OPINION OF ADVOCATE GENERAL GULMANN

delivered on 16 February 1993 *

Mr President,
Members of the Court,

1. One of the means of ensuring and improving the quality of wine consists in restricting the quantity of wine produced per hectare. [1]

The 15th recital in the preamble to Council Regulation (EEC) No 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions (hereinafter 'the Regulation') [2] states that in order to maintain the quality standard of the wines in question and to avoid excessive yields liable to disrupt the market, Member States should fix a maximum yield per hectare for each quality wine.

Article 11 of the Regulation provides:

— in paragraph 1 thereof, that a yield per hectare expressed in quantities of grapes, of grape must or of wine is to be fixed for each quality wine psr by the Member State concerned; and,

— in paragraph 2 thereof, that use of the designation claimed is to be prohibited for the entire harvest if the yield referred to in paragraph 1 is exceeded, save where derogations are provided for, on a general or individual basis, by Member States under certain conditions.

2. Those provisions led to the German Wine Law being amended in 1989 and 1990. Paragraph 2a of the Wine Law now provides:

— in paragraph 1, that the Governments of the wine-growing *Länder* are to fix the permissible yield per hectare, which is the maximum quantity of wine of the relevant year which may be sold;

— in paragraph 2, that wine produced in excess of the permissible yield per hectare (hereinafter 'surplus wine') may be sold only for stated purposes, for example as grape juice (but not as quality or table wine); and

* Original language: Danish.

1 — It cannot be denied that restricting the quantity of wine produced per hectare is of crucial importance for the quality of the wine. That point was stressed by the British wine critic Hugh Johnson in an interview published in *Time Magazine*, No 3, 1993, p. 42. Johnson was asked to clarify the comment: 'The integrity of Germany's viticulture is threatened'. He replied:
'What went wrong with German wines, basically, was overproduction. Nineteenth century German wines were dry, but they were wines produced at low yield levels. They had lots of body and flavour, and they had the great virtue of ageing practically forever. But when you suddenly start producing 200 hectolitres per hectare, then you wonder why the wine tastes of water — well, it *is* water — and why it doesn't last — because it doesn't have any structure ...'

2 — OJ 1987 L 84, p. 59.

— in paragraph 3, that surplus wine may be stored and may under certain conditions be sold as quality wine during one of the subsequent wine-growing years within the limits of the permissible yield per hectare for the year at issue.

3. The authorities of Rheinland-Pfalz fixed the permissible yield per hectare in accordance with the Wine Law. [3] In 1990, Mr Kuhn, a wine-grower, applied for a 'control' number for a certain quantity of wine, entitling him to market it as quality wine. [4]

The authorities granted him a control number for the wine produced within the permissible yield per hectare but refused to issue him with a control number for the surplus quantity. The reason for the refusal was the failure to observe the rules of the Wine Law concerning permissible yield per hectare.

4. Mr Kuhn started proceedings before the Verwaltungsgericht (Administrative Court) Neustadt an der Weinstraße against the authorities for the purpose of obtaining a control number for the surplus quantity of wine.

3 — It appears from the documents in the main proceedings that the relevant yields per hectare for the purpose of those proceedings were as follows:

quality wine 'mit Pradikat' (first quality wine)	80 hl
quality wine	105 hl
table wine	140 hl.

4 — Mr Kuhn had recognized wine-growing land of 82 445 m^2 and had already obtained a control number for the following quantities:

quality wine 'mit Pradikat'	23 850 l = 29 813 m^2
quality wine	27 011 l = 25 725 m^2
table wine	37 538 l = 26 813 m^2
	82 351 m^2

There were left, therefore, 94 m^2 (82 445^2 - 82 351 m^2). These proceedings concern an application for a control number for 1 500 additional litres. Mr Kuhn received a control number for only 75 litres of quality wine 'mit Pradikat' corresponding to the permitted yield per hectare for the remaining 94 m^2.

