In Joined Cases 10 to 14/75

Reference to the Court under Article 177 of the EEC Treaty by the Cour d'appel, Aix-en-Provence, for a preliminary ruling in the criminal proceedings pending before that court between:

THE PROCUREUR DE LA RÉPUBLIQUE AT THE COUR D'APPEL, Aix-en-Provence

and

FÉDÉRATION NATIONALE DES PRODUCTEURS DE VINS DE TABLE ET VINS DE PAYS, Paris, plaintiff claiming damages,

of the first part

and

PAUL LOUIS LAHAILLE, residing in Marseilles (Case 10/75)
ALBERT JEAN BOURGIN, residing in Marseilles (Case 11/75)
ROBERT HÉNRI MARGNAT, residing in Marseilles (Case 12/75)
PIERRE SENECLAUZE, residing in Marseilles (Case 13/75)
PAUL DAVID CREMIEUX, residing in Marseilles (Case 14/75)

of the second part

on the interpretation of certain provisions of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (OJ, English Special Edition 1970 (I) p. 234), particularly in connexion with a presumption in French law of over-alcoholization of wine,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. J. Mackenzie Stuart, Presidents of Chambers, A. M. Donner, R. Monaco, P. Pescatore, H. Kutscher, M. Sørensen (Rapporteur) and A. O'Keeffe, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

1. Wine is a product of the fermentation of fresh grapes or the juice of fresh grapes. The grapes contain sugar which naturally turns into alcohol in the presence of yeast.

The alcoholic strength of the natural product can be increased artificially ('enriched') by various techniques — by fortification, that is, the direct addition of alcohol to the wine or to the grape must or by chaptalization, that is, the direct addition of sugar to the grape must or to the grapes.

These different operations are either prohibited or strictly regulated.

2. Such rules are contained in the Community regulations which have established the common organization of the market in wine since 1 June 1970. Regulation (EEC) No 816/70 laying down additional provisions for the common organization of the market in wine contains provisions which are valid for all products in this sector, save as otherwise provided. Title IV of the Regulation is headed thus: 'Rules concerning oenological processes and conditions for release to the market'. Article 18 lays down the circumstances in which Member States may permit the natural alcoholic strength of fresh grapes, grape musts and wines to be increased. The following articles specify the conditions under which the alcoholic strength may be increased and in particular the methods to be used. The addition of alcohol in order to increase the alcoholic strength is not provided for and is therefore prohibited; this is confirmed by the fundamental prohibition laid down in Article 25 of the regulation.

3. Before the Community regulations were implemented, the addition of alcohol to wine was prohibited under French law. The Law of 24 July 1894 on fraudulent practices in the sale of wines introduced a provision to this effect. This provision was re-enacted in Article 8 of the Decree of 1 December 1936, called the Code du vin. Following the establishment of the Community organization of the market in wine, Decree No 72/309 of 21 April 1972 stated that the Law of 24 July 1894 was repealed in so far as it related to the addition of alcohol to wine.

Chaptalization was also controlled under French law before the establishment of the Community organization of the market in wine. It was prohibited in certain areas and authorized in others.

4. With the object of effectively preventing breaches of these laws, the French Decree of 19 April 1898 on over-alcoholization of wine, which was re-enacted in Article 8 of the Code du vin, introduced a provision concerning a presumption of over-alcoholization of wine which reads as follows:

'Red wines in respect of which the proportion of alcohol to reduced extract is in excess of 4·6 and white wines in respect of which this proportion is in excess of 6·5 shall be presumed to be over-alcoholized. However, this presumption may be rebutted when a comparison of the various constituent elements of the wines, their taste, the conditions of their production and their place of origin enable it to be established

that they result exclusively from the fermentation of fresh grapes.'

The presumption is based on the following premises:

Wine contains, first, volatile substances (few in number, but plentiful, such as alcohol and volatile acids) and secondly non-volatile substances (such as salts, acids, glycerol and pectins). The non-volatile substances make up the 'dry extract' of the wine.

Fortification and chaptalization create an imbalance between the constituents of the wine. They have the effect of increasing the quantity of alcohol without however increasing the quantity of most of the other substances. Therefore the dry extract does not increase in the same proportion as the alcohol. Experience has shown that there is a certain ratio between the weight of the reduced dry extract and the weight of alcohol contained in the wine. Therefore, it may be presumed that the wine has been enriched by fortification or chaptalization when the alcohol/reduced dry extract ratio is in excess of certain limits fixed by the Law.

5. In order to apply this presumption it is necessary to determine the method to be used to calculate the dry extract. [1]

Several methods of analysis have been worked out for the calculation of the dry extract. One is the '100° method' which consists in weighing what is left after evaporating the volatile substances in the wine at 100°. Another is the '70° vacuum method' which consists in weighing what is left after evaporating the volatile substances in the wine at 70° in a vacuum. A third method is the 'densimeter method' which consists in calculating the dry extract 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.

The choice between the various methods of calculating the dry extract is of practical importance because it appears that the results obtained vary according to the different methods. (The dry extract obtained by the 100° method is less than that obtained by the two other methods because evaporation at 100° causes some particles of the unresistant constituents to disperse into the atmosphere.)

The 100° method was laid down in France for establishing the alcohol/dry extract ratio by Order of 18 January 1907 and set out in detail in an Order of 22 April 1908.

Article 1 (1) of Regulation No 1539/71 of the Commission of 19 July 1971 determining Community methods for the analysis of wines provides:

'The methods of analysis for the application of Regulations (EEC) Nos 816/70 and 817/70 shall be those set out in the Annex to this Regulation'.

Heading 3 of the Annex provides that:

'The total dry extract shall be measured by a densimeter and calculated indirectly from the specific gravity of the residue without alcohol.'

