alcoholization which is based on the proportion of alcohol to dry matter determined by the 100° method, provided that that presumption is capable of being rebutted.

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen

O'Keeffe Bosco Touffait Koopmans

Delivered in open court in Luxembourg on 4 July 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 26 JUNE 1979 [1]

Mr. President
Members of the Court,

Article 39a of Regulation (EEC) No 816/70 of 28 April 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970 (I), p. 234), which was created by Regulation (EEC) No 2680/72 of 12 December 1972 (Official Journal, English Special Edition 1972 (9 to 28 December), p. 30), provides that Member States must take all appropriate measures to ensure compliance with that regulation and must designate one or more bodies which are instructed to verify compliance with that regulation. Article 11 of Regulation (EEC) No 817/70 of 28 April 1970 laying down special provisions relating to quality wines produced in specified regions (Official Journal, English Special Edition 1970 (I), p. 252) provides that producers are obliged to submit wines which are likely to be designated "quality wine psr" to an analytical test and to an organoleptic test. For this purpose Article 1 of Regulation (EEC) No 1539/71 of the Commission of 19 July 1971 determining Community methods for the analysis of wines (Official Journal, English Special Edition 1971 (II), p. 552) provided that the methods of analysis for the application of Regulations (EEC) Nos 816/70 and 817/70 are those set out in the annex to that regulation. Points 3 of that annex provides as follows:

"The total dry extract shall be measured by a densimeter and calculated indirectly

1 — Translated from the German.

from the specific gravity of the residue without alcohol".

In France wines bearing the designation "appellation d'origine contrôlée (registered designation of origin) are among the quality wines produced in specified regions within the meaning of Regulation No 817/70. In respect of those wines Decree No 74-71 of 17 October 1974 provided that wines which claim such a designation may only be put into circulation with an official certificate and after a test as provided by Article 11 of Regulation No 817/70 has been carried out (Article 1). Under Article 2 of that decree the above-mentioned test includes an analysis and the procedural rules for the test and the issue of certificates are laid down in an order of the Minister for Agriculture. Moreover, Articles 3 and 4 of the decree lay down provisions relating to the costs of the examination and settle the question to what wines the decree applies directly. Article 3 of an order of the Minister for Agriculture of 20 November 1974 on the analytical and organoleptic tests on wines bearing the designation "appellation d'origine contrôlée" issued under Article 2 of the decree provides that the test covers at least the dry extract which is determined by densimetry and at 100°.

These French provisions were contested *inter alia* by Roger Gallet, a wine producer, by bringing legal proceedings before the French Conseil d'État. The Conseil d'État accepted that the criticisms expressed in relation to Articles 3 and 4 of the above-mentioned decree, in which the costs of examination are laid down and it is provided to what extent the provisions are to be applied directly to specific wines, were justified. However in the view of the Conseil d'État there is no objection to the requirement of an official certificate issued on the basis of a test or to the fact that procedural rules must be laid down in an order of the Minister for Agriculture. The Conseil d'Etat is not however certain whether Article 3 of the order of the Minister for Agriculture (determination of the dry extract not only by densimetry but also by heating to 100°) is compatible with point 3 of the annex to Regulation No 1539/71 of the Commission, which refers only to the determination of the total dry extract by measurement of the specific gravity of the residue without alcohol.

For that reason it ordered in a decision of 22 December 1978, in addition to the annulment of Articles 3 and 4 of the above-mentioned order and the dismissal of the other complaints, that the proceedings were stayed and that the following question was referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"Must the provisions of the annex to Regulation No 1539/71 of the Commission of the European Communities of 19 July 1971 be understood as authorizing the dry extract to be determined 'by densimetry and at 100°'?"

I adopt the following viewpoint with regard to this question:

1. It is above all necessary, as the Commission has done, to recall the relevant case-law of the Court of Justice, in other words the judgments in Joined Cases 89/74, 18 and 19/75 (*Procureur Général at the Cour d'Appel, Bordeaux* v *Robert Jean Arnaud and Others*, judgment of 30 September 1975 [1975] ECR 1023) and Case 64/75 (*Procureur Général at the Cour d'Appel, Lyon* v *Henri Mommessin and Others*, judgment of 9 December 1975 [1975] ECR 1599).