Mr Kuhn does not deny that the authorities correctly applied Paragraph 2a of the Wine Law. He claims, however, that that paragraph — apart from being incompatible with the German Constitution — in certain respects conflicts with Community law, namely Article 11 of the Regulation.

5. The Administrative Court considers that doubts may be entertained regarding the compatibility of Paragraph 2a of the Wine Law with Article 11 of the Regulation; it therefore referred to the Court of Justice for a preliminary ruling a question asking whether Article 11 of the Regulation is to be construed in such a way that the scheme laid down in Paragraph 2a of the Wine Law is permissible.

The Administrative Court states that Article 11 of the Regulation seeks to introduce 'a production scheme' whereas the German legislation merely introduces 'a marketing scheme'. It refers in this respect to three specific issues in which the two sets of rules seem to conflict:

— first, the Regulation prescribes only the fixing of rules concerning the permitted yield per hectare for quality wines, whereas the German rules also provide for fixing the permissible yield per hectare for table wine;

— secondly, the Community rules necessarily presuppose that the permissible yield per hectare is fixed only for areas actually cultivated, whereas the German rules

make it possible for areas which are cultivable but not cultivated to be covered by the permissible yield per hectare for an undertaking; and

— thirdly, there is a difference between the 'penalty' provided for by the Community rules in the event of production of surplus wine and the 'penalty' under the Wine Law.

6. It may appear somewhat surprising at first sight to assert that the incompatibility between Article 11 of the Regulation and Paragraph 2a of the Wine Law is such as to affect the outcome of the main proceedings. It seems that, in any event, those two sets of rules are in agreement as regards the issue contested by Mr Kuhn in the main proceedings, since the two sets of rules mean that surplus wine cannot be marketed as quality wine.

However, the Administrative Court expressly states in its order for reference that in its opinion a finding that Paragraph 2a of the Wine Law is incompatible with Article 11 of the Regulation will necessarily mean that the refusal to grant a control number is unlawful and that, in that case, it will be necessary to agree with Mr Kuhn that he should be granted a control number for the surplus wine. The Administrative Court states that:

— the control number was refused because it involved surplus wine which could not be sold as a result of Paragraph 2a of the Wine Law; and

— that refusal is lawful only where the relevant German rules are compatible with Community law *since domestic rules which are incompatible with Community law are inapplicable.*

7. In its observations to the Court of Justice, the Commission stated that it considered that there was some degree of incompatibility between the Wine Law and the Community regulation, but it also emphasized that in this case that incompatibility could not render the German rules inapplicable as was claimed by Mr K and envisaged by the Administrative Court. Basically, the Commission considers that a finding that the German rules were inapplicable in this case would give Mr Kuhn an advantage which would itself be incompatible with Community law.

8. In spite of everything, Community law has come a long way. This case does not give the Court an opportunity, as has so often been the case in the past, to explain the principle of the precedence of Community law and the fundamental importance of observance of that principle by the national courts for the uniform and effective application of Community law in the Member States. The question submitted for a preliminary ruling would not have been raised had not the court of reference been aware of that principle and its consequences. On the other hand, this case gives the Court an opportunity to rule whether there are cases in which a party to proceedings before a national court may not rely upon a provision of a regulation to obtain a declaration that a conflicting domestic rule does not apply.

This case involves the special circumstance that the party in question, by applying the principle of the precedence of Community law, may possibly bring about a situation in which neither the Community legislation nor the relevant domestic rules can apply and where accordingly a 'legal vacuum' is created which may be incompatible with the objective of the Community rules in question.

9. In my opinion therefore, the question submitted for a preliminary ruling presupposes that a decision is taken by way of introduction as to whether the relevant rule of Community law in this case is such that Mr Kuhn may rely upon it before the Administrative Court to support his contention that the refusal to grant him a control number is unlawful. In my view, the Court need only rule on the question referred to it if it considers that in this case Mr Kuhn may rely on the Regulation. However, a decision on that point presupposes a knowledge of the relevant rules and issues of law set out in the observations submitted to the Court as regards the alleged incompatibility between the Regulation and the German legislation. I shall therefore start by discussing them.

