether sufficient details have been provided so as to enable meaningful answers to be given by the Court.

33 — See respectively Case C-343/90 [1992] ECR I-4673, Case C-83/91 [1992] I-4871 and Joined Cases C-320/90, C-321/90 and 322/90 [1993] ECR I-393.

34 — In this respect the Commission refers, in particular, to the judgment in Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563.

35 — See paragraph 20 of the judgment.

36 — See paragraph 101 of the Opinion.

28. With regard to the relevance of the questions referred for the resolution of the dispute in the main proceeding, especially in so far as the second head of relief is concerned, I share some of the Commission's doubts as to their admissibility. Even if, on the basis of answers provided by the Court to the questions referred, the national court were to find that the German authorities had acted in contravention of Community law in subjecting the wine supplied to the magnetic-resonance test, the national court has not explained exactly how that would assist the claim brought against the defendant. All that the national court has said is that, if the answers provided by the Court were to the effect that the test applied was compatible with Community law, the entire action of the plaintiff would have to be dismissed. In its claim for damages the plaintiff cites the allegedly wrongful failure of the defendant to bring proceedings in Germany against the German administrative authorities. In his Opinion in *Foglia* v *Novello I*, Advocate General Warner saw no reason to exclude the possibility of a question being raised in proceedings between private persons, before a court of one Member State, regarding the compatibility with Community law of the laws of another Member State. Indeed he thought that the national court would be 'bound to address itself to the question'. Of course, as he pointed out, 'its judgment, however, [would] constitute *res judicata* only as between the parties to the litigation' and could not 'bind the Member State whose laws have been impugned'. [37] It is a matter for the national judge, in the light of this explanation of the limits of his powers, to appreciate the consequences for the parties to the litigation of any such possible incompatibility.

29. The duty of cooperation which governs the relationship between national courts and the Court in Article 177 proceedings obliges the Court, in my opinion, to refuse to answer questions referred, only in circumstances where it is very clear that no genuinely useful answer can reasonably be given. Viewed in this light and subject always to the qualification that in Article 177 references 'the Court can neither apply the Treaty to a particular case nor give a judgment on the validity of a measure of national law with regard to it, as it is required to do under Articles 169 or 170', [38] I am satisfied that the present reference is not so 'vague as to the legal and factual situations envisaged by the national court' that 'the Court is unable to provide an interpretation of Community law'. [39] I do not therefore think that the reference is manifestly inadmissible and, accordingly, I recommend to the Court that it answer the questions thereby referred.

37 — [1980] ECR 745, p. 764.

38 — Case 20/64 *Albatros* v *Sopéco* [1965] ECR 29, p. 34.

39 — See, for example, the order of the Court in Case C-257/95 *Gérard Bresle* v *Préfet de la Région Auvergne and Préfet du Puy-de-Dôme* [1996] ECR I-233, paragraph 18.

B — *Analysis of the questions referred*

30. I agree with the submission of the Commission that the three questions referred by the national court raise essentially two separate Community-law issues. Firstly, is the condemnation as improper for human consumption, based on a test carried out by one Member State, of a consignment of wine, delivered with the appropriate accompanying document required by Community law and originating in another Member State, compatible with Article 30 of the Treaty and, if not, can it be justified by reference to Article 36? Secondly, is the use by a Member State of the magnetic-resonance test in order to determine the fitness of wine for human consumption compatible with Community law?

(i) The relationship between wine controls and the free movement of goods

31. The plaintiff, supported by Italy, submits that the failure of the German authorities, in this case, to respect the controls carried out in Italy constitutes a violation of the general principle of mutual recognition of national controls flowing from Article 30 of the Treaty. This, it submits, is particularly the case where, as here, the samples tested were transported from Italy in sealed containers. Furthermore, the plaintiff alleges, though without reference to any supporting evidence, that the test to which its wine was subject was merely an example of the systematic testing of Italian wine which, it submits, is being carried out by German authorities in contravention of Article 30.

32. The plaintiff also claims that the actions of the German authorities cannot be justified by reference to Article 36 of the Treaty, on the supposed ground of protecting human health or life, because they were carried out in circumstances where no valid justification was given for refusing to accept the result of the tests carried out in the country of exportation. Both the plaintiff and Italy maintain that the tests carried out in Italy on the wine in question established, at least, a presumption that it was in conformity with Community regulations, which, they contend, could not have been invalidated by a test carried out in Germany according to a method not recognized by those regulations.

