OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 8 May 1991 *

My Lords,

1. In this case, the Cour de Cassation, Luxembourg, asks for a preliminary ruling on the compatibility with Community law of restrictions such as those placed by the Grand Duchy on the export of certain material which is considered to be of strategic importance. That question has arisen in the course of criminal proceedings instituted by the Luxembourg Minister for Finance and Director of Customs against a number of defendants, including Mr Aimé Richardt, who is chairman and managing director of a French company, Les Accessoires Scientifiques SNC ('LAS').

The background

2. At the origin of the proceedings before the national court lies a contract which Mr Richardt concluded in 1984 with the Soviet central purchasing agency, Technopromimport, for the supply of a unit for the production of bubble memory circuits. It appears from the file that bubble memory devices are used in the microelectronics industry and store information in the form of localized magnetic domains known as magnetic bubbles. The unit was said to be for use by the Soviet post office and consisted of 27 separate machines. One of these was a so-called ten-inch microetch manufactured by a United States company, Veeco Instruments Inc., and for which a price of USD 573 095.00 was to be paid. LAS acquired the microetch in April 1985 from another French company, La Physique Appliquée Industrie SA, which had purchased it earlier that year from Veeco SA, the French subsidiary of the manufacturer. Veeco SA purchased the microetch from its parent company in 1984.

3. As I understand it, the microetch is an ion milling device which permits minute quantities of material to be removed from the surface of a microscopic wafer or substrate with great accuracy. The United States Customs Service in Paris stated in a letter to its Luxembourg counterpart dated 28 May 1985 that the microetch embodied the latest technology, although, according to Veeco SA, such equipment was, at the material time, readily available in Europe and North America.

4. The machine left the United States under an export licence issued by the American authorities which appears to have authorized its use in France only. That restriction on the use of the microetch was mentioned on the French version of the bill presented to Veeco SA by Veeco Instruments Inc., but not on the English

* Original language: English.

version. No reference to any such restriction appeared on the bills relating to the subsequent sales of the microetch. Mr Richardt claims that the French version of the bill presented to Veeco SA was drawn up after the event for the purposes of the proceedings before the Luxembourg courts. Its authenticity does not in my view have any bearing, however, on the answer to the question which has been referred to this Court.

5. In June 1984, LAS applied to the competent French authority for a licence permitting the export of the entire unit to the Soviet Union. LAS was informed that, of the 27 items in respect of which authorization had been sought, 24, including the microetch, did not require a licence and were free to leave French territory. An export licence in respect of the three remaining machines was granted. LAS then instructed a haulage undertaking to arrange for the transport of the microetch to Moscow. An export declaration on form EX was completed in respect of it pursuant to Regulation No 2102/77 (Official Journal 1977 L 246, p. 1) and a contract was concluded with Air France for the transport of the microetch from Roissy to Moscow on board an Aeroflot flight which was due to leave Roissy on 14 May 1985.

6. The flight from Roissy to Moscow was cancelled, however, and Air France decided, without consulting LAS or Mr Richardt, to transport the cargo to Luxembourg, from where there was an alternative Aeroflot flight to Moscow on 21 May 1985. The microetch was, however, seized by the Luxembourg authorities as it was being loaded on to the plane. It is still in their possession.

7. The microetch was transported from Roissy to Luxembourg under cover of a T1 document drawn up by Air France pursuant to Regulation No 222/77 on Community transit (Official Journal 1977 L 38, p. 1). The purpose of that regulation was to establish a so-called Community transit procedure to facilitate the transport of goods between two points situated in the Community, 'and in particular simplify the formalities to be carried out when internal frontiers are crossed' (see the fourth recital). The regulation lays down a procedure for external Community transit and a procedure for internal Community transit. A T1 document is to be used where goods are being carried under the procedure for external Community transit. This variant of the transit procedure applies to three categories of goods, only one of which is relevant in these proceedings, namely goods which are not in free circulation in the Member States (see Article 1(2)(a) of Regulation No 222/77).

8. It appears from the responses to a written question put by the Court to LAS and to the French and Luxembourg Governments, however, that the microetch entered into free circulation in the Community when it was imported into France by Veeco SA. It should therefore have been sent to Luxembourg under cover of a T2 document, which is for use when goods are carried under the procedure for internal Community transit. The use of a T1 document seems to have been the result of a mistake, but neither the French nor the Luxembourg authorities objected and, in February 1986, the French authorities certified that the transit procedure in respect of the goods had been completed.

