OPINION OF ADVOCATE GENERAL GULMANN

delivered on 16 January 1992 *

Mr President,
Members of the Court,

1. This case has been referred to the Court of Justice by the Tribunal de Commerce de Bruxelles pursuant to Article 177 of the EEC Treaty and concerns the interpretation of the prohibition in Article 34 of the EEC Treaty on measures having equivalent effect to a quantitative restriction on exports in an area subject to the organization of the market in wine.

2. Wine producers have traditionally had a choice between bottling wine at the place of production or having the wine transported in bulk for bottling at the place of consumption.

In recent years the trend has been for in any event quality wine to be increasingly bottled by the wine producers themselves.

That is a result of decisions of the wine producers themselves.

3. The background to the present case, however, is that the authorities of the wine-producing Member States have begun to lay down rules regarding the place where wine is bottled.

The present case concerns such rules laid down in Spain and applying to wine from the Rioja area. It is apparent from the Commission's written observations that rules on the compulsory bottling of wine in the area of production have been introduced or are being contemplated in other wine-producing countries of the Community as well. [1]

The Commission rightly points out that the overall effect of national rules laying down particular requirements as to where quality wine is bottled leads to the fragmentation of the single market and the creation of regional markets which has a negative effect on the fundamental Community principle of the free movement of goods.

* Original language: Danish.

1 — According to the Commission's observations a statutory obligation was thus introduced in France in 1972 to bottle *vin d'origine controlé* from Alsace within the *département* where it was produced. In Italy there is an obligation to bottle Marsala within the wine-growing area. Also in Italy a draft law has been submitted providing for rules to be adopted by presidential decree on the bottling of wine of designated origin within certain regions. In Luxembourg rules apply, subject to certain exceptions, under which the *marque nationale* may only be used for wine that is sold ready bottled. In Germany rules apply whereby wine may not be described as quality wine produced in a specified region before it has been given a *Kontrolnummer* which is only assigned to wine that has been bottled. At the hearing it was further stated that with effect from 1992 Spain intends to introduce similar rules concerning the place of bottling as regards wine produced in the Jerez district and that Portugal has introduced analogous rules.

4. However this is not a case brought by the Commission against Spain or others of those countries mentioned pursuant to Article 169 of the EEC Treaty. As stated above it is a case referred by a Belgian court — the Tribunal de Commerce de Bruxelles — which is called on to decide a dispute between two Belgian undertakings and a Spanish undertaking which has been joined as a third party.

The Belgian court considered it necessary in order to give judgment in the case before it to request the Court of Justice to interpret Article 34 of the EEC Treaty. The Court of Justice's interpretation will serve to give the Belgian court a basis for deciding whether Spanish rules which require Rioja wine to be bottled in the actual Rioja district are incompatible with the prohibition under Article 34.

The Belgian court's questions are as follows:

'1. Does national legislation such as Spanish Royal Decree No 157/1988 of 24 February 1988 and the regulation of the Governing Council of the "Rioja" designation of origin adopted in implementation of that decree constitute a measure having an effect equivalent to a restriction on exports within the meaning of Article 34 of the EEC Treaty?

2. If so, may an individual rely on an infringement of Article 34 as against another individual?'

5. The written and oral observations show that the question of compulsory bottling within the wine-growing area is of practical and economic interest. Observations have been submitted not just by the two Belgian undertakings and by the Commission but also by a number of States — Belgium, the Netherlands and the United Kingdom — which themselves produce only very little wine or none at all but by contrast have a significant bottling industry. Of the wine-producing countries, on the other hand, it is only Spain, which is directly concerned, that has submitted observations.

6. An account of the facts of the case and the legal points raised is set out in the Report for the Hearing. I shall here merely summarize the facts and review the legal points which I consider central to an answer to the two questions.

The answer to Question 1

The Spanish rules on the compulsory bottling in the Rioja district of wine of designated origin

7. Pursuant to the Spanish Wine Law of 1970, a special Governing Council has been set up for the Rioja district which has the power, with the approval of the Minister of Agriculture, to lay down rules for wine of designated origin and also has the task of ensuring that the applicable rules for the recognition of designation of origin in Rioja are

respected. The Governing Council consists *inter alia* of members appointed by the public authorities and producers' representatives.

8. The 1970 Spanish Wine Law and the rules adopted in implementation thereof lay down *inter alia* conditions for wine to be able to bear 'denominaciòn de origen'. Furthermore Article 86 of the Wine Law provides that wine can be given a 'denominaciòn de origen calificada' if further special conditions are satisfied. One of those conditions was originally that the product could be sold on the national market only if it had been bottled within the area of production. In 1988 new rules on designation of origin were adopted by Royal Decree No 157/88 of 22 February 1988 referred to in the Belgian court's first question. That decree sets out the conditions that must be fulfilled in order to qualify for the designations 'denominaciòn de origen' (Chapter 2) and 'denominaciòn de origen calificada' (Chapter 3) respectively.

