

OPINION OF MR ADVOCATE GENERAL LENZ  
delivered on 25 May 1989\*

*Mr President,  
Members of the Court,*

Details of the allegations of unlawful acts or omissions can be found in the Report for the Hearing. For the purpose of making my Opinion comprehensible I shall make the following brief remarks.

A — Facts

1. The joined cases on which I give my Opinion today are claims for damages against the Commission brought (in Case 326/86) by 20 applicants residing in Belgium, the Netherlands and Italy who are involved with the cultivation and sale of Italian wine (or only with the latter) and (in Case 66/88) by 11 persons resident in Italy who are the personal representatives of four people who died on 2 March, 10 March, 16 March and 5 June 1986 after drinking Italian wine containing methanol.

2. In the first case it is alleged that the applicants suffered substantial loss of turnover and corresponding loss of profits after dangerous additives were discovered in the summer of 1985 and spring of 1986 in Italian wine. In the second case damages are claimed for the death of close relatives who died after drinking adulterated Italian wine.

3. The Commission is alleged to be responsible for that damage because it did not by appropriate measures prevent the adulteration of wine from occurring or because it did not at least ensure that the adverse consequences were more limited.

4. It is alleged (I am now proceeding chronologically) that as early as 1976 there were Italian press reports that artificial wine was being manufactured (Annex 6 to the reply in Case 66/88). The measures subsequently introduced to stabilize the market, in particular the measures financed out of Community funds to eliminate wine surpluses (by distillation) were so conceived, it is said, that they encouraged abuse in the form of the manufacture of synthetic wines (because there was no provision for thorough analysis before distillation and the term 'table wine' was so defined that adulteration of wine was not discovered on inspection). In particular it ought to have been apparent (reference was made to a parliamentary report — Annex 1 to the reply in Case 66/88 — and to a special report of the Court of Auditors<sup>1)</sup>) first that there was a marked increase in wine distillation in 1984 and secondly that Italian wine stocks, which were stated to be 19 million hectolitres at the end of August 1984, were

\* Original language German

1 — OJ 1987, C 297, p 14

said in a declaration in December 1984 to have been 40 million hectolitres on 1 September 1984.

**B — Opinion**

5. When in the summer of 1985 Austrian wine adulterated with glycol was discovered there were reports in the Belgian press, following a press conference given by the Commission on 27 August 1985, that Italian wine was also similarly adulterated, whereupon two customers of an applicant in Case 326/86 cancelled their orders at the beginning of September 1985. In spite of being requested to do so the Commission did not consider it proper to reveal the names of the undertakings involved (which would have made it possible to limit the damage to the reputation of Italian wines and prevent further operations by the firms concerned). It did not, say the applicants, think of taking the affected wines off the market (pursuant to the Council Decision of 2 March 1984<sup>2</sup>) and introducing more thorough inspections. Finally it is also significant that although the first death from drinking wine adulterated with methanol occurred at the beginning of March 1986 and accordingly there were considerable reductions in the sale of Italian wine, the Commission reacted only at the end of March 1986 and moreover did not make effective use of the available possibilities (in particular it did not carry out any direct inspections pursuant to Article 9 of Regulation No 729/70<sup>3</sup>).

6. When we consider, having regard to the foregoing, whether the complaint of a wrongful act or omission (wrongful omission to adopt the requisite measures which would have prevented or limited the damage) can be substantiated, which is the first question which arises in cases of non-contractual liability, the following detailed observations, in my view, are called for.

7. 1. It is important to observe as a matter of principle that according to the structure of the organization of the wine market as laid down by the Council it is a matter for the Member States to ensure compliance with the Community provisions in the wine sector and for that purpose to designate authorities for verifying compliance (Article 64 of Regulation No 337/79<sup>4</sup>). That is in line with the consistent formula to be encountered in all agricultural sectors, which is based on the obvious consideration that the authorities of the Member States are closer to the relevant circumstances and on a concern not to inflate the Community administration. For that reason Article 8 of Regulation No 729/70 on the financing of the common agricultural policy provides quite generally that the Member States are to 'prevent and deal with irregularities'. In the same way Article 6 of Regulation No 283/72<sup>5</sup> provides that where irregularities or negligence have taken place the Member States are to hold an administrative inquiry. Article 3 of Regulation No 359/79 on direct cooperation between the bodies designated by Member States to verify compliance with

2 — OJ 1984, L 70, p. 16.