33. The plaintiff accepts that, where doubts arise as to the results of a first test, an importing Member State is permitted to carry out further tests but, it submits, those tests should only be based on official methods of analysis. At the hearing, Italy

submitted that the validity of the results of an official test carried out in one Member State cannot be questioned on the basis of an unofficial test carried out in another Member State.

34. The United Kingdom, which has submitted thorough and detailed written observations, points out that the production and marketing of wine is subject to the rules of a very detailed common organization of the market, one of whose objectives is preventing wines which are either a danger to the health of consumers or which are of a poor quality from being marketed. From the 1987 and 1989 Regulations it is clear that wine which has been subject to an unauthorized oenological practice is unfit for human consumption and, furthermore, that the addition of water to wine constitutes such an unauthorized practice. Where such practices occur, the appropriate authorities of each Member State must, according to the United Kingdom, ensure that the adulterated wine does not reach the consumer. It contends that the 1989 Regulation imposes this obligation not only on the Member State of production but, also, on each Member State where the wine is for the time being located. Moreover, the Community regulations do not oblige the Member State of production to furnish any particular certificates of analysis for its wine; nor do they oblige the Member State of importation to accept, as proof of the conformity with such regulations, any certificate which has in fact been issued in the Member State of origin. According to the United Kingdom, the only document which, in accordance with Community law, must accompany wine in free circulation in the Community is that required by Article 3 of the 1993 Commission Regulation, for which no particular analysis has to be carried out. The United Kingdom concludes that the subjection of wine to a quality-control test by the authorities in an importing Member State is not, *per se*, contrary to Article 30 of the Treaty.

35. The United Kingdom does not, however, contend that a certificate issued by appropriate authorities in a Member State of production is so devoid of value that it may be ignored by an importing Member State. On the contrary, it contends that full account ought normally to be taken of any such certificate but that there will still be cases which justify a second analysis. It lists four examples: (i) where there is reasonable suspicion that the wine has been subject to an unauthorized oenological practice; (ii) where the second analysis is carried out as part of a systematic or random control exercise; (iii) where the importing Member State wishes to carry out tests additional to those carried out in the Member State of production; (iv) where, in conformity with Community rules, a Member State wishes to employ a more sophisticated or reliable method of analysis. The United Kingdom observes that, on the basis of information contained in the order for reference, it is apparent that no test

designed specifically to detect exogenous water was effected in Italy. As the tests applied by the German authorities indicated that water had been added, it submits that they had no alternative but to prevent the marketing of the relevant wine.

36. Referring to *Commission* v *France*, [40] the United Kingdom submits that, while Member States could operate ostensibly permissible controls on wine in a manner which, in fact, contravenes Article 30 of the Treaty, the mere fact that testing is carried out on a systematic basis does not justify such a conclusion. It argues that what the Court found objectionable in *Commission* v *France* was not the application *per se* of systematic testing of Italian wines by the French authorities but, rather, the subjection of those wines to a comprehensive and intensive programme of systematic analysis 'in the absence of any concrete facts which might justify a suspicion of fraud or irregularities' and in circumstances where no testing of *comparable frequency* was applied to French wines transported within France. [41]

37. At the hearing, in the event of the Court deciding that the questions referred by the national court were admissible, Germany associated itself with the observations of the United Kingdom and the Commission regarding the answers to be given to the first and second questions. It was stated that at least one German court had already recognized as reliable the result of an analysis of wine using the magnetic-resonance test. Furthermore, the agent representing Germany pointed out that, where wine has been watered down, it is possible to obtain accurate results only if tests are also carried out on an unadulterated batch of the same wine.

38. The Commission points to the difficulty of discussing, in the absence of any details, whether the particular German rules governing the testing of wine are in conformity with Article 30 of the Treaty. It also refers to the Community legislation governing the wine sector and contends that controls by the German authorities may be justified by Community rules even if a hindrance to trade arises from their application. In particular, it states that those rules authorize the application of systematic controls of the quality of wine. The Commission submits therefore that Articles 30 and 36 of the Treaty are not directly applicable to the controls at issue, whose validity should be assessed by reference to the relevant Community rules. Importing Member States are, it maintains, entitled, on the basis of appropriate controls yielding proof that imported wine has been watered down, to impound the wine and prevent its marketing.

