On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Finanzgericht Rheinland-Pfalz, by order of 24 November 1983, hereby rules:

Consideration of the matters raised has disclosed no factor of such a kind as to affect the validity of Regulation No 1167/76.

Bosco Koopmans Joliet

Delivered in open court in Luxembourg on 13 November 1984.

For the Registrar

H. A. Rühl

Principal Administrator

G. Bosco

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 27 SEPTEMBER 1984 [1]

Mr President,
Members of the Court,

The Finanzgericht Rheinland-Pfalz (Third Senate) has requested a preliminary ruling on two questions which concern the complicated import system under the common organization of the wine market and the associated exchange-rate problems. In order to ensure a proper understanding of the facts, I shall devote the first part of my opinion to the applicable legislation.

1 — Translated fromt the Dutch.

1. The applicable legislation

The common organization of the market in wine stems to a major degree from Council Regulation No 816/70 (Official Journal, English Special Edition 1970 (I), p. 234). As regards the importing of wines from outside the Community the principle is that straightforward application of the relevant duties provided for in the Common Customs Tariff will provide adequate protection for the domestic market. That emerges from the third recital in the preamble to Regulation No 816/70. In order to prevent disturbances from arising as a result of abnormally low prices, a so-called free-at-frontier offer price is determined on the basis of all available information (Article 9 (2)).

Where that price, plus customs duties, is lower than the reference price for the wine in question, a countervailing charge is levied (Article 9 (3)). There are two exceptions to that general rule when no countervailing duties may be levied. The first is when non-member countries are prepared and in a position to guarantee that the reference price will be complied with as regards exports from their territory. The second concerns imports of certain quality wines produced in non-menber countries. The reason for that exception is that in many cases the prices of quality wines are such that there is no danger of their being lower than the reference price. Both exceptions (second and third subparagraphs of Article 9 (3)) therefore make provision for the imported wines in question not to be subject to the system of reference prices and countervailing charges.

The system of reference prices and countervailing charges together with the exceptions thereto is developed in greater detail (pursuant to Article 9 (6) of Regulation No 816/70) in Regulation (EEC) No 1019/70 of the Commission (Official Journal, English Special Edition 1970 (I), p. 294). In the sixth recital in the preamble thereto it is stated that the levying of a countervailing charge is not justified for certain liqueur wines in view of their price.

Accordingly, Article 4 (4) of the regulation lists a number of liqueur wines to which that exception applies: port, madeira, sherry, Tokay (Aszu and Szamorodni), Samos muscat wines and Setubal Muscatel wines.

In the 1970s the Community concluded cooperation and other agreements with various non-member countries which incorporated, among other things, preferential customs tariffs on wine imported from the countries concerned. The inevitable consequence was that the threat of disruption to the Community market posed by wine imports increased as the protection afforded by customs duties diminished. Regulation (EEC) No 2506/75 of the Council (Official Journal 1975, L 256, p. 2) therefore introduced a notification system. Member States are to inform the Commission of all cases where wine is imported at a lower price than the Community reference price less customs duties actually levied (the free-at-frontier reference price), whereupon the preferential duty is inapplicable (Article 3 (1)).

However, 1975 and 1976 were turbulent years from the monetary point of view and the application of the system turned out to be fraught with difficulties. General Rule C 3 of the Common Customs Tariff applies to the conversion of customs duty into national currency. According to that rule the conversion is to be effected on the basis of the gold par value. In contrast, the conversion of reference prices is to be performed on the basis of the representative exchange rates ("green" rates) pursuant to Regulation (EEC) No 457/75 of the Council (Official Journal 1975, L 52, p. 28).

Since, according to Regulation No 2506/75, the expression "free-at-frontier reference price" means the Community reference price less the customs duties actually levied, uniform determination of the free-at-frontier reference prices encountered difficulties when old parities which were no longer realistic for the agricultural system were employed for the purpose of converting customs duties. Accordingly, the Council decided by Regulation No 1167/76 (Official Journal 1976, L 135, p. 42) that the representative rates should also be used for the conversion of customs duties. [1] That was accomplished by replacing an annex to Regulation No 816/70, in which the details of Common Customs Tariff subheading 22.05 C are laid down, by a new annex. That annex made provision in footnote (c) for an exception to General Rule C 3 of the Common Customs Tariff with regard to certain of the items set out in the annex. The footnote does not apply to the liqueur wines listed in Article 4 (4) of Regulation No 1019/70. Accordingly, the old exchange rates apply for the conversion of the customs duties charged on those wines. The representative rates did not become applicable to the wines in question until the adoption of Council Regulation No 2842/76 (Official Journal 1976, L 327, p. 6). So, from 17 May 1976 (application of Regulation No 1167/76) to 16 December 1976 (application of Regulation No 2842/76) the representative rate did *not* apply to the wines in question.

2. The fact of the case and the preliminary questions

Between 17 May and 16 December 1976 Racke imported a total of 217 507 litres of Tokay liqueur wine falling within subheading 22.05 C III (b) 2 of the Common Customs Tariff. The import duty thereon amounted to twelve units of account per hectolitre. The customs authorities calculated the import duty at DM 43.92 per hectolitre by applying the IMF par value (1 unit of account = DM 3.66). However, Racke considered that the representative rate (1 unit of account = DM 3.58) should have been applied, which would have produced an import duty of DM 42.94 per hectolitre, the difference amounting to less than DM 1 per hectolitre or less than one pfennig per litre.