3 — OJ English Special Edition 1970 (I), p. 218.

4 — OJ 1979, L 54, p. 1.

5 — OJ English Special Edition 1972 (I), p. 90.

Community and national provisions in the wine sector<sup>6</sup> provides that the competent bodies of the Member States are to study in detail any grounds for suspicion brought to their attention. Similarly Article 1 of the Council Decision of 2 March 1984 introducing a Community system for the rapid exchange of information on dangers arising from the use of consumer products<sup>7</sup> assumes that the Member States will decide on urgent steps to prevent the marketing of a product if there is a risk to the health or safety of consumers.

8. Obviously the Community institutions are not freed from all responsibility in this way, at least in so far as it is not a question of areas such as protection of health in the wine sector (which, as the Commission rightly stressed, is not subject to Community regulation but is purely a national affair). They are, however, at most responsible for supervising the national authorities, and they have occasion to intervene (by amending Community legislation or bringing proceedings for failure to fulfil obligations) only if there is clear evidence that the (primary) national inspection is carried out inadequately and thus there is an infringement of Community law.

9. 2. When, against that background, we turn to the abovementioned 1976 press report (in which it is suggested *inter alia* that Community departments knew the formula by which synthetic wine could be manufactured and that a place had been discovered where synthetic wine was being

manufactured), it is clear to me that that report is not sufficient to place the Commission under an obligation to take action. Assuming that the Commission was aware of it and that the information concerned matters covered by the Community rules, it was legitimate to suppose the national authorities would carry out the requisite examinations and do all that is possible and necessary to stop an unlawful practice. Since, moreover, it was not apparent that in the ensuing years there were any grounds for thinking that the national monitoring measures were inadequate (in fact there was talk of adulterated wines again only in 1985) the Commission cannot be accused of neglecting to bring an action at the proper time for failure to fulfil obligations, thereby bringing about an improvement in national inspections and so contributing to the prevention of the irregularities which are a central issue in the present proceedings.

10. I thus conclude that the 1976 press report provides no evidence (i.e. of a wrongful omission) in support of the applicants' claim.

11. 3. As regards the events of 1984 to which the applicants, referring to the documents mentioned at the outset, attach great importance, the considerable increase in wine distillation (compared with deliveries in December 1983 distillation increased by 14 million hectolitres) and the spectacular amendment of the particulars of Italian stocks (from 19 million hectolitres in

6 — OJ 1979, L 54, p. 136

7 — OJ 1984, L 70, p. 16

August 1984 to 40 million hectolitres at the beginning of the following wine-marketing year) are indeed remarkable.

12. There is no evidence, however, that the manufacture of synthetic wine played any role. It is significant that the parliamentary report cited by the applicants (Annex 1 to the reply in Case 66/88) merely raises questions and conjectures and asks the Commission 'à indiquer les liens éventuels avec la production de vins non naturels'.<sup>8</sup> On the other hand we are told that investigations by a group of experts which were commissioned in May 1984 produced nothing and it must also be admitted that the explanation cannot be lightly dismissed that the abundance of the previous harvest, mistakes in the estimate of consumption and errors in reports of stocks all played a role.

13. Furthermore, the Commission cannot be accused, having regard to the information then at its disposal, of reacting inadequately to those events. Leaving aside the fact that it addressed urgent questions to the Italian Government in respect of the change in the reports of stocks in the spring of 1985, it took measures to ensure, since there had previously been problems with accounts in the wine sector and anomalies had arisen, that it did not have to rely only on information from the Member States but could have recourse to other sources;<sup>9</sup> it obtained

amendments to the rules on distillation;<sup>10</sup> in December 1985 it proposed the introduction of a register of land under vine cultivation (which was adopted by the Council in July 1986); and in March 1985 it participated in a joint declaration of the European Parliament, the Council and the Commission in which *inter alia* the necessity for increased controls in the wine market was emphasized (Annex to the defence in Case 66/88).