6. Messrs Lahaille, Bourgin, Margnat, Seneclauze and Cremieux run French wine-marketing firms. During 1971 these firms imported into France various quantities of wine bought in Italy. Analyses carried out by the French authorities revealed that the alcohol/dry extract ratio of at least some of this wine was in excess of the limit which gives rise to the presumption of over-alcoholization. The accused were prosecuted and acquitted by the Tribunal correctionnel, Marseilles.

1 — Article 8 of the Code du vin uses the expression 'reduced extract' the definition of which is annexed to the order of 24 June 1963 on official methods for the analysis of wines and grape musts: 'The reduced extract is the total reduced dry extract less all the total sugars in excess of 1 gramme, potassium sulphate in excess of 1 gramme, mannitol, if any, and all chemical substances which may have been added to the wine'.

The grounds relied upon in support of their acquittal were essentialy that the provisions of Regulation (EEC) No 1022/70 of the Commission of 29 May 1970 (OJ L 118, p. 20) introducing accompanying certificates for certain wines during a transitional period had been complied with, since the producer Member State had issued a 'clear certificate' attesting that the wine was wholesome and of good merchantable quality.

The court stated in particular: 'All the considerations analysed above lead this court to hold that importing into the national territory wine from Italy which is duly accompanied by "clear certificates" and which the accused has not examined personally cannot make him criminally liable where his intention to defraud has not been proved in the case in question'.

Appeals were brought against these five decisions before the Cour d'appel, Aix-en-Provence, which decided, by judgments of 20 September 1974, and, as regards Case 14/75, by judgment of 18 October 1974, to stay the proceedings and ask the Court of Justice, in accordance with Article 177 of the EEC Treaty:

'— Whether table wines dealt with by Regulation (EEC) 816/70 must, in order to merit that title and circulate within the territory of Member States of the Community, satisfy only the rules of analysis provided for in Item 10 of Annex II to that Regulation or in addition national practices and rules;

— Whether Regulation (EEC) No 816/70 renders inapplicable to intra-Community trade the presumption in national law of over-alcoholization of table wines when the alcohol/dry extract ratio defined by national legislation is exceeded.'

7. In its orders for reference, the Cour d'appel stated *inter alia:*

'Whereas with regard to the common organization of the market in wine, Regulation (EEC) No 816/70 ... defines in Item 10 of Annex II thereto table wine produced in the Community by reference to vine varieties, alcoholic strength and acidity content; and whereas, although it provides in Article 27 (2) (a) thereof that wines falling within that definition may be offered or disposed of for direct human consumption within the Community, it prohibits the addition of alcohol (Article 25) and chaptalization (Articles 18 and 19); and whereas it subjects the circulation of wines within the Community to the drawing up of an officially checked accompanying document (Article 29) and prohibits any quantitative restriction or measure having equivalent effect in the internal trade of the Community (Article 31);

Whereas Regulation (EEC) 1022/70 ... introduced for a transitional period accompanying certificates in respect of which Article 5 thereof provides that they shall be issued by the competent agency of the producer Member State after oenological and organoleptic tests establishing that the wine in question is wholesome and of good merchantable quality and in addition complies with the requirements of subparagraph (a) or (b) of Article 27 (2) of the preceding regulation; and whereas Article 11 thereof provides "Without prejudice to the provisions of this Regulation, national requirements shall apply to the control of the circulation of wines within the territory of a Member State";

Whereas the wines in question were imported into France in 1971 duly accompanied by a "clear certificate" as provided for by the Community regulations; and whereas the importing Member State is not permitted to raise doubts as to the authenticity of such a circulation certificate ...; whereas, however, it falls to the importing Member State to ensure that the wine forming part of intra-Community trade

and imported as such into its territory in fact possesses the properties described in the certificate and that after its delivery no substitution has taken place on the part of the consigner, as the physical conditions of transport do not exclude such a possibility; and whereas the competent authority of the receiving Member State may thus ensure by all legal means that the wine imported fulfils all the conditions as to production laid down by the Community rules and that it is wholesome and of good merchantable quality;

.....

Whereas there is a serious doubt as to the compatibility with Community rules of the presumption in national law of over-alcoholization when the authorized limit of the alcohol/dry extract ratio is exceeded; and whereas this measure of national law necessarily imposes a severe restriction on the freedom of Community trade by placing on the producer the additional obligation, when that limit is found to be exceeded in French territory, of establishing... that they result exclusively from the fermentation of fresh grapes; and whereas in the framework of intra-Community trade such an obligation is not in the nature of "a mere national requirement applying to control of the circulation of wines in the territory of a Member State"...'

8. The orders for reference were entered in the Court Register on 3 February 1975.

Mr Margnat, represented by J. Imbach of the Strasbourg Bar, Mr Seneclauze, represented by P. Guerre of the Marseilles Bar, the Fédération nationale des producteurs de vins de table et vins de pays, represented by B. Celice of the Paris Bar, the French Government, represented by R. Pisani, Chief Inspector in the Service de la répression des fraudes at the Ministry of Agriculture, the Government of the Italian Republic, represented by Ambassador A. Maresca, assisted by I. M. Braguglia, vice avvocato dello Stato, and the Commission, represented by its Legal Adviser, G. Marenco, submitted written observations.

By orders of 26 February and 28 May 1975, the Court, having heard the report of the Judge-Rapporteur and the views of the Advocate-General, decided to join the cases for the written and oral procedure.

The Court, having heard the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the oral procedure without instituting a preparatory inquiry.

However, the Court drew the attention of the parties to a question which it had asked in Case 89/74 and which was as follows:

'The parties are invited to provide... more detailed explanations with regard to the possibility or otherwise of transposing the alcohol/dry extract ratios obtained by using the densimetric method into ratios resulting from the use of the 100° method'

and invited the parties to give their views on this question too in their written observations.

II — Written observations submitted to the Court

1. Observations of Mr Margnat (Case 12/75)

Mr Margnat first of all examines the circumstances in which the problem giving rise to the preliminary questions arose. He claims, *inter alia,* that to his knowledge the presumption of over-alcoholization has not for years given rise to legal proceedings within French territory in respect of French wines and that it was only applied systematically in connexion with wines from Italy because since 1971, shortly

after Regulation No 816/70 was adopted, it looked as though it would constitute a bar to imports from that country.

