for this reason, equivalent to quantitative restrictions.
This is precisely the case where a national legislature grants the protection provided for indications of origin to appellations which, at the time when such protection is granted, are merely generic in nature.

In Case 12/74

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Heinrich Matthies, acting as Agent, assisted by Peter Ulmer of the Hamburg Bar, with an address for service in Luxembourg at the offices of its Legal Adviser, Pierre Lamoureux, 4 boulevard Royal,

applicant,

v

FEDERAL REPUBLIC OF GERMANY, represented by Professor Thomas Oppermann of the University of Tübingen, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 avenue de l'Arsenal,

defendant,

Application for a declaration that the Federal Republic of Germany is failing to fulfil its obligations under the EEC Treaty, in particular as regards the prohibition on measures having an effect equivalent to quantitative restrictions on imports, by reserving the appellations 'Sekt' and 'Weinbrand' to the domestic product and the appellation 'Prädikatssekt' to wines produced within the country from a fixed minimum proportion of home-grown grapes;

THE COURT

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

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and written procedure

1. The German law on vine products ('Weingesetz') of 14 July 1971 (Bundesgesetzblatt, I, no 63 of 16 July 1971) and the implementing regulation of 15 July 1971 on sparkling wines and spirits obtained by distilling wine (BGBl., I, no 64 of 17 July 1971) provide, *inter alia:*

(a) for *sparkling wines:*

- that the appellation *'Sekt'* may only describe a *home-produced* sparkling wine which satisfies the conditions of quality required by paragraph 3 of the implementing regulation on sparkling wines and spirits obtained by distilling wine and may only be applied to quality foreign wines if German is an official language throughout the whole of the country of production (paragraph 8 of the foregoing regulation). By virtue of paragraph 26 (3) of the Law on vine products, this appellation *may,* moreover, be linked to the condition that the sparkling wine be produced from a minimum proportion of home-grown grapes;
- that the appellation *'Prädikatssekt'* may only describe a home-produced sparkling wine which fulfils the abovementioned conditions and contains at least 60 % of home-grown grapes;

(b) for *spirits obtained by distilling wine:*

- that the appellation 'Weinbrand' may only be used for products entitled to the appellation 'spirits obtained by distilling quality wine' (Qualitätsbranntwein aus Wein) and if German is an official language throughout the whole of the country of production (paragraph 44 of the law on vine products).

As regards sparkling wines and spirits obtained by distilling foreign wines other than those coming from countries in which German is the official language, the law on vine products and the regulation referred to above provide that the designations applicable are, according to the quality, respectively those of 'Schaumwein' or 'Qualitätsschaumwein' and 'Branntwein aus Wein' or 'Qualitätsbranntwein aus Wein'.

By letter of 27 July 1971, the Federal Republic of Germany sent to the Commission the text of this law, as well as the text of the three regulations drawn up for its implementation, including that concerning sparkling wines and spirits obtained by distilling wine.

The Commission had previously been notified of another law on vine products, that of 1969, which never came into force, although it was intended to do so on 20 July 1971. The 1971 Law on vine products, enacted after Regulations Nos 816/70 and 817/70 of the Council of 28 April 1970 (OJ L 99, 1970) was in fact intended to replace the Law of 1969. As only the provisions concerning the 'Weinbrand' were restated without any change in the Law of 1971, the Commission considered that it was

necessary, on the basis of the new texts, to reopen the examination procedure provided for in the first paragraph of Article 169 of the Treaty.

By letter of 12 June 1972 the Commission reopened this procedure, at the end of which it concluded that the appellations in question constituted measures having an effect equivalent to quantitative restrictions, within the meaning of Articles 30 et seq. of the Treaty.

The Federal Government submitted its observations by letter of 27 November 1972 and on 25 October 1973 the Commission addressed to it a reasoned opinion dated 18 October 1973 concerning the provisions of the regulation in question regarding the appellations 'Sekt', 'Prädikatssekt' and 'Weinbrand', and requested it to bring to an end the infringements which had been noted. At the same time another reasoned opinion was delivered concerning other provisions contained in the new legislation on vine products.

By a telex message dated 30 November 1973, the German Government declared that it adhered to its opinion, maintaining that the appellations in question did not contravene any rules of Community law.

On 21 February 1974 the Commission lodged the present application, in accordance with the second paragraph of Article 169 of the Treaty.

2. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without holding any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'— declare that the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty, especially Article 30, and under Article 12 (2) (b) of Regulation (EEC) No 816/70 of the Council of 18 April 1970, by reserving the appellations 'Sekt' and 'Weinbrand' to the domestic product and the appellation 'Prädikatssekt' to wines produced within the country from a fixed minimum proportion of home-grown grapes; and

— order the defendant to pay the costs.'

The *defendant* contends that the Court should:

'— dismiss the application,

— order the applicant to pay the costs of the action.'

III — Submissions and arguments of the parties

The *Commission* maintains that by reserving the generic appellations 'Sekt' and 'Weinbrand' for domestic production the German Government was attempting by legal means to transform these appellations into indirect indications of origin. This attempt involves the adoption of 'measures having an effect equivalent to quantitative restrictions' and consequently infringes both the rules of the Treaty concerning the free movement of goods and Regulations Nos 816/70 and 817/70 (OJ L 99, 1970).