Chapter 2 of that Decree envisages the possibility, as regards 'denominaciòn de origen' that in very exceptional cases derogations are possible from the fundamental rule that the wine must be bottled in the area of production.

No such limited possibility of derogation is to be found in Chapter 3 on 'denominaciòn de origen calificada'. The relevant rules on this designation of origin are contained in Article 19 of the Decree which provides *inter alia*:

'Article 19(1)

In connection with the provisions of Article 86 of Law 25/1970 (cited above), products will be considered to have special particularities if they meet the following conditions:

(a) ...

(b) The products are marketed exclusively bottled at the winery of origin.

(c) The Governing Council lays down supervisory measures from production until marketing, within its competence, as regards the quantity and quality of the protected products and numbered seals or labels are used from the wineries of origin'.

There is, however, a transitional rule in so far as concerns the compulsory bottling in the area of production. It provides that the requirement in Article 19(1)(b) is to enter into force only five years after the publication of the Decree on 24 February 1988 in so far as concerns sales for export. [2]

2 — According to the Spanish Government's written observations, the background to that transitional rule was as follows: 'That rule was laid down taking account of the fact that although the zones applying for recognition as denominaciòn de origen calificada (Rioja and Jerez) were progressively increasing the proportions of the protected wines they marketed that were bottled in the wineries of origin, they still kept up a residual trade in bulk for export (in 1988 the proportion of Rioja exports in bulk was 21% of the total destined for foreign markets).'

9. After the adoption of the new rules in the Decree the Governing Council for the Rioja district repeated a request that had already been made for the recognition of the designation 'denominaciòn de origen calificada'.

With a view to ensuring that the corresponding conditions were fulfilled, on 8 September 1988 the Governing Council issued Circular No 17/88 on the cessation of sales of wine in bulk, which stated *inter alia* the following:

'The consistent trend within the Governing Council of the "denominaciòn de origen Rioja" has for a long time been to progressively increase the proportion of wine marketed in bottles and to reduce the proportion marketed in bulk.

...

It has been decided that that situation should also be terminated so that in the medium term the bulk exportation of Rioja wine is totally eliminated and thus 100% of our wine is marketed in bottles, a fundamental objective not only from the point of view of image and prestige but also in connection with the application for the grant of the "denominaciòn de origen calificada", pending a decision by the Ministry of Agriculture.

Consequently, this Governing Council at its plenary session on 2 September 1988, having regard to Royal Decree 157/88 of 22 February on "Rules to be complied with for the 'denominaciónes de origen' and the 'denominaciones de origen calificadas' for wine" took a decision by unanimous vote without any disagreement from those present to end the export of wine in bulk ...'.

The Governing Council laid down various transitional rules — described by the national court as a 'progressive reduction programme' — in order to facilitate the practical implementation of that prohibition.

10. It is important for a proper understanding of the Spanish rules that the requirement in Article 19(1)(b) of the Decree that the bottling is to take place 'in the wineries of origin' ('bodegas de origen') is to be interpreted as meaning that the bottling can take place in any undertaking within the Rioja district which is entered in the register kept by the Governing Council. The bottling may therefore lawfully be carried out within registered undertakings anywhere in the whole Rioja district. There is no requirement that the bottling should be carried out on the premises of the wine producer himself.

It was also stated at the hearing that the designation 'denominación de origen calificada' was approved for Rioja wine in April 1991 and that the special transitional provisions for the bulk export of Rioja wine no longer apply.

11. Examination of the relevant Spanish rules reveals that at the material time for the action pending in Belgium there still existed a limited possibility of exporting Rioja wine

in bulk whereas it could no longer be sold in bulk on the Spanish market.

There are in my view no grounds for the Court of Justice to lay any weight on these transitional rules and their legal effects in answering the questions put to it. They are not in themselves relevant to the decision on what is the essential question in this case, namely whether Article 34 is to be interpreted as preventing a Member State from adopting rules which require quality wine to be bottled in the corresponding area of production and thus prohibit sale of that wine in bulk outside the area of production, whether for sale elsewhere in the Member State or in other Member States.

The proceedings before the Tribunal du Commerce de Bruxelles

12. In short the two questions referred to the Court for a preliminary ruling arose in the following circumstances and stem from the following considerations.

13. The Belgian undertaking Établissements Delhaize Frères et Compagnie 'le Lion' SA (hereinafter 'Delhaize le Lion') sells considerable quantities of wine and has its own bottling undertaking. [3] In July 1989 Delhaize le Lion accepted an offer from its usual intermediary Promalvin SA for the purchase for 3 000 hectolitres of Rioja wine in bulk. [4] Promalvin had apparently made its offer without first making sure that it could have the required quantity delivered by its Spanish supplier A. G. E. Bodegas Unidas SA (hereinafter 'A. G. E. Bodegas'). It transpired that A. G. E. Bodegas could not supply such a large quantity in bulk since that undertaking informed Promalvin that such a supply would be incompatible with the rules laid down in Royal Decree No 157/88 of 22 February 1988.