9. The Luxembourg authorities refused to allow the microetch to be loaded on the flight to Moscow because they took the view that, in order for it to be exported to the Soviet Union, a licence was required under Articles 1 and 2 of a Grand Ducal Regulation of 17 August 1963 ('the Grand Ducal Regulation'), according to which the transport without a licence of certain goods originating in, *inter alia*, the United States and France to, *inter alia*, the Soviet Union is prohibited. The list of goods in respect of which, at the material time, a licence under the Grand Ducal Regulation was required was annexed to a Grand Ducal Regulation of 23 August 1982. The Luxembourg authorities take the view that the microetch falls under item 1355(b)(1) and note 3(h) of that list. That view is contested by the defendants for reasons which are not relevant to the question which has been referred to the Court. The defendants also seek to rely on a provision contained in Article 2 of the Grand Ducal Regulation, according to which a licence is not required when the country from which the goods originate has issued a valid transit authorization certificate. The defendants maintain that the T1 document issued in respect of the goods by the French authorities constitutes such a certificate and dispenses them from the need to obtain a licence from the Luxembourg authorities under the Grand Ducal Regulation.

10. This argument was rejected by the Tribunal Correctionnel, before which criminal proceedings were instituted against Mr Richardt and four other defendants, including the managing director of Air France, for attempting to evade the requirements of the Grand Ducal Regulation. Mr Richardt was acquitted, because he was unaware at the material time that the goods were being transported to Luxembourg, and the prosecution's case against the other four defendants was also dismissed. However, the Tribunal Correctionnel ordered that the microetch be confiscated. On appeal by Mr Richardt, the Cour d'Appel quashed the order for the confiscation of the microetch. The Luxembourg authorities then appealed to the Cour de Cassation, which has referred the following question to the Court:

'Is Council Regulation (EEC) No 222/77 to be interpreted as requiring the T1 document provided for therein to be recognized without reservation as a valid authorization for transit in the territory of any Member State of the European Economic Community, irrespective of the nature of the goods transported and even if they endanger the external security of the State concerned, or conversely does the regulation allow a Member State to refuse to recognize the T1 document as equivalent to a transit authorization when the national legislation of that State considers the goods transported to be strategic equipment and, on external security grounds, makes transit through its territory subject to the grant of special permission?'

The purpose of the Grand Ducal Regulation

11. The Grand Ducal Regulation was adopted to give effect to arrangements made within the framework of COCOM (Coordinating Committee for Multilateral Export Controls). The purpose of COCOM is to control the export to communist countries of goods of strategic importance.

Sixteen States are members, including the United States and all the Member States of the European Community with the exception of Ireland, which none the less has a policy of complying with the rules laid down by COCOM. In view of the changes which have taken place recently in most communist countries, it is likely that the COCOM system will be applied less rigorously in future.

12. The basis of COCOM is an informal one and its decisions have to be implemented by the participating States in order to take effect in national law. The need for implementing legislation means that the classes of product which are subject to export restrictions in different participating States might not coincide precisely at a given moment. None the less, in the present case it appears that the relevant French legislation also restricted the export of equipment falling under item 1355(b)(1) and note 3(h) of the list annexed to the Grand Ducal Regulation of 23 August 1982. Indeed, after the seizure of the microetch by the Luxembourg authorities, the matter was reopened by the French authorities, which subsequently instituted criminal proceedings against LAS. Those proceedings are still pending. Counsel for the French Government informed the Court at the hearing that the French authorities originally approved the export of the cargo only because they were not aware of its true nature.

The issues before the Court

13. Although the question put to the Court refers to Regulation No 222/77, that regulation is not in my view relevant to the solution of the dispute between the parties to the main action. According to Article 1(1) of the regulation, the Community transit procedure applies to the movement of goods 'between two points situated in the Community'. However, no restrictions were placed on the movement of the microetch from France to Luxembourg and, by the time it was seized by the Luxembourg authorities, the Community transit procedure had run its course. The dispute before the national court is concerned with the transport of the microetch, not from France to Luxembourg, but from Luxembourg to the Soviet Union, a non-member State. Regulation No 222/77 cannot have the effect of precluding a Member State from subjecting to a licensing requirement the export of certain goods to non-member States, for such exports fall outside the scope of that regulation.