The fact that a permissible yield per hectare is also fixed for table wine in Germany

10. The Administrative Court rightly points out that under Paragraph 2a of the Wine Law, wines other than quality wines psr are covered by the obligation for the *Land* authorities to fix the permissible yield per hectare, whereas Article 11 of the Regulation merely provides that a permissible yield per hectare should be fixed for quality wines psr.

Since Community legislation does not include any rule relating to the permissible yield per hectare for table wines, it may be contended that, in view of the exhaustive nature of Community legislation in this case, the Member States are not empowered to fix such rules.

The Commission and the German Government point out, however, that there are very special circumstances in Germany which justify the fact that the German rules concerning permissible yield per hectare also apply to table wine. They state that all brands of German wines are suitable for producing quality wine psr and that, moreover, some table wines originating in Germany may be categorized as 'Landwein' and that Community legislation expressly provides that rules may be fixed concerning permissible yield per hectare for Landwein.

The calculation of permissible yield per hectare (cultivated areas as against uncultivated but cultivable areas)

11. Under Article 11(1) of the Regulation:

'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.

When this yield is being fixed, account shall be taken in particular of the yields obtained over the preceding 10 years. Only harvests of satisfactory quality from the most representative soils of the specified region shall be considered.

The yield per hectare may be fixed at different levels for the same quality wine psr depending on:

— the sub-region, local administrative area or part thereof, and

— the vine variety or varieties,

from which the grapes used are derived.

The yield so fixed may be adjusted by the Member State concerned.'

The German Wine Law does not expressly state whether it is necessary solely to fix a permissible yield per hectare for cultivated areas, or whether areas which are cultivable but in fact not cultivated may also be counted. It is apparent from the preliminary studies for the Law that the latter possibility is open to the *Länder*. It was used in some regions of Rheinland-Pfalz including the region in which Mr Kuhn's undertaking is located. However, in that regard there is a requirement that the uncultivated areas which are included in the calculation may represent a maximum of 12% of the total area of the individual undertaking. Moreover, in the regions in which uncultivated areas are included, the permissible yield per hectare is reduced by 3% in relation to the yield per hectare in the regions in which only cultivated areas are included.

The Administrative Court considers that the possibility of taking account of uncultivated areas is hardly compatible with the objective of quality sought by the Regulation. Mr Kuhn and the Commission agree. They note that the very concept of permissible yield per hectare must presuppose that for the purpose of determining the yield per hectare account is taken only of the areas actually cultivated. Furthermore, the Commission points out that inclusion of uncultivated areas discriminates not only between regions where it is possible to include those uncultivated areas and those where it is not, but also between the undertakings within the regions first referred to.

The German Government contends that the German rules on this point do not conflict with Article 11 of the Regulation, which does not include any explicit rule in this respect. It points out, furthermore, that the German rule is well founded since it helps in some particularly affected regions to encourage wine-growers to keep certain areas affected by disease out of cultivation for a number of years.

The penalty for exceeding the permissible yield per hectare

12. Article 11(2) reads as follows:

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

As I have mentioned above, Paragraph 2a of the Wine Law provides *that* the yield per hectare fixed represents the maximum quantity of wine of a particular year which may be sold, *that* the surplus wine may be sold only for different, specially defined purposes, but not as table wine or quality wine and *that* the surplus wine may be stored and, under certain conditions, sold as quality wine in the course of subsequent wine-growing years, within the limits of the permissible yield per hectare fixed for the year at issue.

13. The Administrative Court points out that the Wine Law does not provide that the *Länder* must fix a yield per hectare but merely the quantities which may be sold every year as quality wine and that, therefore, the scheme is first and foremost a marketing scheme. The Administrative Court adds that, according to the German rules, a wine-grower may produce as much as he wishes per hectare without his wine thereby losing the designation 'quality wine psr'; and that that is even true for the surplus quantity which may, in accordance with Paragraph 2a(3) of the Wine Law, be marketed as quality wine psr in the course of subsequent wine-growing years. It considers that the scheme laid down by the German rules is far removed from that fixed by Article 11(2) of the Regulation and that the penalty prescribed by the Regulation is 'much more severe' than that prescribed by the Wine Law.