14. On 11 August 1989 Delhaize le Lion brought proceedings against Promalvin before the Tribunal de Commerce de Bruxelles. Delhaize le Lion sought an order against Promalvin for the specific performance of the agreement they had entered into or in the alternative for damages, provisionally assessed at BFR 1. Promalvin then sought an order to have A. G. E. Bodegas joined as a third party, claiming that A. G. E. Bodegas should be obliged to satisfy the purchase order. A. G. E. Bodegas applied to have the case against it dismissed on the grounds that the above-mentioned Spanish rules made such a supply impossible; it also claimed that the Spanish rules were not incompatible with Article 34 of the EEC Treaty.

15. In its order for reference the Tribunal de Commerce de Bruxelles has expounded its provisional view of the case. The court considers that Promalvin is liable for the failure to supply since it has acted imprudently by

3 — From Delhaize le Lion's written observations it is apparent that in 1989 it sold around 23.4 million bottles of table wine and quality wine, 85% of which, or some 20 million bottles, were of wine it bottled itself.

4 — Immediately before this agreement the two parties had effected a deal for a quantity of 250 hectolitres of Rioja wine. After the first order had been dispatched by Promalvin on the terms agreed with Delhaize le Lion for supply by A. G. E. Bodegas, Delhaize le Lion gave Promalvin a second order, which is at issue in this case, for 3 000 hectolitres.

not making sure that A. G. E. Bodegas could supply the wine. Accordingly Delhaize le Lion can demand specific performance unless such performance is impossible. Specific performance can be demanded only if A. G. E. Bodegas can be obliged to sell the wine to Promalvin.

The conduct of A. G. E. Bodegas is described as a refusal to sell. The question whether such a refusal to sell is lawful falls to be determined under Spanish law. To that end the Tribunal de Commerce de Bruxelles stayed proceedings pursuant to the European Convention on Information on Foreign Law of 7 June 1968 [5] in order to obtain information on refusal to sell under Spanish law, *inter alia* on whether such a refusal may be unlawful and if so under what conditions; specifically it asks: 'would refusal to sell on the grounds of the provisions of a Spanish decree which was inconsistent with the EEC Treaty be unlawful?' At the same time the Tribunal de Commerce de Bruxelles decided to refer the questions set out above to the Court of Justice of the European Communities for a preliminary ruling.

The lawfulness of the mandatory requirement for quality wine to be bottled in the Rioja district and the ensuing ban on bulk sales outside that district

16. It is, in my view, appropriate in assessing the compatibility with Community law of national rules such as those at issue to start by considering the consequences which undeniably flow from those rules.

The rules will put an end to a centuries-old activity of some economic significance. Wine producers are no longer free to choose whether they wish to sell the finished product — bulk wine — to purchasers outside the area of production. The export of wine in bulk outside the area of production is prevented. A monopoly is created for undertakings which bottle wine within the area of production at the expense of such undertakings outside that area. [6] The transport of the finished product will become more difficult and more costly and the wine sold to the consumer will become dearer. [7]

National rules with such effects create serious obstacles to the free movement of goods whose removal is one of the major aims of the EEC Treaty. The obstacles to the free movement of goods created by the rules are such that at first sight those rules must be incompatible with the Treaty's prohibition on barriers to trade unless they are absolutely necessary in order to take account of a factor which is of sufficient importance to justify their restrictive effect on trade.

5 — United National Treaty series, Vol. 720-II, No 10346.

6 — In its written observations the Belgian Government stated that a general obligation to bottle quality wine within the area of its production would mean the loss of 300 jobs in the Belgian bottling industry and 600 jobs in associated undertakings; the economic loss is estimated to be BFR 1 120 million.

7 — In addition it will become more difficult for the importing countries to administer their existing rules on re-use of bottles.

17. The observations submitted in this case — apart from those of the Spanish Government — also state that the Spanish rules are incompatible with Article 34 and that they cannot be regarded as justified.

In some of the observations it is claimed that the Spanish rules are contrary to Article 34 as interpreted by the Court of Justice in the Groenveld case [8] which concerned national rules that were not covered by a Community organization of the market in agricultural products while in other observations it is contended that the Spanish rules conflict with Article 34 as that rule applies, according to the case-law of the Court of Justice, in a field that is covered by one of the Community organizations of the market. In the latter observations doubts are expressed as to whether the Spanish rules entail a difference of treatment between trade on the domestic market in a Member State and export trade which is a prerequisite pursuant to the judgment in *Groenveld*.

The Spanish Government contends that the Spanish rules are not contrary to Article 34 as interpreted by the Court of Justice in the *Groenveld* judgment and are also not incompatible with the organization of the market in wine, under which, on the contrary, rules such as those at issue are indeed lawful. The Spanish Government further maintains that in any event the contested rules are justified since they are absolutely necessary in order to protect wine of designated origin against deterioration in quality and against fraudulent practices.