In particular, as regards trade with third countries, these measures infringe Article 12 (2) (b) of Regulation No 816/70. In its reply, the Commission makes it clear that as the scope of this regulation does not extend to spirits obtained by distilling wine, the complaint of infringement of this article necessarily concerns sparkling wines alone.

In support of this complaint the Commission makes the following statements:

1. The fixing, by legislative means, of protected indications of origin is alien to

the German legal system. At least, in the case of indirect indications of origin the German courts are required to decide whether the appellations in question are regarded by the circles interested as being indications of origin and whether this opinion should be upheld because it is justified by considerations concerning the quality of the product.

2. The concept of measures having equivalent effect includes 'measures ... which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production' (Article 2 (1) of Directive 70/50/EEC of 22 December 1969, OJ L 13, 1970), and also covers measures which favour domestic goods. Moreover, in accordance with the principle which may be deduced from Article 33 (4) of the Treaty, concerning quotas, a measure having equivalent effect is prohibited once it is 'likely' to hinder imports, without any need to check whether its effects are actually restrictive.

3. In this instance importation is more difficult and domestic goods are favoured as a result, in particular, of the fact that, on the German market, imported products are no longer entitled to take advantage of the well-known and particularly attractive designations 'Sekt' and 'Weinbrand', but are compelled to use new appellations which are unknown to the consumer. The disadvantage thus suffered by foreign producers results in discrimination against them which is incompatible with the Treaty.

This analysis is, moreover, confirmed by the expert assessment made of the new arrangements — in the form of the first draft of 1967 — and by the statement of the Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht of 12 September 1967 addressed to the President of the Bundestag. In the light of these observations, it appears unnecessary to resort to opinion polls in order to check whether, in the view of the circles interested, the appellations 'Sekt' and 'Weinbrand' do in fact amount to indirect indications of origin.

4. As regards the justification for the geographical link with the 'domestic' appellation, in its observations submitted during the administrative proceedings the Federal Government gave no example demonstrating that the territory of a whole country may also be the subject of indirect indications of origin. Secondly, the reservation which the rules in dispute lay down for the benefit of producing countries regarding the whole of the territory in which German is the official language, shows that the question concerns a generic appellation in the German language and not an indication of origin.

5. In the international bilateral agreements concluded with various states concerning the protection of indications of origin, registered designations of origin and other geographical appellations, the Federal Republic only claimed protection for such appellations as 'Deutscher Sekt' and 'Deutscher Weinbrand'.

6. In order to justify the continued use of the appellations in dispute it is irrelevant to invoke Article 36 of the Treaty and considerations based upon the legal system of industrial and commercial property. Furthermore, although the 'existence' of a right is not necessarily identifiable with its 'exercise', there is no doubt that when, as in this instance, the exercise of a right leads to the walling off of national markets, the right itself is shown to be incompatible with the Common Market.

As it is of interest in the case, the Commission observes that the limitation of the appellations 'Sekt' and 'Weinbrand' to domestic products alone contravenes the principle of the free movement of goods, even on the assumption that a change must be accepted in the view held by interested

circles, as a result of which these appellations are in fact interpreted as indirect indications of origin. The above principle is not compatible with the possibility of protecting information as to quality, drawn from the vocabulary of a Member State, which acts as an indirect indication of origin for the products of the State in question, and of assigning less well known or less attractive appellations to imported products.

The *German Government* replies primarily by putting forward the following arguments:

1. The appellations 'Sekt' and 'Weinbrand' became part of German commercial practice towards the beginning of this century as designations describing a specific quality and type of German sparkling wine and spirits obtained by distilling wine. They were originally parallel appellations to those of 'Champagner' and 'Kognak' for which they were, moreover, finally substituted in 1923, as from that date these two names ceased to be generic appellations and became registered designations of origin limited to French products.

2. Both originally and at present the appellations 'Sekt' and 'Weinbrand' are closely linked to a particular German method of producing the products to which they apply. This method, which was later defined by the legislature, consists of a specific combination of several elements, capable of being checked in all its details, by means of which products are obtained with a specific taste ('German flavour'). This taste confers on the products described as 'Sekt' and 'Weinbrand' their specific characteristics, as a result of which it is impossible to confuse them with foreign sparkling wines and spirits obtained by distilling wine. For producers based outside Germany to imitate this taste would be very difficult if not impossible, by reason of the economic and financial problems which it would involve. To support its arguments the German Government produces, in a schedule to its statement of defence, opinion polls concerning both 'Sekt' and 'Weinbrand'.

3. In the Law of 1971 on vine products the German legislature acknowledged this development as regards 'Sekt' and 'Weinbrand' and sanctioned on the legislative plane a tendency which also exists in other countries to give legal protection to registered designations of origin and indirect indications of origin based upon the view of the circles interested. Furthermore, to take current opinion into consideration is justifiable and in accordance with the German legislature's usual method of proceeding in matters of competition. In particular, for an appellation to be regarded as an indication of origin it is sufficient for a 'not inconsiderable section' of the interested commercial circles to detect the exact origin of the product.

In these circumstances, to regard the appellations 'Sekt' and 'Weinbrand' as measures having an effect equivalent to quantitative restrictions within the meaning of Articles 30 et seq. of the Treaty, while the registered designations of origin and the indications of origin applied by other Member States are regarded as in accordance with Community law, would amount to discrimination against the Federal Republic.