For the most part, Mr Kuhn and the Commission share the Administrative Court's point of view and consider that the German penalty system conflicts with the system laid down under Article 11(2) of the Regulation.

14. It is true that the German Government does not deny that the two sets of rules to a certain extent prescribe different legal consequences for exceeding the permissible yield per hectare. However, it points out that the two sets of rules have fundamentally the same purpose, namely to restrict the production of quality wine psr in order to guarantee and improve its quality and to avoid disrupting the market and that in reality there is no essential difference between the effects of the respective penalties in restricting production. It points out in particular that under the Community rules nothing prevents a wine-grower who exceeds the permissible yield per hectare from selling all his produce as table wine, whereas a German wine-grower who exceeds the permissible yield per hectare does not have the option of selling the surplus wine as table wine. The government also contends that the option of using surplus wine in later wine-growing years by storing it is not very important in practice because of the limited possibilities for such storage. In those circumstances, it contends that the German scheme may be considered as covered by the possibility left open for Member States in accordance with Article 11(2) to provide for derogations on a general basis.

The Commission claims on the other hand that the option open to the Member States to provide for derogations cannot result in a complete abandonment of the principle underlying the penalty prescribed in the Regulation and that, in any event, the derogations provided for must have legal effects which are at least comparable to the prohibition of using the quality indication for the whole of the harvest. According to the Commission, the German rules do not meet those conditions.

Production scheme as against marketing scheme

15. The Administrative Court is of the opinion that the German rules introduced a 'marketing scheme' whereas the Regulation provides for a 'production scheme'. In their observations submitted to the Court, Mr Kuhn and the Commission expressed their agreement on this point.

In my opinion, there is no need to attach any significance to that terminology. There will always be room for discussion whether it is appropriate to categorize the two systems thus. It may possibly be claimed that they adequately express the real differences between the two schemes. It must not, however, be forgotten that the purpose of both schemes is to restrict production and that neither of them includes an actual ban on the production of wine beyond the permissible yield per hectare — which naturally does not exclude the possibility that there may be significant differences in the efficiency with which the two schemes achieve their common purpose.

Restrictions on the possibility of 'enforcing' the principle of the precedence of Community law in proceedings before the national courts

16. In the *Simmenthal* [5] judgment, the Court gave its reasons for stating that the precedence of Community law was of fundamental importance. 'Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community'. [6] In the same judgment, the Court stressed the obligations of the national courts and their decisive role in that respect. 'Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule'. [7] '... In accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other hand is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but ... also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions'. [8]

5 — Case 106/77 [1978] ECR 629.
6 — *Simmenthal*, paragraph 18.
7 — *Simmenthal*, paragraph 21.
8 — *Simmenthal*, paragraph 17.

17. The national courts' enforcement of the principle of precedence undoubtedly helps to a great extent to ensure — as Mr Kuhn has also emphasized — that the Member States observe their obligations under Community law. In the *Van Gend en Loos* judgment, [9] the Court stressed the importance of the national courts in this respect. In particular, it stated:

'A restriction of the guarantees against an infringement of [their Community obligations] by Member States to the procedures under Articles 169 and 170 [of the EEC Treaty] would remove all direct legal protection of the individual rights of their nationals ... The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.'

18. It is however established that general authority to seek a declaration as to whether the Member States have fulfilled their obligations under Community law lies with the Commission and the Member States, which may bring proceedings before the Court of Justice under Articles 169 and 170 of the EEC Treaty.

Citizens do not possess a corresponding general right. Their right to rely upon Community rules with regard to seeking a declaration that national rules are incompatible with the Community, and are therefore inapplicable, is restricted in a number of ways.