14. 4. With regard to the applicants' view that the Community rules on wine distillation were so conceived and applied that they encouraged the manufacture of synthetic wine, I must agree right away with the Commission's observation that there is no evidence that the wine adulterated with glycol in 1985 and the wine adulterated with methanol in 1986 at issue in the present proceedings are connected with distillation. As the Commission stated without being contradicted, those wines were discovered in bottles intended for human consumption, and it is significant that even the applicants argued at the hearing that natural wines were delivered for distillation and synthetic wines came on to the market (which naturally suggests the conclusion that stricter surveillance of distillation would in no way have prevented synthetic wines from coming on to the market and causing damage.

15. Nor is it possible to accept the applicants' submission that the rules on distillation were so attractive that they encouraged the delivery of too much wine

8 — See the resolution of the European Parliament, OJ 1987, C 190, p. 149, point 8, fourth indent ('— what links there are with the synthetic production of wine').

9 — See Regulation No 2102/84 on harvest production and stock declarations relating to wine-sector products, OJ 1984, L 194, p. 1; Regulation No 2396/84 laying down detailed rules for drawing up the forward estimate in the wine sector, OJ 1984, L 224, p. 14.

10 — Regulation No 2687/84 of 18 September 1984, OJ 1984, L 255, p. 1.

and therefore synthetic wine had to be manufactured for the market. The Commission rightly countered that this appears unlikely in view of the wine surpluses which continued to exist in spite of distillation.

16. It is, moreover, also significant in this connection that, in accordance with what was previously the general position as regards the organization of the wine market, the Community rules are so structured that inspection is a matter for the Member States,<sup>11</sup> that is to say, they are primarily responsible for preventing abuses. There is, however, no evidence that the national inspections were negligent and inadequate at a time when it might have been possible for the Commission (perhaps by means of an action for failure to fulfil obligations under Article 169 of the EEC Treaty) to bring about a change and thus prevent events such as those of 1985 and 1986. Criticism of national inspections is expressed only in a letter of 25 May 1986 from Mr Ripa di Meana, a Member of the Commission (Annex 12 to the application in Case 66/88 — he complains of the lack of a public inspection system in Italy), in the 1987 parliamentary report which has already been mentioned and in the report of the Court of Auditors, also from 1987, which relates to inspections carried out in Italy in 1985 and 1986 (another report of the Court of Auditors dated January 1985 and relating to 1984 criticizes only French measures of inspection).

17. Finally, the applicants' view that the distillation rules are defective since they do not provide for any analysis on the entry of

the wine into the distillery, which would of necessity result in the detection of synthetic wine, cannot be accepted. It must indeed be admitted in that respect that Article 22 of Regulation No 2179/83, relating to the checking of products when they enter the distillery, mentions expressly only quantity, colour and alcoholic strength, but it is clear from the use of the expression 'in particular' that that list is not exhaustive, and Article 22 also provides that Member States may carry out checks by sampling. In my opinion they may be regarded as adequate rules for the Member States, which, in view of the provisions of agricultural policy as a whole, must be conscious of their responsibility for the correct application of the rules, and would certainly have allowed the Italian authorities responsible for inspection (their attention must have been awakened already by the 1976 press reports) to look out for abuse of the intervention rules by the production of synthetic wine, should any abuse have been attempted.

18. 5. With regard to the events of the summer of 1985 — the appearance of Austrian wine adulterated with glycol and the discovery of glycol also in certain Italian wines — it is important first of all to observe that in the Commission's statement of 27 August 1985 (Annex 1 to the defence in Case 326/86) no areas of origin or firms are mentioned (which means that such particulars in the Belgian press of 28 August 1985 — Annex 1 to the reply in Case 326/86 — and the resulting damage are not the Commission's responsibility). It is also significant that the Commission expressly

<sup>11</sup> — See Article 27 of Regulation No 2179/83, OJ 1983, I 212, p 1

stressed that only 'very slight traces' of that substance had been found in nine Italian wines, which indicated that there was no risk to health which might cause consumers to stop drinking Italian wine (the Commission itself says that that fact mitigated the damage).