4. As regards the reference made by the Commission to Directive No 70/50/EEC, it should be noted that in Article 1 this Directive, which was drawn up in application of Article 33 (7) of the Treaty, concerns the abolition of measures having equivalent effect in existence on the entry into force of the Treaty.

Although it does not deal entirely with the problem under discussion this Directive nevertheless provides very useful criteria by which to dismiss the argument put forward by the Commission, even having regard to the criteria which the Commission itself saw in this text.

(a) *First:*

— the appellations in dispute are found among the 'names indicative of origin or source' which Article 2 (3) (s) by implication withdrew from the scope of Article 30 of the Treaty. Moreover, they form part of the 'qualified' class of indications of origin. The consumer does not merely establish a connexion between the 'Sekt' and 'Weinbrand' appellations and their geographical origins, but in this case thinks also of the particular properties and the quality of the products (evidence). Such qualified indications of origin, the concept of which is becoming more and more accepted in Germany, are closer to registered designations of origin in the strict sense than are 'ordinary' indirect indications of origin;

— the indirect indication of origin is an acknowledged principle of the law on unfair competition. German law contains no prohibition against regulating indirect indications of origin by legislative means. Moreover the EEC Treaty has provided for no 'standstill' on this matter by the laws of Member States;

— the 'national' rather than 'regional' link in the appellations in question is a necessary result of the circumstances. Current opinion refers in this instance to products of a specific type and quality which are produced, as such, not in a region but in a specific country. Moreover, the 1971 legislation on vine products does not constitute a new departure in this respect, but is linked to principles of German competition law, known and acknowledged for a long time, according to which any part of the surface of the earth, however its boundaries are marked and independently of its extent, may constitute a legitimate point of reference, in particular in questions of indirect, indications of origin;

— the official language clause contained in paragraph 44 (1) of the Law on vine products and in paragraph 8 (1) of the regulation on sparkling wines and spirits obtained by distilling wine, merely constitute an exception for the benefit of the economically insignificant trade in various varieties of Austrian sparkling wines and spirits obtained by distilling wine, traditionally produced mainly in several border regions of Austria. The method of production of the Austrian products in any case shows a certain affinity with German methods of production, which is in part the result of traditions dating from the nineteenth century.

(b) *Secondly,* the quantities of imports into Germany of sparkling wines and spirits obtained by distilling wine, before and after 1971, show that the legislation in dispute had no restrictive effects on the trade in the products in question. On the contrary, starting more or less in 1970 there developed a particularly marked increase in imports from France and Italy. Even accepting the argument put forward by the Commission, according to which the mere fact that measures having equivalent effect are 'likely' to restrict imports is sufficient for them to be prohibited, nevertheless — without prejudice to the question whether such an argument may be applied to names which are indicative of origin within the meaning of Article 2 (3) (s) of Directive No 70/50/EEC — experience shows that the appellations in dispute are unlikely to be restrictive.

(c) *Thirdly,* as the appellations in dispute have no restrictive effect on imports they are not included among the measures which, according to Article 2 (3) (f) of Directive No 70/50/EEC, 'lower the value of an imported product, in particular by causing a reduction in its intrinsic value, or increase its cost'.

(d) *Finally,* the designations limited to imported products readily enable them to remain competitive in relation to the

products designated as 'Sekt' and 'Weinbrand'.

5. Moreover, even supposing that it constitutes a measure having an effect equivalent to quantitative restrictions on imports and that it thus is covered by the scope of Article 30 of the Treaty, the legislation in dispute is justified as regards Community law by Article 36 of the Treaty. It in fact forms part of national competition law and is justified on grounds of public policy and the protection of industrial and commercial property within the meaning of the abovementioned article, whilst being neither a means of discrimination nor a disguised restriction within the meaning of the second sentence of that article.

As regards the distinction between the 'existence' and the 'exercise' of an industrial or commercial property right, such distinction could not be employed in this instance as, if the appellations in dispute were also applied to foreign products, they would for that very reason be deprived of their function as indirect indications of origin.

In its reply, the *Commission* continues to maintain that the prohibition on measures having equivalent effect is not linked to the actual trend of imports. Proof of the existence of obstacles to imports can moreover only be supported by approximate results and by reference to the past. Moreover, the statistical data produced by the German Government concerning the trend in the imports of spirits obtained by distilling wine and sparkling wines are inconclusive. In fact, the increase in imports which took place between 1969 and 1970 was the result of the elimination, required by Article 33 of the Treaty of existing quantitative restrictions which, in the case of the spirits, was strengthened by a State monopoly of a commercial character which the Commission had specifically requested be adjusted in order to ensure the liberalization of trade. As regards the imports made between 1970 and 1973, it must not be forgotten that the transitional arrangements provided for by the law in dispute accepted, at least in 1972, the use of the foregoing appellations in the import and sale of the products in question.

Furthermore, the fact that the measures in dispute are likely to put foreign producers who do not produce these commodities at a disadvantage was shown by the various applications which, even in 1972, had been lodged against them in Germany before the Bundesverfassungsgericht.