Those restrictions follow both from national and Community law and are based in the main on the fact that individuals must have a legal interest worthy of protection in order to rely upon the Community rule at issue and that the latter must meet certain requirements in order to be applicable by the national court.

19. Generally, individuals can rely only upon Community rules which have direct effect. The precise characteristic of such rules is that they may be relied upon before the national court and that that court is bound, in accordance with Community law, to take them into consideration in reaching its decision.

The criteria generally used for determining whether Community rules have direct effect are their ability to be applied directly by the national courts, more particularly the question whether those rules are sufficiently clear and unconditional.

20. The Community rule which Mr Kuhn relies upon in the main proceedings is a provision of a regulation. Referring to Article 189 of the EEC Treaty, the Court established that, by reason of their nature and function in the system of the sources of Community law, regulations have direct effect and are, as such, capable of creating individual rights which national courts must protect. [10] Of course, that does not mean that every provision of a regulation is suitable, by virtue of its contents, to be relied upon as a source of

9 — Case 26/62 [1963] ECR 1.

10 Case 43/71 *Politi* [1971] ECR 1039, paragraph 9.

rights for individuals. [11] Regulations may include provisions which are directed solely at Member States and oblige them to adopt rules with a specific content and, as will be seen later, there may be provisions which, by virtue of their objective, do not seek to confer any right on individuals to rely on them for a declaration that a conflicting domestic rule is inapplicable.

21. Hence in this case the fact that the rule relied upon is contained in a regulation does not provide a clear answer to the question whether Mr Kuhn may rely upon that provision for a declaration that the national rule is inapplicable.

Furthermore, in my opinion, it is difficult to find in the case-law of the Court concerning the direct effect of Community rules any reply to that question in the particular circumstances of this case.

22. The characteristic feature of a situation such as this is that:

— the Community rules relied upon are suitable for use as a basis for determining whether the contested national rules conflict with them, but

— the Community rules are not — or are not certainly — suitable for application as alternative rules to possibly conflicting domestic rules, since by virtue of their content, they do not — or do not certainly — lay down rights or obligations with regard to individuals, which the national courts are in a position to protect.

The question is whether an individual in this situation should have the opportunity of relying upon the Community rules and the principle of precedence with the result that neither the conflicting domestic rules (which thereby become inapplicable) nor the Community rules can be used as a basis for determining the individual's legal position.

23. In a case such as this, the individual is relying upon a Community rule in order to create a right — namely, the right not to have to comply with an existing domestic rule which imposes obligations on him. However, the Community rule which he relies upon does not seek to create rights for him, but rather obligations. In such circumstances it may be asked whether the individual should have the right to rely upon the Community rule only if its content is such that it may be used by the national court as an alternative legal basis for positively determining the legal position of the person concerned.

11 — See the judgment of the Court in Case 31/78 *Bussone* [1978] ECR 2429 where it was established, in paragraph 30, that 'the direct applicability of a regulation requires that its entry into force and its application in favour of or against those subject to it must be independent of any measure of reception into national law'. See also the opinion of Advocate General Warner in Case 74/76 *Iannelli* [1977] ECR 557 stating: 'The fact that a provision in a regulation is directly applicable (by virtue of Article 189) does not necessarily mean that it has direct effect: it can do so only in so far as it satisfies the familiar tests of being clear and unconditional and of requiring no further legislative action for its implementation'.

In my opinion it would be difficult to justify such a general requirement, which would presumably also result in far-reaching limitations of the possibilities open to individuals of relying upon Community rules to obtain a declaration that conflicting domestic rules do not apply.

24. In my opinion, the limit which may be needed in cases like this to individuals' opportunities for relying on Community rules is best shown by a requirement that individuals must have an interest protected by Community law to be able to rely on the rule.

25. It seems to me that the observations of the Commission and of the German Government are based on the same kind of reasoning. They emphasize the fact that an individual cannot rely upon a Community rule which imposes obligations on him in order to obtain a declaration that a domestic rule which also imposes obligations on him does not apply, and thereby to create a 'legal vacuum' which is incompatible with the objective of both rules.