40 — Case 42/82 [1983] ECR 1013.

41 — Ibid., paragraphs 55 and 56 of the judgment.

39. It is firstly necessary to assess the relevance of Articles 30 and 36 of the Treaty. The status of wine as an agricultural product does not preclude the application of the rules on free movement of goods contained in the Treaty. Article 38(2) of the Treaty provides that 'Save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the common market shall apply to agricultural products'. In *Charmasson*, [42] in the context of a national market organization, the Court held that 'it appears from this provision, particularly if considered in conjunction with Article 42, that agricultural products are, in the absence of any contrary provision, subject to the rules relating to the establishment of the common market ...'. [43] In *Commissionaires Réunis* v *Receveur des Douanes*, [44] the questions referred concerned the interpretation and validity of Article 31(2) of the 1970 Regulation, whereby Member States were authorized in certain special circumstances 'to take measures that may limit imports from another Member State'. [45] The reference arose in the context of the adoption of a French decree imposing a duty on imports of Italian wines. The Court held that Articles 39 to 46 contain no provision allowing the introduction of charges having equivalent effect to customs duties in intra-Community trade and that 'it is clear from all these provisions and their relationship *inter se* that the extensive powers, in particular of a sectoral and regional nature, granted to the Community institutions in the conduct of the Common Agricultural Policy ("CAP") must, in any event as from the end of the transitional period, be exercised from the perspective of the unity of the market to the exclusion of any measure compromising the abolition between Member States of customs duties *and quantitative restrictions* or charges *or measures having equivalent effect*'. [46]

40. The violation of the free movement of goods rules of the Treaty at issue in *Commissionnaires Réunis* was manifest and the importance of the case lies principally in the fact that it establishes that trade in agricultural products is subject to those rules. However, in view of the discretion which the Court has recognized as residing in the Council regarding the implementation of the CAP, through the establishment of common organizations of agricultural markets, [47] there may, as Advocate General Capotorti has put it, be a need, when establishing such common rules, to adopt 'special arrangements which depart from the strict application of the general rules of the common market'. [48] In the present case, however, it is important to emphasize that no doubts have been raised, either in the questions referred by the national court or in the observations presented to the Court, regarding the compatibility with the Treaty of any of the

42 — Case 48/74 *Charmasson* v *Minister for Economic Affairs and Finance* [1974] ECR 1383.

43 — Ibid., paragraph 8 of the judgment; see also Case 68/76 *Commission* v *France* [1977] ECR 515, paragraph 20. The only express derogation is that contained in Article 42, which, at paragraph (1), provides that the *competition rules* of the Treaty 'shall apply to the production and trade in agricultural products only to the extent determined by the Council ...'.

44 — Joined Cases 80/77 and 81/77 [1978] ECR 927, (hereinafter '*Commissionnaires Réunis*').

45 — Loc. cit., footnote 4 above.

46 — *Commissionnaires Réunis*, paragraph 35 of the judgment (emphasis added).

47 — See, for example, Case 106/81 *Kind* v *EEC* [1982] ECR 2885, paragraph 24 of the judgment.

48 — See the Opinion of Advocate General Capotorti in Case 68/76 *Commission* v *France*, loc. cit., [1977] ECR 515, p. 539.

various potentially relevant provisions of the Community wine legislation. I think that it is necessary, in order to provide criteria of interpretation which will be of assistance to the national court, firstly to interpret the relevant provisions of that legislation before, secondly, assessing the relevance of Articles 30 and 36 of the Treaty.