The Commission disputes the relevance of the questions set out in the opinion polls submitted by the defendant and points out:

— that the 'language' clause contained in the law in dispute is incompatible with the system of registered designations of origin, according to which the territory in question must not extend beyond national frontiers, and

— that the transitional arrangements provided for in paragraph 75 (6) of this law, which permit the continued provisional use of the appellations 'Sekt' and 'Weinbrand', show that the appellations in dispute were formerly used for imported sparkling wines and spirits obtained by distilling wine.

The Commission continues to maintain that in commercial practice these appellations constituted purely generic indications. This is particularly clear in the case of the 'Prädikatssekt' which is interpreted by the consumer to describe not a given content of domestic wine but a 'Sekt' of exceptional quality.

Moreover, the case-law of the Bundesfinanzhof prior to 1971 shows that the transformation of an appellation which was originally indicative of quality into one which is indicative of origin is only permissible:

— if this transformation is confirmed by the 'almost unanimous' opinion of the circles concerned (74 % being insufficient in this respect);

— if those concerned have had the opportunity to distinguish and compare several comparable products.

In this instance none of these conditions is satisfied. It is for this reason that an opinion poll such as that produced by the defendant is neither indispensable nor conclusive.

As regards the argument that the products covered by the appellations in question have a characteristic and typical (German) 'flavour', this is based on considerations (proportion of home-produced grapes, method of production, etc) which are incorrect and incomplete. or inconclusive. In particular, as regards the necessary conditions of production, the provisions in question showed that the same conditions of quality are required for both 'Sekt' and 'Qualitätsschaumwein'. Moreover, in Germany these conditions are so general that a sparkling wine sold as 'Sekt' might be produced by the most widely differing methods. In these circumstances it is doubtful whether a 'German flavour' can be a characteristic feature and one which is common to all these wines.

The Commission concludes that although it is indisputable that Directive No 70/50/EEC only 'directly' concerns measures having equivalent effect existing when the Treaty came into force, it does, however, call attention to the method of interpretation approved by the Member States and constantly followed by the Commission in this matter. The reservation on the subject of names indicative of origin or source contained in Article 2 (3) (s) of this provision put into concrete form the exception provided for in Article 36 for the benefit of industrial and commercial property. This Directive cannot create exceptions to the prohibition in Article 30 which exceed the framework of Article 36, with the result that any 'name indicative of origin or source' must be considered in the light and within the limits of this latter Article.

The appellations in dispute were not justified by the provisions of Article 36 of the Treaty. First, the powers held by Member States in the context of this article are not absolute, but are limited by the obligations arising out of Article 5 of the Treaty. Secondly, measures such as those in question which favour all products of domestic manufacture have a particularly restrictive effect on the functioning of the Common Market. Such significant restrictions are only justified if they are absolutely indispensable and if no other means exists of achieving the objective in view. Thirdly, these measures constitute a remarkable innovation which is contrary to the established system. Finally, even supposing that the aim of these measures is to protect German producers of 'Sekt' and 'Weinbrand' from unfair competition and consumers from deception with regard to the origin of the products, no risk of fraud or deception existed in the situation prior to the introduction of the contested measures.

In its rejoinder, the *German Government* point out, first, that in its reply the Commission had restricted the complaint originally raised on the basis of Article 12 (2) (b) of Regulation No 816/70 to the case of 'sparkling wines' and requests the Court, in accordance with Article 69 (4) of the Rules of Procedure, to order the Commission to bear the costs involved in that part of the complaint which has been withdrawn.

In addition, it observes that the Commission shows a certain unease at conducting the debate in the field of its own legislation and that it appears, wrongly in a question as important as that in this instance, to be avoiding undertaking a thorough consideration of the facts. To the evidence and the numerous documents (experts' opinions, opinion polls, etc. . .) submitted by the defendant, the applicant merely puts forward an argument based in the main on an abstract analysis of Articles 30 to 36 of the Treaty.

Moreover, an amendment of the

legislation in dispute in the manner desired by the Commission (use of the appellations 'Sekt' and 'Weinbrand' also in relation to imported products) would not be effective, since it would give rise to a serious problem in intra-Community trade as regards 'checks' on the legitimate use of these appellations.

Having put forward these general observations, the German Government emphasizes in particular the following points:

— Article 2 (3) (s) of Directive No 70/50/EEC does not lay down, as regards names indicative of origin or source, an exception to Article 30 of the Treaty based upon Article 36. This article as a whole makes it clear what is to be understood by measures having equivalent effect within the meaning of the Treaty. A different interpretation of this Directive, such as that suggested by the Commission, would deprive Article 5 (2) of any logical content.

— The discussion concerning the 'likelihood' of the measures in dispute to restrict imports of the products in question is irrelevant in this instance. As a result of the legal exception provided for by Article 2 (3) (s) of the abovementioned directive, in the case of names indicative of origin or source it is no longer necessary to ask whether they constitute measures having equivalent effect within the meaning of Article 30 of the Treaty, as such a question is answered in the negative by the directive itself.

— Even if it is true that the exceptional increase in imports which occurred in 1970 and the years following was in part the result of the freeing of intra-Community trade sought by the Treaty, nevertheless, apart from certain seasonal variations, the trend of imports has for a long time been continuously upward (cf. the years 1966 to 1973).