14. The question therefore arises whether there are any other provisions of Community law which might render such a requirement unlawful. Reference has been made in the course of the proceedings to the rules contained in the EEC Treaty prohibiting quantitative restrictions on the free movement of goods and measures having equivalent effect (see Articles 30 to 36). However, I do not consider those rules applicable in the circumstances of this case for, as the Commission points out, they apply only to the movement of goods between Member States (see Case 51/75 *EMI Records* v *CBS United Kingdom* [1976] ECR 811). Although the Commission persisted in addressing argument to Articles 30 to 36, that approach is in my view wrong and it is necessary to consider instead the Community provisions governing exports to non-member States.

Regulation No 2603/69

15. The export of goods from the Community to non-member States is covered by Regulation No 2603/69 establishing common rules for exports (Official Journal English Special Edition 1969 (II), p. 590), as last amended by Regulation No 1934/82 (Official Journal 1982 L 211, p. 1). Although little argument has been addressed to Regulation No 2603/69 in these proceedings, there can be no doubt about the context within which its provisions have to be considered. It was adopted, at the end of the transitional period, pursuant to Articles 111 and 113 of the Treaty, as a central part of the Community's common commercial policy. While there may still be unresolved doubts about the scope of that policy, there can be no doubt that measures liberalizing exports from the Community to non-member States fall squarely within it, and fall also, therefore, within the exclusive competence of the Community. Article 113(1) itself refers to the common commercial policy as being 'based on uniform principles, particularly in regard to . . . the achievement of uniformity in measures of liberalization [and] export policy . . . '. As the Court has held (see e.g. Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921, Case 174/84 *Bulk Oil* v *Sun International* [1986] ECR 559), measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community.

16. Regulation No 2603/69 is described by its title as establishing common rules for exports; Article 1 of the regulation, which is headed 'Basic principle', provides as follows:

'The exportation of products from the European Economic Community to third countries shall be free, that is to say, they shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with the provisions of this Regulation'.

17. That 'basic principle' constitutes Title I of the regulation; Title II sets up a Community information and consultation procedure; Title III deals with protective measures; and Title IV contains transitional and final provisions. These provisions include a derogation, in Article 10, for certain products, listed in an annex, in respect of which, pending the introduction of common rules, 'the principle of freedom of export from the Community' does not yet apply; and a safeguard clause, in Article 11, which is similar in terms to Article 36 of the Treaty.

18. In the light of the purposes of the regulation and its structure and wording it is clear, in my view, that the regulation embodies a fundamental rule that, subject to the exceptions specified, exports from the Community to non-member States are unrestricted.

19. None the less it has been suggested that the measures in issue in the present case do not fall within Article 1 of the regulation since, it is said, they are not quantitative restrictions but rather measures having equivalent effect. I cannot accept that view. It is

true that Articles 30 and 34 of the Treaty refer to quantitative restrictions (on imports and exports respectively between Member States) and all measures having equivalent effect. It is true also that, while Article 1 of the regulation refers to quantitative restrictions, the second citation of the preamble refers, in a different context, to measures having equivalent effect. But it does not follow, in my view, that the Council must have intended to exclude such measures from the scope of the basic principle set out in Article 1 of the regulation. On the contrary, I think it would be unreasonable, at any rate if such measures are understood in the ordinary meaning of the words, to regard the regulation as prohibiting certain restrictions but as permitting others which have the same effect.

20. That is not to say, of course, that the scope of Article 1 of the regulation is the same as the scope of Article 30 of the Treaty. There may be certain measures which fall within the prohibition of Article 30 of the Treaty but not within the scope of Article 1 of the regulation — just as there are certain measures which might fall within the prohibition of Article 30 of the Treaty but which do not, according to the Court's case-law, fall within the prohibition of Article 34: see Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees* [1979] ECR 3409. Thus, for example, a licensing system for the control of imports, even where all licences are granted automatically, is a measure prohibited by Article 30 in trade between Member States — see Cases 51-54/71 *International Fruit* [1971] ECR 1107; but such a system, if used for the control of exports, is probably not one which Article 1 of the regulation is intended to cover. However, a licensing system, which under Articles 30 and 34 might be regarded as a measure having equivalent effect, would I think be within Article 1 of the regulation if its effect were to preclude all exports of a particular product. That illustrates, to my mind, the danger of interpreting the regulation by reference to Treaty provisions which have a different context, a danger which is illustrated by any attempt to read into the regulation a distinction between quantitative restrictions and measures having equivalent effect.