26. I think the judgment of the Court in the *Ratti* case [12] contains features expressing the same approach. Mr Ratti was prosecuted in Italy for marketing solvents in breach of Italian rules on the labelling of such goods. Mr Ratti claimed that the marketing had complied with the rules laid down in a Council directive which ought to have been implemented by Italy. In this respect, the Court stated, *inter alia*, that:

'... a national court requested by a person *who has complied with the provisions of a directive* not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise;

... after the expiration of the period fixed for the implementation of a directive a Member State may not apply its internal law — even if it is provided with penal sanctions — which has not yet been adapted in compliance with the directive, to a person *who has complied with the requirements of the directive*' (paragraphs 23 and 24) (emphasis added).

The judgment does not expressly state what the legal position would have been if the solvents in question had not been labelled in compliance with the rules of the directive. However, it may be assumed that by pointing out that the rules of the directive had been complied with, the Court showed that it at least left open the possibility that in such a situation Mr Ratti would not have been able to rely upon the rules of the directive, even if those rules were unconditional and sufficiently precise, and even if there

12 — Case 148/78 [1979] ECR 1629.

were no doubt that there was an incompatibility between the Community rules and the Italian rules. [13]

27. Before I consider whether, in the main proceedings, Mr Kuhn can rely on Article 11 of the Regulation, it may be useful to point out that in my opinion there would in practice be no appreciable restriction on the possibility of national courts' upholding the precedence of Community law, were individuals required to have an interest protected by Community law to rely upon Community rules in order to obtain a declaration that domestic rules do not apply. In the relatively few cases in which it must be actually questioned whether that requirement is met, the Court must lay down the precise content of that requirement in the light of the experience acquired in dealing with such cases.

28. In all normal cases national courts will continue to be able to deal with conflict between Community and domestic rules where they are in a position to establish that the conflict does exist on the basis of the Community rules in question. There will only be reason to consider whether an exemption applies in situations in which it is contrary to the purpose of the Community rule that a 'legal vacuum' be created in such a way that the nationals of Member States are not subject to obligations which it is the common purpose of the Community rules and the domestic rules to impose on them.

Even if, in those exceptional cases, individuals are deprived of the possibility of relying upon Community law, that does not mean that a domestic legal situation conflicting with Community law can be maintained. It only means that disputes on whether the legal situation conflicts with Community law must be settled in the context of proceedings for failure to fulfil obligations under Articles 169 and 170 of the EEC Treaty. Where, in such a case, a judgment determines that the domestic rule at issue is contrary to Community law, it follows from Article 171 of the Treaty that the Member State will be required to take the necessary measures to comply with the judgment.

Can Mr Kuhn rely on Article 11 of the Regulation to obtain a declaration that Paragraph 2a of the German Wine Law is inapplicable?

29. In my opinion, an application of the views mentioned above leads to the following results.

13 — In Cases C-46/90 *Lagauche*, C-69/91 *Decoster*, C-92/91 *Taillandier* and C-93/91 *Evrard*, the Court is called upon to give judgment on a question which is similar, to some extent, to the one at issue in this case. As we know, the background to the cases is that prosecutions were brought in Belgium and France in a series of cases against persons alleged to have been in possession of various items of telecommunications equipment which had not been authorized by the authorities as required under domestic law. The Court has previously determined that domestic rules on the authorization of such equipment are not in themselves incompatible with Community law but that the rules applying in the four cases conflict with Community law to the extent to which they provide that authorization is to be granted by a body which itself competes as an economic operator on the market. In those cases, one question is whether the incompatibility of the Belgian and French rules with Community law on these grounds and as thus defined may be relied upon by the defendants in order to establish the unlawfulness of the domestic rules on which prosecution is based. Certain statements by Advocate General Lenz in his Opinions in Cases C-46/90 *Lagauche* and C-93/91 *Evrard*, delivered on 2 December 1992, may, I think, be interpreted, to some extent, as saying that the defendants, who have not requested authorization, do not have an interest protected by Community law enabling them to rely upon the Community rules at issue in order to establish that the Belgian requirement of authorization as such did not apply to them as such (see paragraphs 44 and 45 of the Opinion in *Lagauche* and paragraphs 17 and 18 in the Opinion in *Evrard*).