19. Furthermore, it must be made clear that the Commission was not asked at the press briefing for the names of the firms involved and that there was no such request to the Commission afterwards. The telex message of 29 August 1985 to which the applicants refer in that respect (of which only a copy was forwarded to the 'Service de santé de la CEE') was addressed to the editor of the newspaper *Le Soir* and simply contained a request to that newspaper to reveal the names of the three companies mentioned in the newspaper article of 28 August 1985. It was only in a letter of 25 March 1986 that the Commission itself was requested to specify the firms involved (that is to say, at a time when the scandal of Italian wine adulterated with methanol had already occurred and thus could no longer be prevented by revealing the names), and that request contained an incorrect reference to the contents of the press announcement in August 1985.

20. With regard, moreover, to the question whether the Commission should have volun-

teered the names of the firms involved, I think it is clear that the reason for its negative attitude was the fact that it was aware only of very slight, that is to say not injurious, traces in nine Italian wines. In such circumstances it was certainly reasonable, in order to avoid the risk of claims by the firms concerned, for the Commission to display some reticence and, pending completion of the investigations by the Italian authorities, avoid negative publicity. That is so not least because even if the names of certain undertakings had been disclosed it was not to be excluded that there might be a general mistrust of Italian wine, with corresponding effects on sales.

21. However, in reply to this submission of the applicants the Commission could rely above all on the Community information system, which leaves it to the national authorities to pass on information — entirely reasonably, since the competent national authorities are closer to the circumstances to be investigated. Article 64 of Regulation No 337/79 on the common organization of the market in wine is also relevant; it requires the national authorities to maintain contact with one another so that, through the exchange of information, infringements may be prevented or detected. Article 2 of Regulation No 359/79, furthermore, proceeds on the basis that in the event of irregularities in the wine sector the competent national authorities will exchange information (and Article 7 states that such exchange of information is to be covered by professional secrecy). Mention should also be made of the Council Decision of 2 March 1984 introducing a Community system for the rapid exchange of information on dangers arising from the use of consumer products,<sup>12</sup> Article 1 of which provides that

<sup>12</sup> — OJ 1984, L 70, p. 16.

national agencies which take measures to guard against risks to the health of consumers are to inform the Commission, so that it can pass on the information to the competent authorities of the other Member States (Article 6 provides that in justified cases information may be treated as confidential). On that basis, as the Commission mentioned in its defence in Case 66/88, there was an agreement between the Member States and the Commission, to the effect that if necessary the national authorities should publish information to avoid risks to health.

22. That was done in the summer of 1985, as the Commission informed us. In that respect it is significant, because it was obviously the source of a United Kingdom press report of 22 August 1985, on which the Belgian press reports were probably based, that on 16 August 1985 the competent United Kingdom authorities had informed the other Member States about the Italian wines adulterated with glycol and had named certain firms (Annex 1 to the Rejoinder in Case 66/86). Accordingly the Commission could certainly assume that the national authorities would inform consumers if necessary and, contrary to the applicants' view, did not need in any way to feel obliged to act in their place.

23. Moreover, as regards the applicants' view also put forward in this connection that the Commission ought to have withdrawn the adulterated wines from the market in the autumn of 1985 or at least have ensured increased supervision of the national authorities, it is clear first of all that the Commission had no power to take the first measure, which is a matter for the national authorities (and hence it may at

most be claimed that had those authorities acted in good time against two firms which supplied wine contaminated with glycol and were later involved in the methanol wine scandal, the latter might at least in part have been avoided). Secondly, it should be said that simply on the basis of the appearance of relatively innocuous wines in the summer of 1985 and without further specific evidence the Commission hardly had cause to take special measures to check the Italian monitoring measures (in so far as that is at all a matter for the Community). It may, however, be added that the Commission certainly did not remain completely inactive. Let me refer to the answer of Mr Andriessen, a Member of the Commission, to a parliamentary question of 6 September 1985,<sup>13</sup> stressing the need for increased inspections and stating that the Commission was preparing proposals to amend the relevant legislation. Reference may also be made to the Commission's replies to the Court of Auditors' special report on Community wine distillation measures,<sup>14</sup> according to which in early 1986 the Commission submitted a proposal for amendment of the general distillation rules providing for tighter verification on entry into the distilleries. Finally, I should refer to the letter from Mr Ripa di Meana, a Member of the Commission, of 25 May 1986, from which it appears that in February the Commission had announced a proposal for the establishment of a special inspection service, and the answer of Mr Andriessen to a parliamentary question of 17 September 1985,<sup>15</sup> which stated that the Commission was planning an amendment to Regulation No 359/79 on cooperation between the Member States on wine supervision measures. As a result, in July 1987 Regulation No 822/87 on the common organization of the market in wine was amended (Article 79 now provides that the Council should adopt rules to set up a

13 — OJ 1986, C 123, p. 4.