— As regards the argument that the legislation in dispute is at present the subject of certain actions before the Bundesverfassungsgericht, it should not be forgotten that the number of references made to this court each year is very large, as a result of the special characteristics of the German system in this area. Moreover, these references have not yet reached the stage of an examination of the substance of the action, and in the meantime an application for the adoption of interim measures has been rejected by the Court, on the ground that the Law of 1971 on vine products as regards spirits obtained by distilling wine has not injured the parties concerned. Finally, in proceedings before the Court of Justice, the arguments put forward by the parties in an action pending before another court cannot be invoked by way of evidence. It is for the Court of Justice to decide whether the points of view expressed in the context of this action may be taken into consideration; if this is possible, it should suspend the present proceedings until the Bundesverfassungsgericht has given a final ruling.

— The appellations reserved for imported wines have no pejorative meaning resulting in discrimination in respect of those products. The term 'Schaumwein' is merely an altogether neutral designation of quality: it corresponds to the term 'vin mousseux' reserved in France for 'ordinary' sparkling wine not covered by the designation 'Champagne'. The expression 'Branntwein aus Wein' corresponds in its turn to the French term 'eau-de-vie de vin' also used for wine spirits not covered by the designation 'Cognac'. The word 'Qualität' clearly describes a product of high quality and for this reason has no pejorative connotation. Finally, the term 'Prädikatssekt' emphasizes the particularly pronounced nature of a product in which the 'German flavour' is

accentuated as a result of a minimum content of 60 % of domestic wines. Moreover, nothing prevents the imported product from being described by means of the national registered designations of origin or appellations of origin just as the German product is able to use its appellation of origin.

— The Commission is wrong in maintaining that the conditions required by the legislation in dispute for the preparation of quality spirits and quality sprakling wine are similar for domestic and foreign products. On the contrary, the conditions required for domestic products are stringent and are explained by the need to ensure that the product has the 'German flavour' characteristic of 'Sekt' and 'Weinbrand'.

The German Government thus concludes, *principally,* that instead of constituting a measure having equivalent effect, the legislation in dispute is justified in relation to the Treaty, by virtue of Article 2 (1) to (3) of Directive No 70/50/EEC.

It replies therefore, *secondly,* on the problem concerning Article 36 of the Treaty by stating in particular:

— that, although the reservation contained in this article for the benefit of national authorities cannot be expressed in absolute terms, in the field of industrial and commercial property the Treaty has allowed the legislature a sufficient margin of freedom in which to permit national law to develop, as long as it has not been possible to achieve an approximation of national laws according to the procedures provided for by the Treaty. In order for national legislation to be justified as regards Article 36, genuine reasons must exist for its introduction and it must not improperly hinder trade. Interpreted in this sense the legislation in dispute is justified;

— that as this legislation lays down penalties (paragraph 69, subparagraph (3) (2)) it also forms part of German 'public policy' and, for this reason, benefits from the provisions of Article 36 of the Treaty.

At the hearing on 3 December 1974 the parties elaborated the arguments set out in the course of the written procedure. The Court put to the defendant certain questions to which it replied in writing on 13 December 1974. The Advocate-General delivered his opinion at the hearing on 15 January 1975.

Law

1 By an application lodged on 21 February 1974 pursuant to Article 169 of the Treaty establishing the European Economic Community, the Commission seeks a declaration that by reserving the appellations 'Sekt' and 'Weinbrand' to the domestic product and the appellation 'Prädikatssekt' to wines produced in Germany from a fixed minimum proportion of German grapes, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty, in particular as regards the free movement of goods.

2 According to paragraph 26 of the German Law on vine products of 14 July 1971 (Bundesgesetzblatt 1971, I, p. 893) and paragraphs 3 and 8 of the

implementing regulation of 15 July 1971 on sparkling wines and spirits obtained by distilling wine (Bundesgesetzblatt 1971, I, p. 939), hereinafter referred to as the 'legislation on vine products' the appellation 'Sekt' may only describe a German sparkling wine which satisfies certain conditions of quality and may only be applied to foreign wines if German is an official language throughout the whole of the country of production.

By these same provisions the appellation 'Prädikatssekt' may only describe a 'Sekt' containing at least 60 % of German grapes.

Moreover, according to paragraph 44 of the above-mentioned law, the appellation 'Weinbrand' may only be used for a domestic product which is entitled to the appellation 'Spirits obtained by distilling quality wine' and only for a foreign product if German is an official language throughout the whole of the country of production.

Finally, sparkling wines and spirits obtained by distilling foreign wines other than those produced in countries in which German is an official language are, in principle, compelled to employ the appellations 'Schaumwein' or 'Qualitätsschaumwein', 'Branntwein aus Wein' or 'Qualitätsbranntwein aus Wein'.

3 The Commission maintains that the appellations 'Sekt' and 'Weinbrand' are generic appellations which the German legislature has attempted, by means of a legislative measure, to transform into indirect indications of origin; the German consumers and circles interested do not understand the appellation 'Prädikatssekt' to describe a wine produced from a fixed minimum proportion of German grapes, but a 'Sekt' of a particular quality. The Commission further claims that by reserving the appellations ' Sekt' and 'Weinbrand' for national products and the appellation 'Prädikatssekt' for a 'Sekt' containing a fixed minimum proportion of German grapes, while on the German market foreign products are compelled to use appellations which are less esteemed or are unknown to the consumer, the legislation on vine products favours domestic production to the detriment of foreign goods and thus comprises measures having an effect equivalent to quantitative restrictions, contrary to the requirements of Article 30 of the Treaty and, as regards 'Sekt' and 'Prädikatssekt', to Article 12 (2) (b) of Regulation No 816/70 of the Council of 18 April 1970 (OJ L 99, 1970).