As regards the first question, Mr Margnat observes that Regulation No 816/70 laid down a set of consistent measures to ensure freedom of intra-Community trade. He does not contest the fact that individual oenological processes may be adopted by the different States, but he claims that wine from one country in the Community which complies with the requirements of Regulation No 816/70 and has an accompanying certificate, cannot be rejected in another State.

The aim of the Community rule is, in his opinion, to promote free trade between the Member States in all wines which satisfy the requirements of Regulation No 816/70 in conjunction with Items 7 and 10 of Annex II.

Therefore the Court ought to answer the first question to the effect that table wines, defined according to the rules laid down in Regulation No 816/70, only have to satisfy the rules for analysis provided in that Regulation and Item 10 of Annex II thereof regardless of the national practices and regulations of the importing State.

Then Mr Margnat observes that the second question is only the corollary of the first. The question is whether the presumption of over-alcoholization under national law is an obstacle to the free circulation of wines and therefore a measure which is prohibited by Article 31 of Regulation No 816/70.

He considers that the presumption is a measure which goes beyond the intended operation of the regulations in question and that it is therefore in breach of Article 31 of Regulation No 816/70.

He recalls that the presumption is recognized only by French law and that at the time it was only devised for French wines.

On the national level, the application of the rule is already considered by oenologists as likely to lead to erroneous conclusions because it does not take account of all the influences which may disturb the ordinary composition of wines. This seems to be the reason why this provision is not, in practice, applied in France.

But even if it could have been applied, an expert's report would have been ordered to enable a person charged with such an offence to bring evidence to the contrary. Although it is difficult on the domestic level to bring evidence to the contrary, it is practically impossible in respect of wines produced outside France, since these have analytical and organoleptic properties different from those of French wines. Thus the experts summoned before the Tribunal correctionnel, Marseilles, declared that the alcohol/dry extract ratio could have no meaning of its own when the wines came from Community countries since the conditions of their production, the wine-making processes and their place of origin were difficult to determine.

Then Mr Margnat refers to the actual preamble to Regulation No 816/70 according to which it is prohibited to introduce any measures contrary to the common agricultural organization and any measures which might involve discrimination. The same regulation prohibits all quantitative restrictions or measures having equivalent effect in intra-Community trade. But the aim of the actions brought against French importers when they imported Italian wines into France was the quantitative restriction of imports of these wines into France.

This was confirmed by a French circular of 14 April 1972 marked 'Confidential' which specified for tax inspectors the aims of the verification procedures carried out on wines, and admitted that they were intended to discourage the importation of foreign wines into France.

Mr Margnat claims that his analysis is supported by Regulation No 1022/70 which specifies that the accompanying certificate shall be issued by the competent agency of the producer Member State only if this agency has ascertained that the wine is wholesome and of good merchantable quality and complies, moreover, with the requirements of subparagraph (a) or (b) of Article 27 (2) or Regulation No 816/70.

In Mr Margnat's opinion, the Court, without needing to give a ruling on the validity of a provision of national law, must therefore declare that in intra-Community trade, the presumption in national law of the over-alcoholization of table wines is inapplicable and cannot be relied upon without depriving one of the fundamental principles of the EEC Treaty of its meaning, that is, the free movement of goods between Member States.

2. Observations of Mr Seneclauze (Case 13/75)

Mr Seneclauze observes first that for each consignment of wines imported from Italy in 1971, the French customs officials took a sample, had it analysed by their laboratory, acknowledged that it complied with Community legislation and allowed it to be unloaded, and that it was only some months later after demonstrations on the part of French winegrowers had taken place that the French Service des fraudes took samples from a vat and carried out an analysis of its own.

As regards the first question, he examines Regulations Nos 816/70 and 1022/70 and claims that when the wine comes from a State within the Community, the importing State cannot use its own legislation on oenological processes in opposition to it if the wine involved in the trading transaction has a clear certificate issued by the official laboratory of the producer country which states that it conforms to the requirements of Regulation No 816/70.

The Court should therefore say in answer to this question that table wines need comply only with the rules of analysis laid down in Annex II to this Regulation, as officially certified by the producer country, and not with national rules, in order to circulate within the territory of Member States of the Community.

As regards the second question, Mr Seneclauze claims that the French rules in question are inapplicable to intra-Community trade because they establish a presumption in law of over-alcoholization which is not recognized in the other Member States or in the Community regulations, and because the presumption in law is the result of French legislation which is in the main out-dated and was adopted at a time when wine-making processes were archaic and the science of oenology hardly existed.

French oenological experts have shown that the value of the old alcohol/dry extract ratio under the legislation of 1898 could no longer be upheld, and the legal experts in the case before the Tribunal correctionnel, Marseilles, admitted that the alcohol/dry extract ratio should be interpreted by taking all sorts of factors into consideration; the three leading authorities Jaulme, Portal and Brun have acknowledged that in this case, if the alcohol/dry extract ratio were interpreted according to the works of Bouvatier and Sudraud there was no over-alcoholization of the wines in question.

Recalling Article 40 (3) of the EEC Treaty, Article 31 of Regulation (EEC) No 816/70 and Article 27 of the same regulation, Mr Seneclauze suggests the following answer to the second question:

'Regulation (EEC) No 816/70 is incompatible in intra-Community trade with regulations peculiar to one country which provide for a presumption of the addition of alcohol based on the alcohol/dry extract ratio which on the other hand is still valid under French domestic law.'

3. Observations of the Fédération nationale des producteurs de vin de table et de vins de pays

In the introduction to its observations, the Fédération observes *inter alia* that it has been joined as plaintiff claiming damages several thousand times in criminal proceedings against unscrupulous wine producers or traders, and it therefore considers itself very well placed to show that in fact the preventive system which has been applied without respite to French vine-growers is perfectly adapted to the circumstances which arise from the EEC Treaty.