21. Similarly, the Court has recognized that its case-law under Articles 30 and 36 of the Treaty concerning measures having equivalent effect in the field of industrial and commercial property rights cannot be transposed to a free trade agreement between the Community and a non-member State, despite the similarity of the terms of the provisions in question: see Case 270/80 *Polydor* v *Harlequin Record Shops* [1982] ECR 329. Again, in Case 51/75 *EMI Records*, already cited, the Court rejected an attempt, in the context of trade marks, to apply the doctrine of common origin to goods originating in non-member States. It was in that context that the Court stated, at paragraph 20, that the provisions of Regulation No 1439/74 (Official Journal 1974 L 159, p. 1) introducing common rules for imports, related only to quantitative restrictions to the exclusion of measures having equivalent effect. It is clear — and the reasons are self-evident — that the case-law concerning limitations on industrial and commercial property rights in trade between Member States cannot be automatically transposed to instruments governing trade with non-member States, and that it cannot be so transposed regardless of whether the instrument in question specifically prohibits measures having equivalent effect. The conclusion to

be drawn from the case-law is that the scope of the various provisions depends not on the formulation used, but on their context and purposes.

22. Accordingly I conclude that, if Article 1 of the regulation is read in its context and in the light of its purposes, then a ban on exports of the kind in issue here must be regarded as within that article. I note also that Article XI of the GATT, which may be regarded as relevant to the interpretation of a Community instrument governing international trade, refers in its title to 'General Elimination of Quantitative Restrictions', while the text of Article XI(1) refers to 'prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures'.

23. Moreover, even if Article 1 is read more narrowly than I suggest, it still cannot be read as specifically authorizing restrictions on trade with non-member States; yet such specific authorization is, as I have pointed out, required by the Court's case-law.

24. The conclusion which I have reached, to the effect that the measures in issue in this case are caught by Article 1 of the regulation (although I shall also suggest that they are in principle capable of being justified under that regulation), is, I think, confirmed even if one takes a different approach and seeks to draw a distinction between quantitative restrictions and measures having equivalent effect. The argument would in that event run as follows. A system of controlling exports by way of licences may, depending on the circumstances, be regarded as falling within either the former or the latter category. Where the decision whether or not to award a licence is taken on a case-by-case basis in the light of all the prevailing circumstances, with the result that it cannot in advance be said with certainty whether a licence will be granted, the system in question will amount to a measure of equivalent effect: see *Donckerwolcke* (already cited); Case 53/76 *Procureur de la République* v *Bouhelier* [1977] ECR 197; Case 68/76 *Commission* v *France* [1977] ECR 515.

25. In the present case, however, it seems most unlikely, in view of the purpose of the Grand Ducal Regulation, that, at the material time, any licences were granted for the export to the Soviet Union of equipment falling within item 1355(b)(1) and note 3(h) of the list annexed to the Grand Ducal Regulation of 23 August 1982. If that was the case, then the effect of the contested national provisions was to prohibit such exports completely. In those circumstances, those provisions should be regarded as a quantitative restriction on exports. It would be unrealistic to treat a partial restriction as a quantitative restriction while a total restriction was not. Moreover the Court held in Case 34/79 *R* v *Henn and Darby* [1979] ECR 3795, paragraphs 11-13, that a complete prohibition on the movement of

goods constitutes a quantitative restriction rather than a measure of equivalent effect.

26. Thus, even on the view, which I do not accept, that Article 1 of Regulation No 2603/69 must be read as not prohibiting measures having equivalent effect to quantitative restrictions, it can be contended that it is applicable in the present case.