14 — OJ 1987, C 297 at p. 43.

15 — OJ 1986, C 156, p. 3

Community monitoring system<sup>16</sup>) and a proposal was submitted to that effect by the Commission on 29 December 1987,<sup>17</sup> the implementation of which, as is well known (I refer once again to Mr Ripa di Meana's letter), encountered considerable objections of principle.

24. 6. In the light of the foregoing there is not much left to be said on the remaining issue, namely the Commission's conduct after the discovery of the Italian methanol wine scandal.

25. Since the Commission was first informed of the scandal by a telex message from the Italian Ministry of Health of 19 March 1986, that is to say after most of the regrettable deaths at issue in Case 66/88 occurred, this point is relevant mainly to Case 326/86, which is concerned with the loss of sales as a result of the damage to the reputation of Italian wines and its possible limitation. It should be mentioned first of all that, as the Commission stated without being contradicted, pursuant to the relevant Community rules it immediately passed on the information it had received to the other Member States and continued to keep contact with the Italian authorities who had taken charge of investigating the events.

26. It is also relevant that in Italy certain measures were immediately taken. Reference may be made to the decree mentioned in the defence in Case 326/86, which required a certificate of analysis for the export of wine; to the aforementioned letter from Mr Ripa di Meana, which mentions a decree of 11 April 1986 for preventing and punishing the adulteration of food; and to the fact that on page 5 of the defence in Case 66/88 it is stated (and this point was not contradicted) that the publication of an article in the magazine *Vigne e Viti* of 6 March 1986 contributed to a rapid reorganization of the national inspection service.

27. We were also told — in this respect a letter of 13 June 1986 from a Member of the Commission (Annex 4 to the application in Case 326/86) is of interest — that in May 1986 the Commission asked all Member States to ensure that the competent authorities re-examine the methods of inspection in the wine sector.

28. With regard to the applicants' claim — to which it seems they attach particular importance in this connection — that the Commission (in a letter of 15 May 1986) requested the Italian authorities to hold an inquiry under Article 6 of Regulation No 283/72<sup>18</sup> of the Council and did not hold

16 — OJ 1987, L 184, p. 27.

17 — OJ 1988, C 24, p. 8.

18 — OJ English Special Edition 1972 (I), p. 90.



one under Article 9 of Regulation No 729/70 (which refers to inspections on the spot by the Commission), it must be borne in mind (quite apart from the fact that the Commission's inspectorate is not of sufficient size for such an extensive inspection) that the inspections under Regulation No 729/70 are concerned with the financing of the common agricultural policy and relate to documents, that is to say not the sale of wine on the market. It is also relevant that Article 6 of Regulation No 283/72 provides for the possibility of Commission employees taking part in the inquiry into irregularities, and that this was the intention of the Commission (as is apparent from the aforementioned letter of 13 June 1986, in which, moreover, it is stated that the Commission reserves the right to conduct special investigations

pursuant to Article 9 of Regulation No 729/70).

29. Accordingly it must be concluded (not least because it is clear that the bringing of lengthy proceedings for failure to fulfil obligations would hardly have helped the interests of the applicants) that the Commission's conduct after the discovery of the Italian wine scandal in the spring of 1986 can not be regarded as constituting a wrongful act or omission.

30. 7. It is not necessary to discuss any further issues in relation to an alleged wrongful act or omission (causation, damage, if necessary proof of special damage) beyond what has already been mentioned in other contexts.

### C — Proposal

31. 8. In conclusion it should thus be held that the applicants' claims that the Commission has in various respects failed to fulfil its obligations are unfounded.

32. I therefore propose:

- (1) that the application be dismissed;
- (2) the applicants be ordered to pay the costs.