Moreover, the Commission states, as the measures in dispute are not indispensable in order to protect producers against unfair competition and consumers against deception regarding the origin of the products, they are not justified under Article 36 of the Treaty.

4 In its principal submission the Federal Republic maintains that the legislature made no changes in the factual situation existing before the entry into force of the legislation on vine products, but merely sanctioned, on the legislative plane, the view of the German economic circles concerned and the German consumer, for whom the appellations in dispute described domestic products.

For this reason the provisions of the legislation on vine products concerning 'Sekt' and 'Weinbrand' formed part of the system of indirect indications of origin and thus, under Article 2 (3) (s) of Directive No 70/50/EEC of the Commission of 22 December 1969 (OJ L 13/29, 1970) could not be described as measures having an effect equivalent to quantitative restrictions. Moreover, the appellation 'Prädikatssekt' describes a 'Sekt' of which the fixed minimum proportion of German grapes used in its production brings out the typically German flavour.

5 The Common Market is based upon the free circulation of goods within the Community.

In order to ensure this freedom the Treaty prohibits, in particular by Articles 12 and 31, the introduction, as between Member States, of new measures whose effect is directly or indirectly to create barriers to trade within the Community which are not justified under Article 36.

More especially, as regards 'Sekt' and 'Prädikatssekt', from the entry into force of Regulation No 816/70 rules concerning the conditions of marketing of these products must be placed in a Community context.

The legislation on vine products adopted in 1971 after the entry into force of this regulation may affect the conditions of supply of the products to which it refers in the German market.

Having regard to the prohibitions set out both in the Treaty and in Regulation No 816/70, it is necessary to consider whether, by introducing the provisions in question, the Federal Republic of Germany failed to fulfil its obligations under the EEC Treaty.

For this purpose it is first necessary to consider the situation created with regard to the appellations 'Sekt' and 'Weinbrand'.

6 Directive No 70/50/EEC, which is based on the provisions of Article 33 (7) of the Treaty, states in Article 1 that its purpose is to abolish measures which

have an effect equivalent to quantitative restrictions on imports operative at the date of entry into force of the Treaty and sets out in Article 2 (3) the measures which must be regarded as prohibited within the meaning of the preceding paragraphs; it refers under Article 2 (3) (s) to measures which 'confine names which are not indicative of origin or source to domestic products only'.

7 Whatever the factors which may distinguish them, the registered designations of origin and indirect indications of origin referred to in that directive always describe at the least a product coming from a specific geographical area.

To the extent to which these appellations are protected by law they must satisfy the objectives of such protection, in particular the need to ensure not only that the interests of the producers concerned are safeguarded against unfair competition, but also that consumers are protected against information which may mislead them.

These appellations only fulfil their specific purpose if the product which they describe doen in fact possess qualities and characteristics which are due to the fact that it originated in a specific geographical area.

As regards indications of origin in particular, the geographical area of origin of a product must confer on it a specific quality and specific characteristics of such a nature as to distinguish it from all other products.

8 The German legislation on vine products provides that the appellations 'Sekt' and 'Weinbrand' shall describe products originating in the Federal Republic of Germany or coming from other countries throughout the whole of which German is an official language.

An area of origin which is defined on the basis either of the extent of national territory or a linguistic criterion cannot constitute a geographical area within the meaning referred to above, capable of justifying an indication of origin, particularly as the products in question may be produced from grapes of indeterminate origin.

In this instance, it is not disputed that the area of origin referred to by the legislation on vine products does not show homogeneous natural features which distinguish it in contrast to adjacent areas, as the natural characteristics of the basic products used in the manufacture of the products in question do not necessarily correspond to the line of the national frontier.

The German Government maintains, however, that the products covered by the appellations 'Sekt' and 'Weinbrand' are clearly distinguished from all other products as a result of the particular method of manufacture used in Germany which confers on them a typical flavour, which is moreover brought out in 'Prädikatssekt' by the required minimum content of German grapes.

9 In the case of vine products, the natural features of the area of origin, such as the grape from which these products are obtained, play an important role in determining their quality and their characteristics.

Although the method of production used for such products may play some part in determining their characteristics, it is not alone decisive, independently of the quality of the grape used, in determining its origin.

Moreover, the method of production af a vine product constitutes a criterion which is all the less capable of being by itself sufficient to which it is not linked with the use of a specific type of grape, the method in question may be employed in other geographical areas.

It is impossible to exclude the possibility that the method of production employed in a given area may be practised, in so far as it is not protected by exclusive rights, by producers who are wholly or partially established in other geographical areas.

Moreover, a comparison of the provisions of paragraph 3 (1) with those of the third sentence of paragraph 8 (1) of the national regulation on sparkling wines and spirits obtained by distilling wine shows that, taking Schedule 2 to that regulation into account, the conditions which must be satisfied by quality foreign sparkling wines and by 'Sekt' are in the main identical.