The dispute between Racke and the Hauptzollamt Mainz culminated in two questions being submitted by the Finanzgericht for a preliminary ruling:

1. Does Council Regulation (EEC) No 1167/76 of 17 May 1976 (Official Journal 1976, L 135, p. 42) infringe the second and third subparagraphs of Article 40 (3) of the EEC Treaty, in so far as it excludes Tokay wines falling under subheading 22.05 C III (b) 2 of the Common Customs Tariff from the application of the representative exchange rate used for the conversion into national currencies (here, German marks) of the rate of customs duty expressed in units of account, and retains the arrangement under General Rule C 3 in Part I, Section I, of Regulation (EEC) No 950/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 275)?

2. If so, what are the legal consequences thereof for the applicability of Article 2 of Regulation (EEC) No 2842/76 of 23 November 1976 (Official Journal 1976, L 327, p. 2)?

   In particular, may the individual within the Community require that regulation to be applied retroactively,

1 — Regulation No 2506/75 had not yet been put into effect since, partly on account of the difficulties described above, no implementing rules had been adopted. As a result of Regulation No 1166/76 (Official Journal 1976, L 135, p. 41), the entry into force of Regulation No 2506/75 was postponed until 1 July 1976, the date on which the rule about the representative exchange rates under Regulation No 1167/76 came into effect.

with effect from the entry into force of Regulation (EEC) No 1167/76?

3. The alleged infringement of Article 40 (3) of the EEC Treaty

According to the reasons stated for submitting the questions, the Finanzgericht entertains doubts about the legality of Regulation No 1167/76 on the ground that it led to the application of two exchange rates, namely the par value and the representative rate, in the period in question.

I consider that those doubts are completely refuted by the explanation furnished in the preamble to the regulation. It appears from the fourth recital in that preamble — as I have already explained — that the system of reference prices encountered difficulties where the two rates had to be applied concurrently. The fifth recital explains that, and emphasizes the need for uniform application of the reference price. It is clear from those recitals that in the first instance the aim is to secure the effective operation of the system of reference prices, and so it is logical from that point of view to declare the alteration in the conversion rate applicable to wines subject to that system. It is clear that the annex which which sets out subheading 22.05 C of the Common Customs Tariff is also based on that principle, since the reference to footnote (c) was only omitted in the case of the group of liqueur wines which was not included in the reference price system in Regulation No 1019/70. General Rule C 3 of the Common Customs Tariff continued to apply to those wines. As a result liqueur wines are indeed treated differently from other wines within subheading 22.05 C. However, the object of the regulation in question warrants that difference in treatment, firstly because it was not necessary to apply the representative rate to the liqueur wines in question and secondly because the divergence from the rules of the Common Customs Tariff was thereby kept to a minimum. I should add, though it may well be superfluous, that the application of General Rule C 3 during the relevant period was in itself justified despite the devaluations and revaluations then taking place. I would refer in that regard to the Court's judgment in *Glunz* v *Hauptzollamt Hamburg-Waltershof* ([1982] ECR 197, paragraph 24). Racke's argument that as a result the wines concerned were treated differently from other wines of the same type does not hold good in view of the fact that, as the Council in particular has emphasized, the reference price system was indeed applicable to those other wines.

4. Regulation No 2842/76

The questions put by the Finanzgericht also refer to Regulation No 2842/76, as a result of which the representative rate was applied to the liqueur wines in question as from 16 December 1976. The question of its having an implied retroactive effect must, in my view, be answered unreservedly in the negative. According to previous judgments of the Court that is only possible if it was the intention of the regulation (see, in particular, the judgment in Joined Cases 212 to 217/80 *(Amministrazione delle Finanze dello Stato* v *Salumi,* [1981] ECR 2735, paragraphs 9 and 12). The reason for extending the application of the representative rate is stated in the preamble to the regulation as being that application of two different exchange

rates in respect of wines falling within subheading 22.05 C may lead to distortions in competition between imported wines. That reason differs from that given by the Commission in the proposal for that regulation (Official Journal 1976, C 263, p. 2). There it was stated that distortion in competition was already occurring.

From that statement of reasons it appears that the initial decision to continue applying General Rule C 3 of the Common Customs Tariff to liqueur wines obviously could not be maintained and in retrospect can even be described as erroneous.

Such a situation, however, does not automatically mean that Regulation No 1167/76 is unlawful. It is entirely possible for the administration to make a policy decision in the light of known circumstances which subsequently has to be changed in the light of supervening events. The Court recognized that possibility in the second subparagraph of paragraph 24 of *Merkur* v *Commission* (Case 43/72, [1973] ECR 1055), where it also added that it must be considered whether "the considerations adopted by it [the body in question] for guidance were not manifestly erroneous". As I have already pointed out in paragraph 3, that was not the case.

5. Conclusion

In conclusion, I propose that the questions put by the Finanzgericht Rheinland-Pfalz should be answered as follows:

"Consideration of the matters raised has disclosed no factor of such a kind as to affect the validity of Council Regulation No 1167/76."