41. That the prohibition of unauthorized oenological practices should be a central feature in the common organization of the Community wine market is, in my opinion, not surprising when both the economic and cultural importance of wine in the Community is considered. I cannot improve on the words of Advocate General Trabucchi in his Opinion in *Arnaud*, where he stated that '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'. [49] As the United Kingdom submits, one of the objectives of the 1987 Regulation is to ensure, in the interests of preventing the marketing of poor quality wines and of protecting the health of consumers, that only wines produced in accordance with authorized oenological practices are traded in the Community. [50] While the adding of water to wine may not present any obvious danger to public health, it is probably the most widespread fraud which can be practised on unsuspecting consumers and on competing wine-producers. It is therefore hardly surprising that Article 15(4) of the 1987 Regulation states unambiguously that the addition of water to wine '*shall* be prohibited' [51] and that the watering-down of wine is an unauthorized oenological practice within the meaning of Article 73. Under Article 1 of the 1978 Commission Regulation, such wine must either be destroyed or used only for distillation. The duty of Member States is to ensure the destruction or industrial use of such wine as provided in Article 79 of the 1987 Regulation.

42. The 1989 Regulation, in obliging Member States to take 'the necessary measures' (Article 3(1)) to ensure compliance with proper oenological practices, does not limit that duty to occasional controls but expressly authorizes systematic sampling (Article 3(2)). These obligations, as the United Kingdom explains, are not limited to the producing Member States but are applicable to *all* Member States without exception. Indeed, the very nature of a regulation, as defined in Article 189 of the Treaty, supports this conclusion. [52] Moreover, I am also convinced that this conclusion flows clearly from, *inter alia*, the wording of Article 3, the recitals to the 1989 Regulation which refer, for example, to 'the immense danger which

49 — Joined Cases 89/74, 18/75 and 19/75 *Procureur Général, Bordeaux* v *Arnaud* [1975] ECR 1023, p. 1040.

50 — See the 26th, 84th, 85th and 89th recitals in the preamble to the 1987 Regulation.

51 — Emphasis added.

52 — The first paragraph of Article 189 states that 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'.

fraud can cause to consumers and producers' (see recital 10), provisions such as Article 4 on 'control authorities' which are not confined to wine-producing Member States and Article 5 which requires each Member State to 'take all appropriate measures to facilitate the work of the officials *of its competent authority or authorities*'. [53] Besides, while Article 71(1) of the 1987 Regulation provides that 'wine may be put into circulation within the Community only with an officially checked accompanying document', the detailed rules concerning the content of this document that were applicable upon the occurrence of the events involved in the main proceedings (see Regulation No 986/89 referred to at paragraph 9 above) do not, however, require the authorities in the Member State of origin to carry out any particular test prior to issuing the relevant document. A trader's obligation to obtain such a document in the Member State of origin cannot, in my opinion, be interpreted as affecting the right of the importing Member State to carry out quality controls.

43. I do not consider the principle of the mutual recognition of national controls, relied upon by the plaintiff and Italy as flowing from Article 30 of the Treaty, to be of particular relevance in this case. As pointed out in paragraph 40 above, no suggestion has been made in this case that the relevant provisions of the Community wine legislation are in conflict with the freedom of movement of goods. The rules, so far as relevant, are designed in an even-handed way to guarantee the quality of all wine, whether imported or not, that is released for human consumption.

44. There is, of course, nothing to prevent a wine producer from voluntarily subjecting wine, which it intends to export, to testing in the Member State of production. In this case, the national court has assumed (apparently on the basis of the information provided by the plaintiff) that a 'lawfully authorized' research institute in Italy had certified the wine to be 'in full conformity with the relevant Community legislation'. However, the Community regulations do not envisage any such certification; nor do any of the documents furnished to the Court purport to certify the conformity claimed. Furthermore, in response to an express question as to whether the wine in question had been accompanied by a certificate that water had not been added, the agent for the plaintiff was not in a position to give 'a specific answer'. The certificates on which he relied at the hearing, namely those annexed to the plaintiff's written observations, do not purport to refer to any such test.

45. In reality, it seems clear that no specific test for the addition of water was effected in Italy nor was the wine certified as fit for human consumption. Besides, the fact that the wine was transported in a sealed container to Germany cannot have reduced the risk that it might still have been adulterated prior to its being placed in that container. I do not think, for the reasons articulated in

53 — Under Article 2(b) of the 1989 Regulation, a competent authority 'shall mean each of the authorities or each of the departments designated by the Member States to ensure compliance with the rules in the wine sector'.

more detail below, that there is any basis in Community law for contesting the right of national authorities to carry out the sort of controls effected in the present case. This, of course, does not resolve the question whether the controls actually applied were compatible with Community law. That is a matter which touches upon the *application* of Community law and, in the context of a preliminary reference, it is only the national court, which can make the necessary findings of fact, that can decide that question.