27. Where national measures such as those at issue in the main action fall within the prohibition contained in Article 1 of Regulation No 2603/69, the question arises whether they can be justified under Article 11 of that regulation. Article 11, which as I have mentioned is similar in terms to Article 36 of the Treaty, provides as follows:

'Without prejudice to other Community provisions, this Regulation shall not preclude the adoption or application by a Member State of quantitative restrictions on exports on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property'.

28. The Luxembourg Government, supported by the Governments of France and the United Kingdom, argues that a system of licences such as that established by the Grand Ducal Regulation is justified on grounds of public security. I have no doubt that the concept of public security is in principle broad enough to embrace restrictions on the transfer of goods or technology of strategic importance to countries which are thought to pose a military threat.

29. In my view, however, Member States may only rely on Article 11 of Regulation No 2603/69 where the principle of proportionality has been respected. This means that Member States must not seek to enforce a national measure which is capable of being justified under that provision by steps which go further than is necessary to achieve the objective of the measure. The application of the principle of proportionality in specific cases is a matter for the national courts. It should not be assumed that that principle produces the same effect in relation both to Article 11 of the regulation and to Article 36 of the Treaty, to which it also applies. Nevertheless, where failure to comply with national rules such as those at issue in the main action may lead to confiscation of the goods in question, such matters as the state of mind at the material time of the owner of the goods seized and the value of the goods should in my view be taken into account.

Articles 223 and 224 of the Treaty

30. Finally, there are two exceptional provisions of the EEC Treaty which fall to be considered in the context of these proceedings. The first is Article 223(1)(b), which provides as follows:

'Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes'.

This provision is not in my view relevant in the circumstances of the present case, as no one has claimed that the microetch constitutes arms, munitions or war material for these purposes. Moreover, under the second paragraph of Article 223, the Council was required, within one year of the entry into force of the Treaty, to draw up a list of the products to which Article 223(1)(b) applies. It appears that such a list was drawn up, but it has not subsequently been amended and it has not been suggested that the microetch is covered by it.

31. The second exceptional provision which it is necessary to mention is Article 224, which provides as follows:

'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'.

32. Although it is not clear from the wording of this provision to what extent it confers upon the Member States power to adopt measures derogating from other rules of Community law, the second paragraph of Article 225, which refers to 'the powers provided for in Articles 223 and 224', suggests that Article 224 was intended to authorize the adoption of national measures which would otherwise be unlawful. This seems to have been the view taken by Advocate General Gand in Case 15/69 *Südmilch* v *Ugliola* [1969] ECR 363 at 373, where he said that Article 224, 'in the case of a serious crisis, enables Member States to take any necessary measures without being bound to observe the rules of the Treaty'. The question therefore arises whether the Grand Ducal Regulation can be regarded as a measure which Luxembourg was called upon to take in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

33. Of those who have submitted written observations to the Court, only the Commission addresses this point. The Commission argues that the informal nature of COCOM means that it cannot be said that Luxembourg has 'accepted' any 'obligations' under it. In my view, however, it is not necessary for this point to be resolved in the context of the present proceedings, because the contested national legislation is capable of being justified under Article 11 of Regulation No 2603/69.

Although, as I have explained, a Member State must comply with the principle of proportionality in order to rely on Article 11, it cannot in my view turn to Article 224 of the Treaty where the contested measure, although in principle covered by the former provision, goes further than is necessary to achieve its objective. In any event, Article 224 may itself be subject to the principle of proportionality, so that recourse to that article would in these circumstances be futile.

Conclusion

34. I am therefore of the opinion that the question referred to the Court should be answered as follows:

(1) A Member State which, on the ground of public security, makes the export of certain goods to a number of non-member States subject to the grant of a licence, is not precluded by Council Regulation No 222/77 from requiring such a licence to be obtained in respect of goods which come from another Member State and which arrived in the first State under cover of a transit declaration drawn up pursuant to that regulation.

(2) Article 1 of Council Regulation No 2603/69 must be interpreted as prohibiting national measures which have the effect of precluding the export of certain categories of goods to non-member States. Nevertheless, where the purpose of such measures is to control the export of strategically important goods or technology to States which are thought by the Member State concerned to pose a military threat, they must in principle be regarded as justified on the ground of public security under Article 11 of that regulation. Any penalties imposed in the event of failure to comply with the legislation concerned must not, however, be heavier than is necessary to achieve its objectives.