The Fédération first examines the contents of the French regulations. In particular it observes that it has never been alleged that the presumption of over-alcoholization was too oppressive. The very fact that the rule now being contested is of long standing is enough to show, in any case, that it was not adopted in order to block common market products.

It is useless to allege that the procedure is only valid in respect of French wines. In fact, Article 8 of the Code du vin was applied by the French administration in all the North African countries whose wines were of a different composition and alcoholic strength from those of wines produced in Metropolitan France.

The preventive French system is moreover not inflexible. It takes into consideration, as attested by recent circulars, special methods of wine-making and it permits in advance certain means of proof which are put at the disposal of the defence.

Then the Fédération examines the objections based on the 'Community methods for analysis' which differ from the 100° method. It is correct that the 70° evaporation method and the densimeter method enable more complete data on all the constituents of the wine to be obtained — that is, the total dry extract — because the 100° method which is carried out in the open air subjects the wine to a harsh process which causes some particles of the unresistant constituents to disperse in the atmosphere. However, if it is desired to determine whether the wine is over-alcoholized, the fluctuations owing to the special characteristics of each wine have to be ignored and in this special form of investigation, only the reduced extract is of interest. When over-alcoholization is being investigated, the 100° method has the advantage of volatilizing the substances which vary most from one wine to another. Consequently, the reduced extract laid down in Article 8 of the Code du vin, far from being a datum inferior to the total extract, constitutes the separate result of a different form of investigation.

For this reason the Fédération strongly protests against all allegations that the rules laid down in Article 8 of the Code du vin for the examination of wine should be reviewed in the light of present Community rules.

As regards the question of the compatibility of Article 8 of the Code du vin with Community regulations, the Fédération first claims that the preventive system laid down in Article 8 does not infringe any provisions of Community law as the system has no equivalent under Community law. Moreover, no question of compatibility can arise with regard to provisions which are in accordance with a Community objective. Articles 39a and 13 of Regulations (EEC) Nos 816/70 and 817/70 respectively provide in fact that each Member State shall control wines 'marketed' within its territory.

Then the Fédération claims that the method of analysis laid down in Article 8 of the Code du vin is not incompatible with the Community regulations. It recalls that examination of the reduced extract and that of the total extract are not conflicting or even competing

methods since in fact they have different objectives in view. This follows moreover from the Community regulations themselves. Thus Article 39a of Regulation No 816/70 which was intended to establish the control of the product marketed did not provide rules defining fraudulent practice. On the other hand, when Article 39 provides for methods of analysis, these are exclusively to establish the type of the wine.

Finally the Fédération claims that Article 8 of the Code du vin does not constitute a quantitative restriction on imports from abroad. The contents of this provision cannot constitute an illegal restriction when they are in accordance with a Community objective which has been expressly stated. Then again, the very aim of Article 8 is in principle qualitative and cannot therefore be alleged to have quantitative effects short of acknowledging, paradoxically, that adulterated wine should also benefit from Community protection.

Moreover the action of the Service français de la répression des fraudes is in accordance with national public policy. Over-alcoholization by chaptalization may occur at any time during transport or distribution and there is no reason why products from abroad should escape fraudulent practices.

The Fédération adds that the necessary harmonization of Community legislation on the prevention of fraudulent practices will of necessity have to be based on a rule to detect over-alcoholization which very closely corresponds to that in Article 8 of the Code du vin because at present, there are no other valid procedures.

The Fédération suggests to the Court that it should give the following answers to the questions put by the Cour d'appel, Aix-en-Provence:

'1. Article 8 of the Code du vin which seeks to determine that the product has been the subject of a fraudulent practice in the course of its making, regardless of the analysis of the substances of which it is composed, concerns a subject which has not yet been dealt with by Community law but corresponds with an objective laid down by the Community.

2. Article 8 of the French Code du vin is applicable to intra-Community trade and does not *per se* produce effects equivalent to quantitative restrictions.'

4. Observations of the French Government

As regards the first question, the French Government points out that the Community regulations have provided that table wines must comply with certain standards. An analysis of these regulations reveals, however, that these standards, in particular those laid down under Item 10 of Annex II to Regulation No 816/70, are not exhaustive and that the Community is taking action by stages to determine the distinguishing features of wines allowed for direct human consumption.

In the opinion of the French Government, taking progressive action necessarily involves the retention of special provisions of national law until Community law replaces them. Article 28 a of Regulation No 816/70 is explicit in this connexion.

Moreover, the French Government stresses that the limits set by Article 8 of the Code du Vin concerning the alcohol/dry extract ratio are not a rule of analysis but the expression of an oenological rule the results of which enable it to be determined whether the provisions as to enrichment have been complied with.

Therefore the Government concludes that it is not sufficient for a wine only to answer to the definition of table wine given in Item 10 of Annex II to Regulation No 816/70 in order to circulate freely within the Community

but that it must in addition satisfy all the conditions laid down by Community regulations and by provisions of national law which have not been repealed, and that the methods of control are the responsibility of the national administrative authorities.

In this connexion it recalls that Article 39 a of Regulation No 816/70 and Article 13 of Regulation No 817/70, Article 9 of Regulation No 1594/70 and Article 4 of Regulation No 1618/70 impose upon the Member States the obligation to adopt all appropriate measures to ensure the application of the Community regulations.

With regard to the provisions of Regulation No 1539/71, the French Government observes that the title thereof refers to 'methods for analysis' ('des méthodes d'analyse') and therefore does not lay down all the methods of analysis. The regulation only lays down methods of analysis to ascertain the elements which are capable of being adopted in application of Article 11 of Regulation No 817/70 and in particular of enabling quality wines produced in specified regions to be recognized.

Finally, the French Government stresses that there have as yet been no provisions of Community law on the investigation of fraudulent practices and adulteration except to call upon the Member States to adopt all measures to ensure compliance with Community rules.