46. The Court can provide criteria to the national court which will assist it in making that decision and, in my view, ought to do so in this case. I should, however, firstly state that if the account of the tests carried out in this case as given by Germany at the hearing was correct, I think that the German authorities were entitled to carry out further tests regarding the quality of the wine. [54] Moreover, I consider that even if an authorized Italian laboratory had, *prior* to the transport of the wine, tested the consignment in question for the addition of water, found no evidence of such an unauthorized oenological practice and issued a certificate to that effect, the German authorities would still, for example, either by way of a random test or pursuant to a reasonable suspicion of fraud or irregularity, have been entitled, in performing their obligations under the Community regulations, to carry out a second test; they would have been obliged, under Article 30 of the Treaty, in those circumstances to presume the fitness for human consumption of the wine, unless and until probative evidence to the contrary had emerged. Close cooperation between the relevant national authorities would be of particular importance in such circumstances and the carrying out of independent tests would probably be indispensable.

47. The Treaty rules on the free movement of goods apply even where no test for the addition of water has been carried out in the Member State of production. Referring to oenological checks in *Commission* v *France*, [55] the Court, having accepted that the Community wine legislation then in force conferred 'on national authorities the responsibility for ensuring compliance with the Community rules [and that checks] by means of analyses may ... be a useful means of discovering infringements of the rules in question', [56] stated that 'the measures of verification carried out must be necessary for attainment of the desired objectives and must not create obstacles to trade which are

54 — The agent representing Germany stated that, having noted an unusually low alcohol percentage (see paragraph 15 above) and having carried out one set of analyses which showed that the quality of the wine was not what would be expected, the authorities proceeded to a sensory analysis which, by a ratio of 4: 1, showed the wine to be watery. Following this result, they proceeded to carry out the Oxygen 16/18 test, which confirmed the earlier results.

55 — Case 42/82, loc. cit., footnote 40 above.

56 — Ibid., see paragraph 53 of the judgment.

disproportionate to those objectives'. [57] In that case, the Court noted the testing by the French authorities in one month of every consignment of wine arriving from Italy and, during a separate period, of three out of every four consignments 'in the absence of any concrete facts which might justify a suspicion of fraud or irregularities in a given case', [58] where 'the frequency of the analyses was distinctly higher than the occasional checks carried out on the transportation of French wine within France' and where it was 'an established fact that checks [were] also carried out by the Italian authorities in order to ensure that wine produced in Italy complie[d] with the Community rules and that consumers and the health and life of humans [were] protected'. [59] The Court, in these circumstances, held that 'the French authorities had no right to carry out systematic checks by means of analyses and, in the absence of any reasonable suspicion on the basis of specific evidence in a given case, ought to have confined themselves to random checks'. [60]

48. I think that the case-law of the Court, to which reference has already been made, regarding the testing of wine, though not concerned with the detection of exogenous water, provides relevant guidance on the permissibility of national testing methods and procedures. In *Gallet*, for example, the Court recognized that, for the purpose of calculating the reduced dry extract of wine, recourse had traditionally been had to what was called the 100° method. [61] Although the then current Community regulation provided for the densimetric method alone, the Court noted that the methods of analysis laid down were not comprehensive and held that 'it follow[ed] that the regulation [was] not exhaustive but le[ft] to the Member States the choice of applying other methods of analysis for determining the constituents of wine ...'. [62] *Gallet* was part of a sequence of cases concerning the question of methods of analysis to be used to detect over-alcoholization. In its earlier decision in *Arnaud* the Court had reached the same conclusion, but had pointed out that '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 ...'. [63] In order to avoid such a conflict, the Court went on to say that '[t]his 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'. [64] This is a principle which, in my view, should be applied generally, and which, in particular, is relevant to the present case. Where a Member State authority applies a test, which is permissible because Community regulations are not exhaustive in the area, its administrative authorities must admit rebutting evidence to be produced by