18. I shall first examine the significance of the rules in the organization of the market as regards an assessment of the lawfulness of the Spanish rules. I shall then go on to examine whether the Spanish rules infringe Article 34 as interpreted by the Court of Justice in the *Groenveld* judgment and in later similar cases. Finally I shall consider whether the rules may be regarded as justified on the grounds cited by the Spanish Government.

The organization of the market in wine

19. The organization of the market contains comprehensive rules for the wine sector. The fundamental rules on the organization of the market are laid down in Council Regulation (EEC) No 822/87 of 16 March 1987. [9] Article 11 provides:

'1. The common organization of the market in wine shall comprise rules governing production and control of the development of wine-growing potential, rules governing oenological practices and processes, a price system and rules governing intervention and other measures to improve market conditions, arrangements for trade with third

8 — Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees* [1979] ECR 3409.

9 — OJ 1987 L 84, p. 1.

countries, and rules governing circulation and release to the market.'

It is apparent from the fourth recital in the preamble to the regulation that the objectives of the regulation may be attained 'by adjusting resources to needs, in particular through the pursuit of a policy of quality'. The organization of the market also contains important rules on quality wines produced in specified regions. Those special rules are primarily laid down in Council Regulation (EEC) No 823/87 of 16 March 1987. [10]

20. I shall first examine whether the organization of the market, as claimed by the Spanish Government, contains rules which justify or in some other way render lawful a national requirement for wine to be bottled in the area of production. I shall further examine whether the organization of the market contains express rules with which a bottling requirement would be incompatible. Finally I shall consider whether there is anything in the organization of the market showing that the bottling requirement is contrary to the regulation of the market in wine as envisaged under the organization of the market.

21. It is clear from Council Regulation No 823/87 that the Council has confined itself to laying down certain fundamental common rules for quality wines produced in specified regions and that the Member States have autonomous powers to lay down rules supplementing those in the regulation. [11] The Spanish Government has laid particular stress on the provisions of Article 18. Article 18 provides:

'Producer Member States may, taking into account fair and traditional practices:

— in addition to the factors listed in Article 2, determine such other conditions of production and characteristics as shall be obligatory for quality wines psr,

— in addition to the other provisions laid down in this Regulation, lay down any additional or more stringent characteristics or conditions of production, manufacture and movement in respect of the quality wines psr produced in their territory.

...'. [12]

10 — OJ 1987 L 84, p. 59, as amended by Council Regulation (EEC) No 2043/89 of 19 June 1989 (OJ 1989 L 202, p. 1) and Council Regulation (EEC) No 3577/90 of 17 December 1990 (OJ 1990 L 383, p. 23).

11 — That is apparent *inter alia* from the following provisions of the regulation: Article 5 provides that 'Each Member State concerned shall lay down the provisions regarding wine-growing methods which are required in order to ensure the best possible quality for quality wines psr'. Article 8 provides that 'the specific wine-making and preparation methods used for obtaining quality wines psr and quality sparkling wines psr shall be laid down for each of those wines by each producer Member State concerned'. Article 11(1) provides that 'a yield per hectare expressed in quantities of grapes, of grape must or of wine shall be fixed for each quality wine psr by the Member State concerned'.

12 — As set out in Council Regulation (EEC) No 2043/89 of 19 July 1989 amending Regulation No 823/87 (OJ 1989 L 202, p. 1). Article 18 in its original version provided: 'In addition to the provisions laid down in this Regulation, producer Member States may, taking into account fair and traditional practices, lay down any additional or more stringent characteristics or conditions of production and movement in respect of the quality wines produced in specified regions within their territory'. It should be noted that it was the original version that applied at the material time for the resolution of the dispute before the Tribunal de Commerce de Bruxelles. However I do not consider that the amendments, which were presumably primarily made for reasons of legislative technique, are of any significance for the questions to be answered by the Court of Justice.

22. Even though the Spanish Government has rightly pointed out that the additional or more stringent rules which the Member States may adopt pursuant to Article 18 may also extend to trade in quality wines, it appears to me plain that Article 18 *does not entail any autonomous authority for national rules concerning a requirement for wine to be bottled in the area of production.* There are at least two good reasons. First, Article 18 expressly provides that the rules are to be adopted 'taking into account fair and traditional practices'. It is not disputed in this case that for many years there have been substantial exports of Rioja wine in bulk and that such exports continued until the time when they were restricted by the Spanish rules. The Spanish Government has stated in these proceedings that until the implementation of the bottling requirement exports of wine in bulk accounted for around 20% of total exports of Rioja wine.

Furthermore Article 18 cannot, any more than other provisions adopted by the Community legislature, be interpreted as containing authority for national rules that would conflict with the fundamental rules in the Treaty on the free movement of goods. In any event, therefore, it is necessary to examine whether the Spanish provisions conflict with those rules. The examination embraces the following points.