As regards the second question, the French Government recalls that French law makes no distinction between French products and products from abroad. The Government stresses that fraudulent over-alcoholization may occur at any stage from the production to the marketing of the product even when it is circulating with an accompanying certificate or document. Consequently, it is important to ensure at all times that the product complies with the specifications of the regulations which are applicable thereto. To subject only French wines to the oenological rule in question would moreover lead to a discriminatory system incompatible with the principles of the EEC Treaty.

The national courts have, besides, applied the provisions of Article 8 of the Code du vin both to French wines and foreign wines.

The French Government concludes therefore that in the absence of harmonization of methods of keeping a check by analysis on over-alcoholization of wines, it falls to the Member States to apply their national law to the products which circulate within their territories, even under the rules for reference laid down by Community law.

5. Observations of the Government of the Italian Republic

The Italian Government recalls that in the first question the court referring the matter raises a problem concerning the material properties required of table wines produced within the Community.

The Italian Government claims that a complete common organization of the market in wine was established from 1 June 1970. A common organization of this type presupposes, *inter alia,* as the twelfth recital of Regulation No 816/70 states, a precise definition of the products which the regulations concern.

This definition appears in Annex II to the abovementioned regulation, whilst rules concerning production and for controlling planting and those concerning oenological processes and conditions for release to the market are the subject of Titles III and IV of the same regulation.

In these circumstances, there can be no doubt that when a table wine produced in the Community satisfies the conditions laid down by the provisions of Community law, it must be able to

circulate freely within the Community. If not, the very existence of the common organization of the market is compromised.

It follows that as regards the material properties required, the question calls for an answer in the affirmative to the effect that in order to warrant the description 'table wine' and to be able to circulate freely in the Community, a wine need only satisfy the conditions laid down by Community regulations.

In order to answer the second question, the Italian Government first examines the French rules in the field in question. In its opinion, the presumption of over-alcoholization is a measure for checking the existence of certain material properties which wine must possess. It is thus concerned not with specifying these conditions but checking that they exist.

In its opinion, an examination of the provisions of Community law reveals that the task of checking that the material properties of the wine are present is left to Member States, with some exceptions. In this connexion, it refers to Article 39a of Regulation No 816/70 and to Article 9 of Regulation No 1594/70.

Therefore the Italian Government claims that Member States are still free to undertake checks intended to ensure that the Community rules are observed, so that where the national court considers that the presumption of over-alcoholization constitutes a similar check, it is compatible with the system of Community law to keep it in force.

However, according to the Italian Government, Community regulations, in particular Regulation No 1539/71, do not allow a Member State to adopt the 100° method of analysis for the application of the presumption of the addition of alcohol. This conclusion follows from the very grounds upon which the regulation is based, and especially the third recital thereof ('... consequently, these methods should be compulsory for all commercial transactions and all verification procedures'). These grounds make it mandatory to consider the regulation as also applicable to the methods of analysis which are necessary to verify the existence of the material properties wich are required by the Community regulations in respect of the product in question. This view is supported by the provisions of Article 1 of the regulation itself, since Regulation No 816/70 includes Article 39a which imposes upon Member States the obligation to take all appropriate measures to verify compliance with the provisions of Community law. Moreover, if a different view were taken, the aim of the common organization of the market would be jeopardized since a product which was regarded in one country and according to a certain method of analysis as a table wine fulfilling the required conditions might not be regarded as such in another country which had adopted a different method of analysis.

6. Observations of the Commission

In the part of its observations headed 'Facts', the Commission relies upon some circumstances which influence the values upon which the alcohol/dry extract ratio is based.

It recalls that when white wine is produced, the stalks, pips and grape skins are generally removed from the grape must immediately. (However, in Italy sometimes white wine is left to steep in contact with these solid parts). On the other hand, when red wine is produced, the grape must normally remains in contact with these solid parts. Therefore the dry extract of red wine tends to reach higher levels and consequently the alcohol/dry extract ratio is smaller. But even comparing one red wine with another the dry extract is greater the longer the period of steepage. The length of time, which varies according to local conditions and traditions, shows a

general tendency to be reduced. The geographical region in which vine-growing is carried on may also have a decisive influence upon the level of the extract. In fact, this extract includes fixed acids which are more abundant the more northerly the vines grow and which on the other hand are very scant in wines from Apulia, Sicily and most especially from Sardinia.

However, the Commission recalls that the possibility of rebutting the presumption enables it to be taken into consideration that a wine which is perfectly wholesome may, in spite of everything, show an alcohol/dry extract ratio in excess of the upper limit for many reasons, and in this connexion it refers to two French circulars of 2 March 1965 and 25 March 1974. The first one graduated the limit of the alcohol/extract ratio according to the permanganate measurement in order to take account of the difference in dry extract which the variations in the method of wine-making entail. The second took account of the shortness of the period for making certain red wines of the 1973 vintage.

The Commission begins the discussion of the first question by examining the Community regulations in the wine sector and in particular the many provisions fixing the minimum standards of quality for a wine to come within the category of table wine, without which it may not be offered for human consumption. It recalls that other provisions of Regulation No 816/70 control certain oenological processes or the maximum percentage of certain substances. If these provisions are infringed the wine may not be offered or disposed of for direct human consumption even if it comes within the category of table wine, and this is now stated expressly by Article 28 a of Regulation No 816/70 which was introduced by Regulation No 2680/72. Products which may not be offered for direct human consumption are not, however, in the Commission's opinion, prevented from circulating within the Community.

Moreover, the Commission recalls that under Article 29 of Regulation No 816/70 products in the wine sector may not circulate within the Community unless they are accompanied by a document. Regulation No 1769/72 which introduced this document has only been applied since 1 April 1972. During the previous period, a provisional state of affairs existed, governed by Regulation No 1022/70, where an accompanying certificate was required only for trade between Member States.