57 — See paragraph 54 of the judgment.
58 — See paragraph 55 of the judgment.
59 — See paragraph 56 of the judgment.
60 — See paragraph 57 of the judgment.
61 — Case 7/79 *Gallet* v *Minister for Agriculture* [1979] ECR 2373.
62 — Ibid., paragraph 5 of the judgment.
63 — Loc. cit., footnote 49 above, paragraph 13 of the judgment.
64 — Ibid., paragraph 14 of the judgment.

or on behalf of the producer of the wine in the Member State of origin. It follows that such authorities must be prepared to consider that evidence before reaching their conclusion. In other words, they must follow fair procedures. However, if, having done so, they remain convinced that the wine has been subjected to illegal oenological practices so as to be unfit for human consumption, they must, *subject to judicial control*, proceed to condemn it.

49. In this case, the plaintiff and Italy also allege that the German authorities are subjecting Italian wines to systematic testing but, beyond this bare assertion, no supporting evidence is contained either in the order for reference or the observations of the plaintiff. The case-file does not tend to support the allegation as the first batch of the red wine in question does not appear to have been subjected to any controls. The agent representing Germany stated that, at least in so far as the CUT was concerned, it tested both domestic and imported wines. The Court cannot, in the absence of any evidence, assume for the purpose of providing answers to the national court that Germany subjects Italian wines to systematic controls. [65]

50. It seems likely that Germany subjects domestic and imported wines to random controls. However, even if the particular tests at issue in the main proceedings were not part of such normal controls, it appears that there was a reasonable basis, as already described (see paragraph 15 above), for suspecting the quality of the second batch of the wine at issue in the present case. A Member State which, on reasonable grounds, subjects a consignment of wine, whether imported or not, to further controls does not act in contravention of Community law. Even if such controls constitute formally a barrier to free movement, it is a barrier which in my view is clearly 'necessary for attainment of the desired objectives of the Community wine legislation'. [66]

51. In consequence, I recommend to the Court that it answer the first two questions jointly and in a general manner to the effect that Member States are entitled to subject imported wines to random controls, particularly, but not only, where there is a reasonable basis for suspecting that the wine has been subject to unauthorized oenological practices, such as the addition of water. This is particularly the case where no specific test for exogenous water has previously been effected. Member States on whose territory imported wine is located are not bound, by

65 — In my opinion, if a Member State were effectively to alter its policy from one of random controls to systematic testing, it would, apart from the obligation substantively to be able to justify such a change, by analogy with Articles 9 and 10 of the 1989 Regulation (see paragraph 52 below) and with the principles laid down in Case 42/82 *Commission* v *France*, loc. cit. (see particularly paragraph 36 thereof), be obliged to notify in advance both the Commission and the appropriate authorities in the affected Member State of origin.

66 — See Case 42/82 *Commission* v *France*, loc. cit., paragraph 54 of the judgment.

the rules on freedom of movement of goods, to accept the results of any *specific* analyses carried out in the Member State of origin of the wine. However, they may only refuse to accept those results where, either there are grounds for questioning the accuracy of the certificate(s) issued in the originating Member State, or they subject imported wines to the same standards as are routinely applied to domestically-produced wines, and where the undertakings affected by the controls in question are given the opportunity to refute any findings adverse to the free movement of the wine.

52. In this respect, it is also important to note that Member States are bound (Article 4 of the 1989 Regulation) to designate competent authorities for the purpose of ensuring 'compliance with the rules in the wine sector'. [67] Furthermore, the laboratories which those authorities use for carrying out analyses must be chosen by the Member States in accordance with Article 79(1) of the 1987 Regulation. It follows from Articles 9 and 10, in particular, of the 1989 Regulation that where the competent authorities in one Member State have reason to suspect that a shipment of wine originating in another Member State does not 'comply with the wine-sector rules or has been subject to a fraudulent action', they must notify the relevant authorities in the Member State of origin and the Commission. Moreover, the persons subject to controls 'shall not obstruct such controls and shall be required to facilitate them at all times'. [68]

(ii) The compatibility with Community law of the Oxygen 16/18 test

53. The third question of the national court effectively asks the Court to determine whether the use of the Oxygen 16/18 test meets the criteria of accuracy, repeatability and reproducibility set out in Article 74(2)(c) of the 1987 Regulation and Article 5 of the 1990 Commission Regulation. A glance at the annex to the 1990 Commission Regulation reveals that these criteria are scientific. Any determination of whether that test can be said legally to satisfy those criteria can be made only on the basis of appropriate scientific evidence and findings of fact based on that evidence. In a case such as that involved in the main proceedings, it is for the national court to make such findings. I do not think that the Court can provide the national court with any specific answer in relation to this question since it is patently not the role of this Court in Article 177 proceedings to make such findings of fact.