23. It is first necessary to consider whether, as is claimed in some of the observations, *the organization of the market contains rules which preclude, directly or implicitly, Member States from requiring quality wine to be bottled in the area of production itself.* That question gives rise to certain difficulties.

It is quite plain that *there are no rules within the system of the market organization expressly prohibiting* Member States from laying down such rules.

It could be argued that the power conferred on the Member States under Regulation No 823/87 to adopt additional or more stringent trade rules is expressly conditional on those rules being laid down 'taking into account fair and traditional practices'. I have pointed out above that the bottling requirement does not constitute regulation of an existing practice and that, for that reason, Article 18 cannot in itself legitimate the Spanish rules. If I hesitate to draw the further conclusion that Article 18 imposes the direct condition on regulations adopted by the Member States that any additional or more stringent requirement reflects an existing practice, it is on the basis of two considerations. Article 18 provides, after all, only that the Member States are to exercise their power '*taking into account* fair and traditional practices'. The wording does not appear so clear as to allow the conclusion that any supplementary national rules which do not reflect an existing practice are incompatible with Article 18. Furthermore, such an interpretation of Article 18 would, in my view, signify a too restrictive limitation of the Member States' powers. There may well be sufficiently

important grounds for the Member States to adopt autonomous rules on matters of significance for the production of or trade in quality wine, even if the new rules do not reflect an existing practice.

24. It is clear that the objective which, according to the Spanish Government, underlies the bottling requirement, namely to safeguard the quality of the wine and to combat fraudulent practices, is also an aim pursued by the rules of the organization of the market. The *objectives thus coincide.*

25. It must also be recognized that the *organization of the market regarding the matter at issue here is not exhaustive.* That must be the case even if the organization of the market contains rules which presuppose trade in wine in bulk between the Member States. Such rules are laid down for example 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 [13] which also regulates the transport of wine products in bulk. There is a similar presupposition of the existence of trade in wine in bulk in Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wine and grape musts. [14] Those rules hardly signify anything other than that the Community found it necessary to lay down rules for trade in wine in bulk because such trade does exist simply as a matter of fact. The rules do not proceed on any assumption that such trade is always to be possible.

26. There are, however, judgments which show that the *existence of organizations of the markets entails restrictions on the possibilities open to the Member States for regulating the economic activity* which is covered by the organizations of the market, even if the national rules do not conflict with express provisions in the organizations of the market. According to that case-law, *particular restrictions apply to the Member States' powers to regulate matters of significance to trade between the Member States* in the products covered by the organizations of the market. It is established that the provisions in the EEC Treaty on the removal of customs and trade restrictions on intra-Community trade, in particular Articles 30 and 34, are an integral part of the common organization of the market in wine. [15]

The conclusion to be drawn from that case-law is that in areas covered by organizations of the market — in any event organizations of the market containing such comprehensive rules as the organization of the market in wine — the principle applies of an open market which entails, *inter alia*, that all national provisions or practices which might alter the pattern of imports or exports or influence the formation of market prices are incompatible with the principles of the

13 — OJ 1989 L 106, p. 1.

14 — OJ 1989 L 232, p. 13. See Article 11(1)(d) under which special labelling requirements apply for containers of quality wine with a nominal volume of over 60 litres and Article 11(2)(r) envisaging the option of supplementing the information on the labelling by information in respect of bottling in a specified region.

15 — See Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraph 53 et seq.

organization of the market. [16] That presumably means in the first place that the prohibition on obstacles to exports is more extensive in sectors covered by organizations of the market than in sectors which are not. [17]

I have already referred to the serious consequences flowing from the Spanish bottling requirement for exports of wine in bulk, which has traditionally been a major component in trade between Spain and the other Member States. Accordingly, and in view of the case-law referred to above, it can be held that a national bottling requirement is contrary to the prohibition under Article 34 of the Treaty as that provision applies in the field covered by the organization of the market in wine.

27. I shall, however, not rule out the possibility that such a national requirement can be justified on the grounds put forward for it by the Spanish Government. As mentioned above, the factors concerned are ones which the organization of the market also purports to take into account and the market organization does not preclude their also being taken into account with the assistance of national rules.

I shall go on to consider whether from a purely factual point of view the Spanish rules can be held to be based on such absolutely necessary and important factors that they can be regarded as justified even though they are in principle incompatible with the organization of the market.

Article 34 of the EEC Treaty

28. It must further be examined whether a national requirement for quality wine to be bottled in the area of production is incompatible with Article 34 of the Treaty as

16 — See the judgment in *Redmond* cited in the preceding footnote, paragraphs 57-58. In a number of judgments concerning national rules restricting production of goods covered by organizations of the market the Court has held that the relevant organization of the market 'excludes any national system of regulations which could impede directly or indirectly, actually or potentially, trade within the Community', see Case 190/73 *Officier van Justitie* v *Van Haaster* [1974] ECR 1123, paragraph 16. Similarly see Case 111/76 *Officier van Justitie* v *Van den Hazel* [1977] ECR 901.