The Commission wonders, in view of these regulations, what room still exists for the application of national legislation and considers that the question calls for a different answer according to the circumstances.

As to the *designation 'table wine'*, the Commission claims that the answer ought to be that this designation is exclusively regulated by Community law.

As regards accompanying documents, it claims that Community regulations do not mean that wines accompanied by the Community document are exempt from all control. On the contrary, the accompanying document is intended to facilitate checking procedures which aim in particular to check that the product has not been illegally tampered with in transit. However, if the checking procedure were to make it possible to ascertain, for example, that the wine could not be offered for direct human consumption, the Member State still could not prohibit the product in question from entering its territory. On that basis, the Commission considers that the Court should say in answer to the Cour d'appel, Aix-en-Provence, that in trade between Member States, and from 1 April 1973 also in trade within Member States, the latter may not make *the movement* of table wines subject to requirements other than those laid down by Community law.

As regards *oenological processes and rules of analysis,* the Commission considers that the Court's reply should be that at the present stage of Community rules, Member States may make the offer or disposal of table wines for direct human consumption within their territory subject to compliance with oenological processes and rules of analysis other than those laid down by Community regulations, provided that the prohibition on measures having an effect equivalent to quantitative restrictions referred to in Article 31 of Regulation No 816/70 is observed.

As regards oenological processes, this result is clearly confirmed by the wording of Article 28a of Regulation No 816/70 which was introduced by Regulation No 2680/72.

In the Commission's opinion, the second question poses the problem to what extent the Member States may apply provisions of national law to verify and enforce compliance with the Community provisions concerning oenological processes.

The Commission's conclusion is that Member States not only may but must take all appropriate measures to ensure that the provisions of Community law are observed. In this connexion it refers to Article 9 of Regulation No 1594/70 and to Article 39a of Regulation No 816/70.

In this respect the Commission observes that the provisions of Community law on the harmonization of verification procedures which have been adopted up to the present are not exhaustive and that none of the provisions of the Community rules prevents the application of the presumption of over-alcoholization which is based on the alcohol/dry extract ratio.

However, it adds that the action of the Member States conflicts with the limit which the prohibition on measures having an effect equivalent to quantitative restrictions on imports constitutes. If the controls imposed by a Member State on the products of other Member States were carried out more rigorously than on home-manufactured products, this would be such a measure.

In the Commission's opinion it is impossible to raise the objection to this answer that the presumption in question causes the Community rules on the enrichment of wine to be replaced by the mere conformity of the results of the chemical analysis with the values laid down by national legislation. This objection would only be well founded if the presumption were irrebuttable. On the other hand, although it is fully possible to give evidence in rebuttal, the presumption in question must be considered as a true method of verification.

Moreover, a distinction must be made between the question of the permissibility of the presumption in question in the abstract and the permissiblity of the determination *in concreto* of the values which give rise to the presumption. To fix values for the alcohol/extract ratio which are valid for all Community wines and which penalize wines from other Member States by contrast with home-produced wines is, for example, a measure having an effect equivalent to a quantitative restriction on imports. Although the Commission cannot within the context of these proceedings commit itself as to whether the values laid down in French law are fair in respect of all Community wines, there is nothing in its opinion to make it believe *a priori* that these values penalize wines from other Member States.

Then the Commission dismisses another objection which may be made to the conclusion set out above. The presumption of over-alcoholization is not in conflict with the opportunities of enriching wine legally because simple

mathematical operations are sufficient for the person concerned to show that the enrichment is legal, if such is really the case.

Finally the Commission points out that the effect which Community law has of repealing contrary provisions of national law consists essentially in rendering inapplicable provisions of national law to the extent to which their contents are contrary to the contents of the provisions of Community law. Indeed, a Member State may and sometimes must go further than this and formally repeal provisions of national law. But repealing provisions in this way is then the action of the Member State. In this case, although it is true that Article 25 of Regulation No 816/70 by its wording precludes the applicability in a Member State of a rule the content of which is similar to that of Article 2 of the Law of 24 July 1894, this article, on the other hand, has no effect on the presumption of over-alcoholization unless it is proved that a contradiction exists between these two rules.

The Commission concludes by proposing that the Court should give the following answer to this question:

'In view of Articles 18, 19, 22 and 39a of Regulation No 816/70 and Article 9 of Regulation No 1594/70, a Member State may apply to table wines a presumption of over-alcoholization based on the alcohol/reduced extract ratio even if they come from another Member State, provided that the presumption is worded and applied so as not to put wines from other Member States at a disadvantage in relation to home-produced wines and provided that the persons concerned are allowed to adduce evidence in rebuttal.'

Even though the Cour d'appel, Aix-en-Provence, did not ask questions concerning the method of analysis of the dry extract, the Commission recalls that this question was asked in Case 89/74 *(Arnaud)* v *Procureur général).*

In this connexion the Commission merely claims, as regards the facts, that it is not possible to transpose the alcohol/extract ratio based on one of the two methods of analysis (100° and densimetric methods) into values calculated on the basis of the other, and, as regards the law, that Regulation No 1539/71 does not allow Member States to lay down any other method of analysis of the dry extract than the densimetric method.

At the oral proceedings on 11 June 1975 Mr Margnat, represented by Mr J. Imbach, Mr Seneclauze, represented by Mr P. Guerre, the Fédération nationale des producteurs de vins de table, represented by Mr B. Celice, the French Government, represented by Mr R. Tinlot, Chief Inspector in the Serice de la répression des fraudes and the Commission, represented by its Legal Adviser, Mr G. Marenco, presented oral argument.

During this hearing the parties adduced new arguments which are summarized below:

The *French Government* denies that it had let the rule of presumption fall into disuse and claims that from 1965 to 1974, 54 cases of offences concerning over-alcoholization were brought before the courts, 45 of these cases relating to French wines, 8 to Italian wines and 1 to Spanish wine. Of these 54 cases, 18 were brought before 1970.