Similarly, as between 'Weinbrand' and spirits obtained by distilling quality foreign wine, the provisions of paragraph 40 (1) and of paragraph 44 (1) of the Law on vine products do not show an appreciable difference in the requirements of quality applicable to each product.

Moreover, the condition laid down in paragraph 40 (1) no 4 regarding 'Weinbrand' is all the less essential in this instance as, first, the legislation on vine products does not exclude the possibility that the domestic distillate may be obtained from foreign wines and, secondly, the obligation to stock this distillate in an undertaking situated in German territory does not necessarily imply that all the producers established in this same territory in fact employ the specific method of production in question.

10 In the light of these considerations it cannot be shown from the arguments based by the defendant on the method of production used for 'Sekt' and 'Weinbrand' that, by reason of this method, these products have a quality and characteristics peculiar to them which render them typically German products.

Furthermore, it is not disputed that the law in force until 1971 in the Federal Republic of Germany allowed, as regards 'Sekt', and even required, as regards 'Weinbrand', the use in German of the appellations in dispute as regards the imported products.

Both the provisions of paragraph 75 (6) of the Law on vine products which provides for a transitional system of implementation and the reactions to this law in the courts of the Federal Republic of Germany by importers or producers of both foreign sparkling wines and spirits obtained by distilling foreign wine show by implication that, from the entry into force of this law, the appellations in question were in fact applied to at least a part of the imported products.

When the defendant maintained in its reply to a question put by the Court during the oral procedure that the use of these appellations to describe imported products had been 'very infrequent', it was referring to the year 1966, that is, to a period in which the supply of these products on the German market was still very limited by reason of national restrictions on imports which were in force at that time and destined to be abolished a short time later by virtue of the Treaty.

In fact, the statistics concerning the imports which were made during the years following 1966 show that in the Federal Republic of Germany these imports increased considerably, in particular during the years 1969 and 1970.

Moreover, the details provided by the defendant concerning the sales of German sparkling wine and imports of foreign sparkling wines show that, during the years 1969 to 1971, imports and, as a result, the quantities available on the German market increased at a much greater rate than did sales of the domestic product, although, on the other hand, this rate decreased in relation to sales during the years following the entry into force of the legislation on vine products.

It must therefore be accepted that use of the contested appellations to describe imported products, although it was still very infrequent, particularly in 1966, from the entry into force of the legislation on vine products may have applied to increasingly large quantities of such products.

11 It must therefore be concluded that as the appellations 'Sekt' and 'Weinbrand' do not apply to products whose quality was essentially the result of their being restricted to a particular area of origin and as they could or should describe both imported goods and domestic production, such appellations were not, at the time of the entry into force of the legaslation on vine products, capable of identifying the products in question as German, on the basis of their specific quality and characteristics.

12 The defendant puts forward opinion polls in order to show that, at the date referred to above, in the opinion of the German consumer the appellations 'Sekt' and 'Weinbrand' referred to the domestic product.

As, however, the protection accorded by the indication of origin is only justifiable if the product concerned actually possesses characteristics which are capable of distinguishing it from the point of view of its geographical origin, in the absence of such a condition this protection cannot be justified on the basis of the opinion of consumers such as may result from polls carried out on the basis of statistical criteria.

In addition, by reason of the difficulties which are inherent in these types of inquiry, opinion polls are, by their very nature, incapable of producing results on the basis of which the facts in dispute may be objectively assessed.

Moreover, the polls on which the defendant relies were carried out in 1966 and 1973 during periods which in this instance cannot be regarded as conclusive as, in 1966, measures to restrict imports of the products in question were still in force in the Federal Republic and at the date of the later polls the legislation on vine products had already been in force two years.

It results from the foregoing considerations that the appellations 'Sekt' and 'Weinbrand' do not constitute indications of origin.

13 As regards the appellation 'Prädikatssekt', which was created by the legislation on vine products, it cannot be accepted that the use of 60 % of German grapes confers a particular flavour on the product in question.

In fact, as the legislation on vine products does not define the grapes which must be used in the production of 'Prädikatssekt' with reference to their specific character but only on the basis of their national origin, the minimum percentage required does not necessarily imply that the product in question is actually of a special quality in comparison with 'Sekt' and thus warrants the protection accorded to it.

14 The provisions of the Treaty establishing the free movement of goods, in particular those of Article 30, prohibit, as between Member States, quantitative restrictions on imports and all measures having equivalent effect.

Under the terms of Article 2 (3) (s) of Directive No 70/50/EEC of the Commission, measures which 'confine names which are not indicative of origin or source to domestic products only' are to be regarded as prohibited within the meaning of Articles 30 et seq. of the Treaty.

By reserving these appellations to domestic production and by compelling the products of the other Member States to employ appellations which are unknown or less esteemed by the consumer, the legislation on vine products is calculated to favour the disposal of the domestic product on the German market to the detriment of the products of other Member States.

Thus, this legislation on vine products involves measures having an effect equivalent to quantitative restrictions on imports within the meaning of the abovementioned provisions; such measures, as regards imports of sparkling wines from third countries, are contrary to Article 12 (2) (b) of Regulation No 816/70 of the Council.