17 — There are perhaps more recent judgments showing that the Court does not consider that it is appropriate to interpret Article 34 differently according to whether or not it is to apply to a sector covered by an organization of the market. Such a view is possibly expressed in Case 118/86 *Openbaar Ministerie* v *Nertsvoederfabriek* [1987] ECR 3883 concerning Netherlands rules on the compulsory collection of poultry offal; in paragraph 9 the Court referred to provisions in two organizations of the market and stated: 'Since those provisions reproduce the prohibitions laid down by Articles 30 and 34 of the Treaty, the rules described by the national court must be appraised exclusively in the light of those articles, which prohibit quantitative restrictions on imports and exports and any measures having equivalent effect, and which are regarded as forming an integral part of the common organization of the markets.'
It is also possible that the same view is expressed in the judgment in Case 148/85 *Direction Générale des Impôts* v *Forest* [1986] ECR 3449 concerning French rules on quotas for the milling of wheat in which the Court considered the questions of the meaning of Article 30 and Article 34 independently of the existing organization of the market.
A more restrictive approach to the question of the significance of an organization of the market for the application of the EEC Treaty rules on the free movement of goods may also possibly be found in Case 237/82 *Jongeneel Kaas* v *Netherlands State* [1984] ECR 483 concerning Netherlands rules in the cheese sector.
It is in my view also an open question whether within a sector covered by an organization of the market but without any particular indications in the market organization itself there are grounds for giving better protection to the free movement of goods than is given to the movement of goods in sectors not covered by market organizations.
It is however not sufficiently certain that the old case-law which in itself is clear has been abandoned and I shall therefore base my opinion on that case-law.

interpreted by the Court of Justice in fields not covered by one of the common organizations of the market in agricultural products.

As pointed out above, the Court of Justice first had occasion to interpret Article 34 in its judgment of 8 November 1979 in Case 15/79, *Groenveld*, and has since reaffirmed that interpretation in many other judgments. [18]

According to those judgments Article 34 prohibits national measures which:

have as their specific object or effect the restriction of exports, and

thereby establish differences in treatment between the domestic trade in a Member State and its export trade,

in such a way as to provide a particular advantage for national production or for the domestic market of the Member State in question at the expense of the production or the trade of other Member States.

29. On the face of it it might perhaps seem that the Spanish rules at issue do not have the specific object or effect of restricting exports and that there thus cannot arise differences in treatment between domestic trade in a Member State and its export trade. In my view, however, such a view is not tenable in the present situation. The national rules concerned do not treat goods uniformly irrespective of whether they are sold on the domestic market or for export. Differences in treatment arise in so far as it is possible for wine producers within the area of production to sell wine that has not yet been bottled while such wine cannot be sold outside that area. The Spanish rules place undertakings in the Rioja district in a preferential position. That preferential position reflects a difference in the treatment accorded to undertakings in other Member States. That result is not altered by the fact that the preferential rules similarly afford differential treatment to Spanish undertakings which are outside the Rioja district. All of those favoured by the preferential rules are within the area of production in question and the fact that the restrictive effects of those rules on exports do not favour all undertakings in the Member State in question cannot signify that the rules fall outside the prohibition under Article 34. It will be seen that I have here followed the line of reasoning which underlay the judgment of the Court of Justice in the *Du Pont de Nemours Italiana* case [19] concerning Italian regional preferential rules which restricted imports of goods from other Member States and which was therefore held to be incompatible with Article 30 of the Treaty. In my opinion that precedent can also be applied in connection with the interpretation of Article 34.

18 — See for example Case 155/80 *Oebel* [1981] ECR 1993, Joined Cases 141, 142 and 143/81 *Holdijk* [1982] ECR 1299, Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575 and Case 237/82 *Jongeneel Kaas* v *Netherlands* [1984] ECR 483. Its most recent judgment is that of 28 February 1991 in Case C-332/89 *André Marchandise* [1991] ECR I-1027.

19 — Case C-21/88 [1990] ECR I— 1889, see p. 920.

30. That conclusion is borne out, moreover, by the Court's case-law concerning the application of Article 34 to national rules on the disposal or recycling of various kinds of waste. [20] The national rules in question laid down mandatory obligations to hand over waste within certain areas in the Member States concerned. The Court held that prohibited indirect obstacles to exports existed in so far as the rules prevented waste from being exported to other Member States in order to be recycled or disposed of in undertakings approved in those States.