That Government also denies that the application of the alcohol/dry extract ratio is an obstacle to freedom of trade. It recalls that almost 6 million hectolitres of foreign wine were imported into France in 1973 and the same quantity in 1974. In the second half of 1972, 2·8 million hectolitres of Italian wine were imported into France; of that 2·8 million, 158 379 hectolitres were analysed and criminal proceedings were only instituted for exceeding the alcohol/dry extract ratio in respect of 9 495 hectolitres.

Moreover, the French Government recalls that most of the samples taken from wines imported by the accused in the main actions took place before 1 September 1971, the date when Regulation No 1539/71 came into operation, which is perhaps the reason why the Cour d'appel, Aix-en-Provence has not asked any questions concerning that regulation.

Messrs Margnat and Seneclauze stress in particular that the rule of presumption is not a mere rule of verification. Since the type of wine must, according to national legislation, depend on an alcohol/dry extract ratio, it is necessarily the very definition of the wine which is at issue. They claim that the difficulties raised for those concerned by the need to supply evidence in rebuttal are so great that this is in fact an irrebuttable presumption.

The Commission claims that the 100° method is not the only method by which a ratio showing over-alcoholization may be determined. It is true that the present ratio in France is determined by the 100° method and it is true that at present there is no alcohol/dry extract ratio based on another method. But, in the Commission's opinion, it is certain that on the basis of experiments based only on the densimetric method a new alcohol/dry extract ratio could be formulated.

The *French Government* replies that it might be possible to create a new rule of presumption based on the alcohol/total reduced dry extract ratio, the total dry extract being calculated by densimeter and making the reduction in proportion to this total dry extract calculated by densimeter. But to work out such a new rule requires a great deal of effort and time. Several years at least would be needed to obtain enough experience.

The Advocate-General delivered his opinion at the hearing on 8 July 1975.

Law

1 By judgments of 20 September 1974 and, with regard to Case 14/75, of 18 October 1974 which were received at the Court on 3 February 1975, the Cour d'appel, Aix-en-Provence, referred under Article 177 of the EEC Treaty two questions on the interpretation of Regulation (EEC) No 816/70 of the Council of 28 April 1970 laying down additional provisions for the common organization of the market in wine (OJ, English Special Edition 1970 (I), p. 234).

2 Since the five cases have the same subject-matter, they must be joined for the purposes of judgment.

3 It follows from the judgments making the reference that the questions were raised during prosecutions brought against French wine traders for offering for sale table wines imported from Italy which had been subject to illegal processes to increase the alcoholic strength.

4 The prosecutions are based on Article 8 of the Code du vin which re-enacts the provisions of the Decree of 19 April 1898 and creates a presumption of over-alcoholization of wine if the proportion of alcohol to reduced extract is in excess of 4·6 in respect of red wines and 6·5 in respect of white wines, subject to certain adjustments which were introduced to take account of particular methods of wine-making.

5 The Cour d'appel, Aix-en-Provence asks essentially whether the Community rules in the wine sector enable the Member States to apply a presumption in law of over-alcoholization such as that laid down in Article 8 of the French Code du vin.

6 Under Regulation No 816/70 certain processes such as the increase of the alcoholic strength by vinification, acidification, deacidification and sweetening are only authorized under the conditions laid down in Articles 18 to 21, whilst the addition of alcohol to wine is prohibited by Article 25.

7 Article 27 provides that the description 'table wine' shall be limited to the wine defined under Item 10 of Annex II to the regulation which lays down *inter alia* certain values relating to the alcoholic strength and to the acidity content.

8 It follows from Article 28a, which was introduced by Regulation No 2680/72 of the Council of 12 December 1972, that wines which have been used in oenological processes not allowed by Community rules or, where such rules do not exist, by national rules, may not be offered or disposed of for direct human consumption.

9 Therefore, although the Community rules do not prohibit Member States from adopting additional and more restrictive provisions with regard to oenlogical processes, there are no grounds for taking the view that the definition of table wine as it appears in Regulation No 816/70 may be supplemented or amended by national provisions.

10 The conclusion must be drawn from this that in order to be entitled to the designation 'table wine' a wine need only comply with the rules of analysis laid down in that regulation.

11 Article 29 of Regulation No 816/70, as amended by Regulation No 2312/71 of the Council of 29 October 1971, provides that from 1 September 1972, wines may be put into circulation within the Community only with an officially checked accompanying document.

12 Regulation No 1022/70 of the Commission of 29 May 1970, which was adopted for a transitional period, provided with regard to trade within the Member States that the competent agency of the producer Member State shall issue an accompanying document which attests, after analysis and organoleptic tests carried out by an official laboratory or institution, that the wine is wholesome and of good merchantable quality and that it complies with the conditions for disposal for direct human consumption within the Community.

13 Regulation No 1769/72 of the Commission of 26 July 1972 which was applicable from 1 April 1973 prescribed the use of an accompanying document containing *inter alia* the particulars necessary to acquaint the consignee with the nature of the product whenever wine is transported between two places in the Community.

14 It follows from this that although the Member States could still prescribe the use of national certificates in respect of their own products moving within their territory during the transitional period, at no time could they require a certificate, other than that governed by Community rules, in respect of products from other Member States.

15 However, the conditions which are necessary to enable a wine to be released to the market for direct human consumption must be fulfilled not only when it is first placed on the market and when it is imported into a Member State but in addition at all the subsequent marketing stages.

16 Therefore, measures of control may prove necessary in order to check that the wine has not been subject at those stages to illegal processes such as the addition of alcohol, which is prohibited by Article 25 of Regualtion No 816/70.

17 Article 39a of Regulation No 816/70, which was introduced by Article 12 of Regulation No 2680/70 of the Council of 12 December 1972, provides that

the Member States shall take all appropriate measures to ensure compliance with that regulation.

18 Moreover, this rule aims to strengthen and to extend the application of that laid down in Article 9 of Regualtion No 1594/70 of the Commission of 5 August 1970 which provides that pending the adoption of Community provisions in this matter, Member States shall take all necessary measures to ensure that the provisions relating to enriching, acidifying and deacidifying are observed.