54. It was accepted in all of the observations submitted in this case that, to date, the magnetic-resonance test has not been

67 — The definition of such authorities is set out in Article 2(b) of the 1989 Regulation, which is quoted in footnote 53 above.

68 — See Article 15 of the 1989 Regulation.

recognized as an official test either at Community or international level. [69] It is reasonable to assume, since the test was employed by the CUT and, according to Germany, has already been approved by one German court, that its propriety has been accepted in that Member State. In these circumstances, if the test meets the criteria of accuracy, repeatability and reproducibility required by Article 74(2) of the 1987 Regulation, it is compatible with Community law. It is, however, for the national court as the fact-finding tribunal to make this determination.

55. The national court refers to the necessity for a supporting data bank and reference to other 'supporting data' as potentially important requirements for applying the magnetic-resonance test. It may be that this is an implicit reference to the circumstances in which the test was, in fact, carried out in Germany. It seems to me, however, that where, during the course of national controls on wine, the Oxygen 16/18 method is used merely 'to buttress' (as the agent representing Germany stated at the hearing was actually the case in the main proceedings) findings based on other tests, the results obtained from that test cannot be considered in isolation from the results of those other tests. Furthermore, as there is no internationally recognized test for determining whether water has been added to wine, I agree with the Commission that no one test can be regarded as conclusive. However, where the results of a series of tests all point towards the same conclusion, I do not consider that a competent authority in a Member State is precluded from *presuming* that water has been added merely because one of the tests used was the Oxygen 16/18 method. A presumption is, of course, always rebuttable. If, in an individual case, the undertaking whose wine is presumed to have been adulterated on the basis of the results of an Oxygen 16/18 test, presents probative evidence to the relevant testing authorities to the effect that the basis upon which they carried out that test was flawed, then, subject of course to the individual circumstances of the case and, particularly, the accuracy, repeatability and reproducibility of the other tests that were used by such authorities, the presumption of adulteration should be reversed.

56. These are all, however, matters for the national court to determine. Nevertheless, I think that it is appropriate to add that, in my view, since the CUT, the relevant ministerial authorities of the region of Rhineland-Palatinate and Germany are not parties to the main proceedings, it is difficult to envisage how the national court can make reliable findings regarding the details of the methods of testing used and the results obtained thereby in Germany in the summer of 1991, unless it is at least prepared to seek evidence from those responsible for the tests.

69 — At the hearing Germany stated, however, that it was hoped that the International Wine Office would adopt a resolution approving the test at a meeting due to be held in November 1996.

IV — Conclusion

57. I propose that the Court reply as follows to the questions referred by the Tribunale Civile e Penale di Ravenna:

(1) Articles 30 to 36 of the EC Treaty do not prevent a Member State from testing wine produced in another Member State, even when accompanied by bona fide certificates of analysis issued by research institutes duly authorized in the Member State of origin, provided testing methods and procedures are applied in a non-discriminatory way and, in particular, are the same both in law and in fact as those applied to wine produced in the first Member State;

(2) It is a matter for the national court to determine whether the 'isotopic test for oxygen 16/18' complies with the requirements of Article 74(2)(c) of Council Regulation (EEC) No 822/87 on the common organization of the market in wine regarding accuracy, repeatability and reproducibility and to decide the case pending before it in the light of all the information available, including other evidence regarding the wine tested. Any presumption made by a Member State on the basis of the findings of such a test must be capable of rebuttal by the undertakings affected. However, if a Member State remains convinced by such findings, despite the contradictory evidence (if any) which has been adduced, that a consignment of wine has been watered down, it is obliged to prevent such wine being released for human consumption, provided the test complies with the criteria of Article 74(2)(c). Such decisions must, however, be subject to appropriate judicial controls.