31. I therefore consider it legitimate to conclude that the requirement for quality wine to be bottled within the area of production in a Member State does constitute a barrier to exports of the product — wine in bulk — that could have taken place if the bottling requirement had not applied and that such a requirement is therefore covered by the prohibition under Article 34 of the Treaty. [21]

The question whether the national requirement for quality wine to be bottled in the area of production can be regarded as justified

32. Since I have reached the conclusion that the Spanish rules at issue have such restrictive effects on the free movement of goods between Member States that they are incompatible with Article 34 of the EEC Treaty, I must consider whether they none the less can be regarded as justified on the ground that they are essential in order to take account of factors of sufficient importance to justify their restrictive effects on trade.

33. As mentioned above the Spanish Government has claimed that the rules in question are essential in order to protect wine of designated origin against deterioration in quality and against fraudulent practices. In

20 — See Case 172/82 *Fabricants Raffineurs d'Huile de Graissage* v *Inter-Huiles* [1983] ECR 555, Case 173/83 *Commission* v *France* [1985] ECR 491 and Case 118/86 *Openbaar Ministerie* v *Nertsvoederfabriek Nederland* [1987] ECR 3883. The first two cases concerned the lawfulness of French rules concerning the disposal of waste oils and the last case concerned Netherlands rules on the disposal of offal.

21 — The present case has led me to wonder whether the interpretation of Article 34 which has been laid down by the Court of Justice may prove to be too narrow. The basis for my view that Article 34 is applicable to the Spanish bottling requirement is, as mentioned above, that wine may continue to be sold in bulk within the area of production in question. Such a basis could not be used in respect of national rules requiring wine to be bottled by the wine producers themselves. Nor could that basis be used in other situations where national rules might require further processing of an otherwise saleable product to be carried out in the undertaking where it is first processed. It may well occur that a State finds it appropriate to lay down rules obliging undertakings which hitherto had produced semi-finished products which they had sold to undertakings in other States to produce the final finished product themselves. Such national rules, which according to the Court's interpretation would hardly be covered by Article 34, could well in my view constitute unlawful obstacles to the free movement of goods.

that connection the Spanish Government has stated *inter alia* that it follows from Article 36 of the Treaty that restrictions affecting exports may be lawful if they are justified on grounds of the protection of industrial and commercial property and the Spanish Government considers that designations of origin are covered by the concept of industrial and commercial property.

34. It is in principle a key question in this case whether the consideration which underlies the Spanish rules is one that is covered by the concept of industrial and commercial property rights in Article 36. The basic premiss is that it is only considerations covered by Article 36 that can justify national rules which fall under the prohibition in Article 34 because of their discriminatory effects. [22]

None the less I shall not in this opinion express a view on whether designations of origin are covered by the concept of industrial and commercial property rights under Article 36.

The first and chief ground is that I do not consider it necessary in this case to take a position on that question since it appears clear to me that the Spanish rules cannot be regarded as justified simply because they are not essential in order to take account of the consideration in question, nor are they the measures with the least restrictive effect on trade that can be chosen in order to take account of the consideration in question.

My second reason for proceeding in this way is that I do not consider that the present case is the appropriate occasion to decide the important and hitherto unresolved question whether designations of origin are covered by Article 36 of the EEC Treaty. [23]

35. The Spanish Government is of course right in saying that it is important for the quality of wine covered by a designation of origin to be strictly protected and for all reasonable steps to be taken to prevent fraudulent practices affecting such wine.

I shall hereinafter assume that as the Spanish Government has stated it was this consideration that underlay the bottling requirement and that it is a consideration that could justify restrictions on the free movement of goods.

36. There are many grounds showing, in my view, that it is not essential to lay down a bottling requirement in order to attain the objective which is allegedly the background to the obligation.

22 — See in this connection *inter alia* the judgment in *Du Pont de Nemours Italiana* referred to in footnote 19.

23 — I may point out in this connection that the approach I have taken is not without precedent. In a case in which it was also claimed that designations of origin were covered by Article 36 the Court of Justice refrained from taking a position on that question holding that the national rules in question could not be held to be justified simply because they failed to satisfy the other conditions for Article 36 to apply. See Case 16/83 *Prantl* [1984] ECR 1299, paragraph 35.

One would expect that a requirement that leads to the termination of a practice that has existed for hundreds of years and which has far-reaching effects for the free movement of goods and leads to restrictions on wine producers' freedom of action would be based on a clearly substantiated need.

However, such a need is not substantiated. No facts have come to light in this case cogently establishing that the former legal position gave rise to real dangers of deterioration in quality and fraudulent practices and that the bottling requirement entailed a significant reduction of the risk that might exist.

37. It is important in this connection that, as mentioned above, the Spanish rules do not prevent the transport of wine in bulk within the Rioja district. There still exists the risk of deterioration in quality and fraudulent practices in connection with transport to other undertakings and bottling of the wine other than at the wine producer's undertaking. The Spanish Government's observation that the Governing Council has supervisory powers only within the Rioja district itself is not sufficient in this connection to justify the rules at issue. Checks are also carried out outside the district and there has been no evidence in this case that the alleged risks are indeed greater outside the district than within it.