19 It follows from this that the Member States must take effective measures of control whilst retaining the power to choose the measures which they consider appropriate for that purpose within the limits which have been laid down by other rules of Community law.

20 Thus, when a Member State adopts or maintains, for the detection of illegal enrichment, operations, a presumption in law of over-alcoholization based, like Article 8 of the Code du vin, on the proportion of alcohol to reduced extract, the problem arises whether this provision must be considered as a measure of control which comes within the national jurisdiction or as a rule of analysis which might be incompatible with the Community rules on that subject.

21 Such a presumption in law must be described as a measure of control and not as a rule of analysis when it is not irrebuttable but may be invalidated.

22 It must therefore be concluded that in the present state of the Community rules, a Member State may in principle apply a presumption in law as a measure of control in order to detect cases of over-alcoholization.

23 However, a presumption in law of over-alcoholization would not be permissible as a national measure of control if its application could put at a disadvantage wines from other Member States and therefore constitute a measure having an effect equivalent to a quantitative restriction, which is prohibited by Article 30 of the EEC Treaty and Article 31 (1) (b) of Regulation No 816/70.

24 This would be the case for example if the possibility of rebutting the presumption in respect of wines originating in another Member State were not available in law and in fact to the same extent and under the same conditions as in respect of home-produced wines.

25 The same could apply if the legal provision were so applied that its effect was merely to reverse the burden of proof relating to the special circumstances of the case in question, without accepting that the data relating to the climatic conditions of the producer region, to the methods of wine-making and to the other factors of a general nature having an effect on the proportion of alcohol to dry extract, may be sufficient to rebut the presumption of over-alcoholization.

26 It is in the first place for the national court to check whether such is the case.

27 It is necessary then to consider whether the provisions of Community law on the methods of analysing wine prohibit the application in a Member State of a measure of control based on a presumption of over-alcoholization whenever the proportion of alcohol to dry extract is in excess of certain values.

28 Article 1 of Regulation No 1539/71 of the Commission of 19 July 1971 determining Community methods for the analysis of wines, which came into force on 1 September 1971, provides 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.

29 Item 3 in the annex provides that 'The total dry extract shall be measured by a densimeter and calculated indirectly from the specific gravity of the residue without alcohol'.

30 Therefore, in order to decide whether this method of analysis is obligatory, it must first be examined whether the national measure of control in question comes within the application of Regulation No 816/70 or, as the case may be, of Regulation No 817/70 relating to quality wines produced in specified regions which, however, contains no particular provisions prohibiting the addition of alcohol to wine.

31 In this respect it is important to remember that although Regulation No 816/70 leaves to the Member States the choice of the necessary measures of control, it nevertheless requires them to ensure compliance with the provisions concerning oenological processes, including the prohibition on adding alcohol to wine.

32 In any case, this has been the situation since Regulation No 2680/72 of 12 December 1972, which came into force on 1 January 1973 introduced into Regulation No 816/70 an additional article, 39a, which provides that 'Member States shall take all appropriate measures to ensure compliance with this regulation'.

33 It must be concluded from this that a national measure of control which is intended to detect cases of the addition of alcohol to wine in violation of the Community prohibition comes within the field of application of Regulation No 816/70 and consequently within that of Regulation No 1539/71 on methods of analysis.

34 However, in order to answer the question which has been referred it is also necessary to inquire whether a presumption in law based on the proportion of alcohol to dry extract may be applied in practice if only the densimetric method laid down by Regulation No 1539/71 is permissible for the measurement of the total dry extract.

35 The presumption in question is based on an oenological rule, which is drawn from experience, according to which natural fermentation results in a certain relationship between the weight of the alcohol and that of the reduced dry extract contained in the wine.

36 The concept of reduced dry extract which is relevant in this context appears to differ from the concept of total dry extract prescribed by the provision of Community law not only in that certain substances are deducted but also in that it implies that recourse may only be had to the so-called 100° method in order to extract the dry substances from the wine.

37 It seems in fact that the reduced dry extract cannot be calculated from another method of analysis, in particular the densimetric method, and that

experience shows that no coefficients exist which enable the values of the dry extract obtained by other methods to be transposed into those which would be the result of the 100° method.

38 In spite of the criticism of this method in scientific and professional circles, no other method has been found until now to replace it for the purposes of the presumption in law of over-alcoholization.

39 It follows that this presumption would be rendered impracticable if the densimetric method was obligatory to the exclusion of the 100° method, but that on the other hand the latter may only be applied with caution.

40 The use of the densimetric method laid down by the Community regulation is not an aim in itself but a means intended to ensure compliance with Community rules on oenological processes and on the quality of wines.

41 In the absence of Community measures of control, it would therefore be contrary to the aims of the Community rules on this subject to require that this method be used at the cost of invalidating the only method of control which is at present acknowledged to be appropriate for the detection of over-alcoholization.

42 It must be concluded from this that until more appropriate methods have been formulated, 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.

Costs

43 The costs incurred by the French Government, the Government of the Italian Republic and the Commission of the European Communities which have submitted observations to the Court are not recoverable.

44 Since the proceedings are, so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, it is for that court to make an order as to costs.

On those grounds,

THE COURT

In answer to the questions referred to it by the Cour d'appel, Aix-en-Provence, by judgments of 20 September and 18 October 1974, hereby rules:

Regulations Nos 816/70 and 1539/71 must be interpreted as meaning that:

1. **Table wines, in order to be entitled to that designation and to move freely in the territory of the Member States, need not comply with any rules of analysis other than those laid down in Regulation No 816/70.**

2. **A Member State may not require in respect of wines from another Member State an accompanying certificate, other than that governed by Community regulations.**

3. **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, wines from other Member States.**

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 30 September 1975.

A. Van Houtte
Registrar

R. Lecourt
President