For the purposes of this prohibition it is not necessary to show that such measures actually restrict imports of the products concerned but, in accordance with Article 2 (1) of the abovementioned Directive, that they may merely hinder 'imports which could otherwise take place'.

Moreover, the statistics contained in the rejoinder show that, as regards imports of sparkling wines in particular, after the entry into force of the legislation on vine products, the annual rate of increase of these imports declined in relation to that of the years 1969 and 1971.

15 The fact that the appellations 'Sekt' and 'Weinbrand' do not constitute indications of origin signifies that the measures in dispute which are included in the legislation on vine products cannot be justified under Article 36 of the Treaty on grounds of the protection of industrial and commercial property.

The defendant maintains, however, that by referring to national rules on industrial and commercial property, the abovementioned Article 36 does not intend to refer to a specific system of legal protection of such property, but leaves to the Member States the power to prepare and develop such a system, and that in this instance the system in force in the Federal Republic of

Germany in the field of indications of origin, whilst still forming part of the law on competition, is in fact developing towards that of industrial and commercial property.

16 However, such an unlimited development would run the risk of progressively restricting the scope of the Treaty.

Although the Treaty does not restrict the power of each Member State to legislate in matters of indications of origin, they are nevertheless prohibited by the second sentence of Article 36 from introducing new measures of an arbitrary and unjustified nature whose effects are, for this reason, equivalent to quantitative restrictions.

This is precisely the case where a national legislature grants the protection provided for indications of origin to appellations which, at the time when such protection is granted, are merely generic in nature.

17 The Federal Republic of Germany maintains in addition that the measures in dispute are justified on grounds of public policy, within the meaning of Article 36 of the Treaty, in particular by reason of the need to protect producers against unfair competition and consumers against deception regarding the origin of the products.

However, independently of any definition of the concept of public policy referred to in Article 36 of the Treaty, this provision could only derogate from Articles 30 to 34 to the extent to which such derogation proves necessary in order to ensure that the producer and consumer are protected against fraudulent commercial practices.

Vine products of the same type may differ from each other by reason of their quality and certain of their characteristics.

Moreover, before the entry into force of the legislation on vine products a designation of the origin of at least some of the products in dispute appeared on the labelling beside the generic appellation.

The defendant has not shown the reasons for which it has modified this practice.

18 It must therefore be concluded that by reserving, in the Law on vine products and in the implementing regulation on sparkling wines and spirits obtained by

distilling wine of July 1971, the appellations 'Sekt' and 'Weinbrand' to the domestic product and the appellation 'Prädikatssekt' to wines produced in Germany from a fixed minimum proportion of German grapes, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the Treaty and, as regards sparkling wine, under Article 12 (2) (b) of Regulation No 816/70 of the Council of 28 April 1974.

Costs

19 Under the terms of Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading.

In this instance the Federal Republic of Germany has failed in its submissions.

It maintains, however, that as, in its reply and contrary to the terms of its application, the Commission restricted the ground of complaint based on the infringement of Article 12 (2) (b) of Regulation No 816/70 to sparkling wine, it has partially discontinued its application and should for this reason be ordered to pay the costs involved in such discontinuance in accordance with Article 69 (4) of the Rules of Procedure.

20 It follows from Article 1 (2) of Regulation No 816/70 that this regulation, which concerns *inter alia* sparkling wine, does not refer to spirits obtained by distilling wine.

Therefore, by limiting the ground of complaint based on the infringement of Article 12 (2) (b) of Regulation No 816/70 to sparkling wine, the Commission has not amended the conclusions of the application, but has added thereto details arising from the scope of this regulation.

Consequently, it is unnecessary for Article 69 (4) of the Rules of Procedure to be applied in this instance.

On those grounds,

THE COURT

hereby:

1. Declares that by reserving, in the Law on vine products of 14 July 1971 (Bundesgesetzblatt 1971, I, p. 893) and in the implementing regulation on sparkling wines and spirits obtained by distilling wine of 15 July 1971 (Bundesgesetzblatt 1971, I, p. 939) the appellations 'Sekt' and 'Weinbrand' to domestic production and the appellation 'Prädikatssekt' to wines produced in Germany from a fixed minimum proportion of German grapes, the Federal Republic of Germany has failed to fulfil its obligations under Article 30 of the Treaty and, as regards sparkling wine, under Article 12 (2) (b) of Regulations No 816/70 of the Council of 28 April 1970 (OJ L 99/1, 1970);

2. Orders the Federal Republic of Germany to pay the costs.

Lecourt Mertens de Wilmars Mackenzie Stuart

Donner Monaco Pescatore Kutscher

Delivered in open court in Luxembourg on 20 February 1975.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 15 JANUARY 1975

My Lords,

On 14 July 1971 the Federal German Parliament enacted a new statute about wine, the Weingesetz of that date. Among the implementing regulations made under that statute the following day was a set of regulations concerning sparkling wine and brandy, the Schaumwein-Branntwein-Verordnung of 15 July 1971. I will, for convenience, refer to that statute and to those regulations, together, as 'the 1971 legislation'.

So far as relevant to this case, that legislation provides:

(1) that, in the Federal Republic of Germany, sparkling wine, whether produced in Germany or elsewhere, is in general to be described as 'Schaumwein', but that, if it complies with certain prescribed standards of quality, it may be described as 'Qualitätsschaumwein';