As mentioned above, there are Community rules laying down provisions governing the transport of wine in bulk with the aim, *inter alia*, of combatting fraudulent practices, [24] and there is nothing in this case, as far as I can see, to show that those rules operate in an unsatisfactory manner with the result that it may be necessary for more stringent rules to be laid down in the Member States.

38. A bottling requirement such as that applying in the Rioja district can, therefore, not be regarded as essential in order to attain the object envisaged. That can be achieved by other means which are less restrictive of trade.

The bottling requirement, which is incompatible with Article 34 of the EEC Treaty, is therefore not justified.

Question 2

39. The second question put by the Tribunal de Commerce de Bruxelles is as follows: '... may an individual rely on an infringement of Article 34 as against another individual?'

24 — See 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 (OJ 1989 L 106, p. 1). The regulation contains special rules on the accompanying documents for the transport of unpackaged products.
Moreover, under Council Regulation (EEC) No 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts (OJ 1989 L 232, p. 13) wine producers are under an obligation to state on the labelling where the wine is produced.

According to the order for reference the background to that question is that in support of its argument that its refusal to sell was lawful, A. G. E. Bodegas claimed *inter alia* that Article 34 is directed only against measures of Member States which restrict trade and that it is not applicable in respect of private undertakings.

40. The premiss underlying that view is correct in so far as it follows from the Court's case-law that Article 34 is directed only against public measures and not against the acts of private undertakings themselves. [25]

The obligations under Article 34 are not directly addressed to private undertakings. Article 34 does not entail a prohibition on undertakings restricting the free movement of goods by means of their own independent acts. A. G. E. Bodegas's refusal to sell can thus not in itself constitute a breach of Article 34.

41. But it does not follow that the prohibition under Article 34 cannot otherwise be of significance in litigation between individuals.

It will be recalled that as grounds for its refusal to sell to Promalvin, A. G. E. Bodegas pointed out that the bottling requirement and the consequent prohibition on sale of wine in bulk outside the Rioja district prevented it from selling the desired quantity to Promalvin.

It will also be recalled that the Tribunal de Commerce de Bruxelles considered it necessary to decide whether that refusal to sell is lawful under Spanish law and to request, in that connection, an interpretation of Article 34 in order to determine whether the bottling requirement in question is incompatible with Article 34.

In the view of the Tribunal de Commerce, therefore, the question of the bottling requirement's compatibility with Community law may be relevant to determining whether the refusal to sell is lawful under Spanish law.

42. In the light of the Court's case-law there can be no doubt that in such circumstances Article 34 can be relied on by an individual in proceedings before a national court. Article 34 has direct effect and confers rights on individuals which must be protected by the courts of the Member States. [26] That signifies that individuals may invoke Article 34 also in cases against other individuals in order to seek an assessment of the lawfulness of measures adopted by public authorities which are material to the decision of the legal dispute between the individuals.

25 — See *inter alia* Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801.

26 — See *inter alia* Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347.

There are many examples in the Court's case-law where Article 30 of the Treaty has been recognized as having such effect in proceedings between individuals before the national courts. I would mention here only the judgment in the *Rau* case [27] and the extensive case-law on the significance of Article 30 regarding individuals' reliance on *rights under national laws on exclusive rights* as a basis for prohibiting parallel imports.

There is no cause in this context to treat Article 34 differently from Article 30. [28]

43. It may accordingly be concluded that the Tribunal de Commerce de Bruxelles must apply Article 34 if it finds that the Spanish bottling obligation which A. G. E. Bodegas has cited as grounds for its refusal to sell is lawful.

44. It may however also be appropriate to point out that if the bottling requirement is incompatible with Community law it does not necessarily follow that the refusal of A. G. E. Bodegas to sell wine to Promalvin is also unlawful. That is a question which must be determined pursuant to Spanish law and it is possible that the refusal to sell may be lawful under Spanish law even if the bottling requirement conflicts with Community law. As has also been pointed out by the Commission in its written observations, there may exist grounds under Spanish law which, independently of the unlawfulness of the bottling requirement, mean that the refusal to sell is lawful.

The answers to be given to the national court's questions

45. For the foregoing reasons I would suggest that the Court of Justice give the following answer to the questions asked by the Tribunal de Commerce de Bruxelles:

1. National provisions such as those applying in the Rioja district which require quality wine to be bottled within that district are incompatible with Article 34 of the EEC Treaty.

2. Article 34 also has direct effect in cases between individuals before national courts in so far as it may be relied on as a basis for an assessment of the compatibility with Community law of national public measures which are of significance to decisions in disputes before national courts.

27 — Case 262/81 *Walter Rau Lebensmittelwerke* v *De Smedt* [1982] ECR 3961.

28 — That is confirmed by the Court's judgment in Case 172/82 *Inter-Huiles* [1983] ECR 555, in which Article 34 had been relied on in a dispute between individuals in connection with the question of the lawfulness of the French rules on waste oils referred to above.