In the first of the above-mentioned judgments useful explanations for laymen on the term "dry extract" — that is the non-volatile substances contained in wine — and on the various methods of calculating this are given in the statement of facts and issues. Thus we learn that in the case of the 100° method what is left after evaporating the volatile substances in the wine at 100° is weighed and that in the case of the densimeter method the dry extract is calculated indirectly from the specific gravity of the wine from which the alcohol has been removed and which has been brought up to the initial volume by adding water.

In the decision in this judgment it is stated with regard to the presumption of over-alcoholization applicable under French law — it applies if the proportion of alcohol to dry extract is in excess of specific limits — that, provided it is not irrebuttable, it is a measure of control in connexion with the duty of the Member States to ensure compliance with the provisions of Community law and in particular with those relating to enriching, acidifying and de-acidifying. This is compatible with the provisions of Community law on the methods of analysing wine, in particular with the annex to Regulation No 1539/71. This is so because only the 100° method is practicable as regards the presumption in law of over-alcoholization, and the reduced dry extract referred to in the French provisions cannot be calculated by means of the densimeter method. Because therefore the 100° method is an essential element of the presumption of over-alcoholization and because the densimetric method is "not an aim in itself" the Community rules in the wine sector do not prohibit Member States from using the 100° method to measure the dry extract of wine in order to apply a presumption in law of over-alcoholization based on the proportion of alcohol to dry extract until more appropriate methods have been worked out.

This was confirmed by the judgment in Case 64/75, the operative part of which also states as follows:

"A Member State may in the present state of Community law apply as a national measure of control a presumption in law of over-alcoholization which is based on the proportion of alcohol to the dry extract measured by the 100° method, provided that that presumption is capable of being rebutted and that it is applied in such a way as not to place at a disadvantage, in law or in fact, wine from other Member States".

In my opinion the Commission is correct in stating that the question submitted in the present proceedings may also be answered by that and indeed likewise to the effect that the 100° method mentioned in the order of the French Minister for Agriculture in addition to the densimeter is compatible with Regulation No 1539/71 of the Commission. In this connexion the consideration that Article 7 of Regulation No 817/70 contains provisions relating to the conditions under which the alcohol content may be increased is sufficient. The Member States must ensure compliance with those provisions and only if they are complied with may a wine receive the designation of quality wine produced in specified regions. It is therefore necessary to assume that in the analytical test of the wine it is impossible to disregard the test based on the

presumption of over-alcoholization. The test of over-alcoholization is, as the Commission has shown, inseparably linked to the analytical test. If however it is impossible to object to the 100° method within the context of the presumption of over-alcoholization the same must be said with regard to the above-mentioned joint test which constitutes an inseparable entity.

2. In addition, Commission Regulation No 2984/78 of 17 November 1978 (Official Journal L 360 of 22 December 1978, p. 1) is of interest in the present case although it cannot be of decisive importance owing to its date of adoption. It replaced Regulation No 1539/71 after the above-mentioned judgments had been delivered. It is true that Annex 3 states with regard to the total dry extract: "Single method: measurement by a densimeter". Article 1 (4) of the regulation however contains a transitional provision the content of which reads as follows:

"Until Community provisions are adopted on the level of the constituents which indicate that certain oenological practices have been employed and on tables enabling a comparison of the analysis data, the Member States may, in order to assess whether a product has been subjected to treatments or practices which are not in accordance with Community provisions,

— until 31 August 1979 at the latest, determine the reduced dry matter by the method which they used before 19 July 1971 only in the context of checking the proportion of alcohol to dry matter."

This also applies precisely to the 100° method in France which has apparently been used there since an order adopted in 1907 and which accordingly is no longer permissible as from 1 September 1979 — it is hoped that by then more suitable methods will have been developed.

3. As the Commission has suggested and has also been advocated by the French Government the following answer should therefore be given to the question raised by the French Conseil d'État:

A Member State may in the present state of Community law apply in connexion with the issue of certificates for wines produced in specified regions and as a national measure of control a presumption in law of over-alcoholization which is based on the proportion of alcohol to the dry extract measured by the 100° method, if that presumption is capable of being rebutted.