30. The alleged incompatibility between the German and Community rules in view of the fact that the German rule also provides for fixing a permissible yield per hectare for table wine and in addition permits account to be taken of uncultivated areas for the purposes of permissible yield per hectare is not in my opinion such that Mr Kuhn may rely upon it in the main proceedings in order to obtain a decision that Paragraph 2a of the Wine Law does not apply as the legal basis for the administrative act rejecting his application for a control number. There are at least two reasons for this.

First, it is difficult to see how a conflict between the Community and German rules on those points could be relevant in relation to the provisions of the Wine Law on the basis of which Mr Kuhn's application was rejected. The order for reference seems to me, furthermore, to show that the Administrative Court does not consider that incompatibility between the German and Community rules on those two points is directly relevant to resolving the dispute. It is my impression that it is for the purpose of, as it were, substantiating its main doubt about compatibility between the Regulation and the penalty prescribed in the Wine Law that the court of reference mentions its doubt about the concordance between the Regulation and the German rules.

Secondly, it seems to me, furthermore, that in any event Mr Kuhn does not have in the main proceedings an interest protected by Community law in obtaining a declaration of any incompatibility between the Regulation and the German rules regarding these points. In my opinion Mr Kuhn has not proved that he would be in a different and, in this specific connection, a better legal position were the Community rules applicable to him in accordance with the meaning he attributes to them.

31. The crux of the case undeniably lies in the alleged conflict between the rule on penalties in Article 11(2) of the Regulation and that in Paragraph 2a of the German Wine Law. Mr Kuhn's application for a control number was rejected on the basis of the rule on penalties in Paragraph 2a of the Wine Law.

32. As regards the penalty provided for in Article 11(2) of the Regulation, it is desirable to consider a matter which was not dealt with in the observations submitted to the Court. It should be considered whether the material provisions in Article 11(2) of the Regulation — that is to say prohibition of using the quality designation for the entire harvest if the permissible yield per hectare is exceeded — has direct effect. It must be considered whether it is for the national authorities and, therefore, also for the national courts to enforce that prohibition directly on the basis of the Regulation. It seems that the German administrative system enables such a

prohibition to be imposed since failure to observe the rule on permissible yield per hectare may be penalized by a refusal to grant a control number, with the result that the wine cannot be marketed as quality wine.

Acceptance of the direct effect of the Regulation rule on penalties will imply, in my opinion, that Mr Kuhn cannot rely on that rule in order to establish that the refusal to grant him a control number is invalid since, in that case, the refusal will be directly based on the Regulation. Of course, the German authorities applied the provisions of Article 11(2) in a partially defective way, since, contrary to the Regulation, Mr Kuhn obtained a control number for that part of his production which came within the limits of the permissible yield per hectare. However, in my opinion, the German authorities' mistake cannot in any event result in the provisions of the Regulation being deprived of the legal effect provided for as regards the surplus wine.

33. It is not, however, certain that the penalty rule in Article 11(2) has direct effect. In that context it is important that the Commission has not contended that that provision has direct effect and there may be several reasons for that. That direct effect may possibly be excluded by the far-reaching option open to Member States to provide for derogations to the material content of Article 11(2). Confirmation of the absence of the direct effect of that provision may possibly also be found in the context in which it is set. Article 11(1) on the Member States' obligation to fix permissible yields per hectare does not meet the general requirements for the existence of direct effect in such a way that in itself it could form the basis of obligations for individuals, and most of the other provisions of the Regulation have a similar content, that is to say they lay down general obligations for Member States to create in specified areas a more or less clearly defined situation in law. Furthermore, the Commission gave explanations during the proceedings of the legal position in the other Member States, showing that those States 'implemented' Article 11(2) in ways which to some extent diverge from the exact content of the penalty rule in Article 11(2). That may perhaps be seen as showing that that provision is not suitable for producing direct effect.

34. In my opinion, however, the Court is not called upon to decide whether Article 11(2) may be enforced as directly creating obligations. I consider that it can be established that, in any event, it would be contrary to the objective of that provision for Mr Kuhn to be able to rely on a possible conflict between that provision and Paragraph 2a of the German Wine Law for the sole purpose of obtaining a decision that Paragraph 2a is inapplicable. In my opinion, Mr Kuhn has no interest protected by Community law enabling him to rely on the Community rule in order to obtain such a result.

35. In that regard, the Commission strongly emphasizes that Article 11(2) of the Regulation must be regarded as containing a

'more severe' provision in relation to wine-growers than Paragraph 2a of the Wine Law.

I agree with the Commission that, in the actual circumstances of this case, that may be used as an argument to prevent Mr Kuhn relying upon the rule.

It may, however, be appropriate to observe that it should hardly be established as a condition which must necessarily be fulfilled for refusing an individual the right to rely upon a Community rule that the latter is 'more severe' than the national rule.

In practice, cases may be found in which it will be difficult to determine whether the legal position implied by the Community rules or that prescribed by the national rules is the 'more severe' from the point of view of the party in question. In addition, it can hardly be excluded that there may be cases in which the party in question does not have an interest protected by Community law to rely upon a Community rule in order to establish the inapplicability of a domestic rule, even where the Community rule is 'less severe' than the domestic rule.

36. In my opinion, the Court should, in this case, confine itself to finding that the plaintiff in the main proceedings does not have an interest protected by Community law enabling him to rely upon Article 11 of the Regulation for the purpose of establishing the inapplicability of Paragraph 2a of the German Wine Law, which was used as the basis for rejecting his application for a control number.

In my opinion the Court should, in its statement of the reasons on which that outcome is based, in particular point out that it would clearly be incompatible with the objective of the Regulation to use Article 11 to bring about a legal position in Germany in which, as long as a conflict established between the Community rule and the corresponding German rule has not been removed by amending the German legislation, the wine should be freely marketed as quality wine, even in the case of wine produced in excess of the permissible yield.

There is in this respect an important factor, and it is perhaps the conclusive factor, that there is no real conflict between the Regulation and the Wine Law on the issue which is the subject-matter of the main proceedings, that is to say whether Mr Kuhn should be given a control number for his surplus wine so that it may be sold as quality wine. Both the Regulation and the German Wine Law preclude surplus wine being sold as quality wine.

Whether the Court considers that it has to reply to the question raised by the Administrative Court

37. If the Court agrees that the plaintiff in the main proceedings cannot rely upon Article 11 to obtain a declaration that Paragraph 2a of the Wine Law is inapplicable, I do not think that the Court is called upon to reply to the specific question referred to it for a preliminary ruling. The reason why the plaintiff cannot rely upon the Community

rule is that its application by the Administrative Court would, in certain circumstances, lead to an outcome contrary to the objective of the Regulation. In those circumstances, a reply to the question raised would be of no use to the national court.

Were the Court to consider it appropriate to reply to the Administrative Court's question, I would point out that I can entirely agree with the Commission's interpretation of Article 11.

Conclusion

38. Having regard to the foregoing, I shall propose that the Court should reply to the question referred to it for a preliminary ruling by the Verwaltungsgericht Neustadt an der Weinstraße as follows:

Article 11 of Regulation No 823/87 laying down special provisions relating to quality wines produced in specified regions cannot be relied upon by the plaintiff in the main proceedings in order to establish the inapplicability of the provision of the German Wine Law used as the basis for the administrative act refusing to grant the plaintiff a control number for the wine produced above the permissible yield per hectare.