OPINION OF ADVOCATE GENERAL JACOBS
delivered on 18 May 1995 *

1. Both these cases (Case C-70/94 *Werner* and Case C-83/94 *Leifer*) concern the export from the Community of 'dual-use' goods, i. e. goods that can be used for both civil and military purposes. In the *Werner* case the Verwaltungsgericht Frankfurt-am-Main has referred to the Court the question whether national provisions imposing a licence requirement for the export of certain products are compatible with Article 113 of the Treaty. That question arises in proceedings relating to the exportation of a vacuum induction oven to Libya. In the *Leifer* case criminal proceedings were brought before the Landgericht Darmstadt against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer in connection with the unauthorized exportation of certain products to Iraq. In both cases the essential issues are whether restrictions of the kind in issue can be imposed unilaterally by Member States or whether they fall within the exclusive competence of the Community, and more generally whether national measures of this kind are compatible with or justified under Community law.

The *Werner* case

2. Firma Fritz Werner Industrie-Ausrüstungen GmbH is a German company which erected in Libya between 1979 and 1982 a repair shop with a foundry, including a number of furnaces for the smelting of cast iron, aluminium and copper. In order to cure a problem with the cast quality of aluminium, so the company claims, it received an order to supply a vacuum induction, smelting and cast oven, as well as induction spools for that oven. On 17 September 1991 the company applied to the competent national authorities for the issue of a licence for the export of those goods to Libya. By notice of 31 October 1991 the Bundesamt für Wirtschaft (Federal Office for the Economy) declined to issue such a licence on the ground that the supply of arms to Libya would significantly jeopardize the interests to be protected under points 2 and 3 of Paragraph 7(1) of the Aussenwirtschaftsgesetz (Law on Foreign Trade, hereafter AWG). [1]

3. Paragraph 7(1) of the AWG provides:

* Original language: English.

1 — Aussenwirtschaftsgesetz of 28 April 1962, BGBl. I, p. 481, as amended most recently by Article 3(1) of the law on the establishment of a Federal Office for Exports of 28 February 1992, BGBl. I, p. 376.

'Contracts and activities in the sphere of foreign trade may be curtailed in order to

1. guarantee the security of the Federal Republic of Germany;

2. prevent a disturbance of peaceful coexistence;

3. prevent the external relations of the Federal Republic of Germany from being seriously disrupted'.

4. That provision should be read in conjunction with Paragraph 2(1) of the AWG, according to which regulations may prescribe that contracts and activities may be subject to a licensing requirement or may be precluded. Paragraph 2(2) contains a proportionality rule, indicating that restrictions shall not exceed what is necessary and that they should interfere as little as possible with the freedom of economic activity. It also states that restrictions may only affect existing contracts if the objectives pursued are seriously threatened. Paragraph 27 of the AWG contains the authorization for the regulations provided for. Under Paragraph 5 of the Aussenwirtschaftsverordnung (Regulation on Foreign Trade, hereafter AWV), adopted on the basis of those provisions of the AWG, a licence is required for exports of goods mentioned in Part 1 A, B and C of the list of exports (Annex AL to the AWV).

5. By the 76th Regulation of 11 September 1991 the list of exports in Annex AL was amended as follows:

'1. After number 1203 a new number 1204 shall be inserted as follows:

1204	Vacuum or inert-gas furnaces suitable for operating temperatures of more than 1073° K (800°C), specially constructed components, adjustment and guidance devices and specially developed software for such furnaces. Components or installations if the purchasing or destination country is Libya.

2. After number 1355 a new number 1356 shall be inserted as follows:

1356

Coiling machines whose movements for positioning, winding, rolling up can be coordinated and programmed, suitable for the production of compound material structures and steering devices for coordinating or programming, specially constructed components, specially constructed accessories and specially developed software in that connection, if the country of purchase or destination is Libya.'

6. On the occasion of that amendment, the Bundesminister für Wirtschaft (Federal Minister for the Economy) declared that the products as defined above could be used by Libya for the production of missiles. It is alleged that Libya is attempting to produce medium-range missiles, capable of reaching countries such as Israel and Italy. It appears from the German Government's observations in this case that the above amendments were inspired by the attempts of Firma Fritz Werner to export the oven in issue.

7. Firma Fritz Werner lodged an administrative appeal against the decision by which the export licence was refused. It argued that the contested decision infringed Council Regulation (EEC) No 2603/69 establishing common rules for exports (hereafter the Export Regulation). [2] It also argued that the goods in issue were not suitable for the production of missiles.

8. The administrative appeal was rejected on 30 November 1992 by the Bundesausfuhramt (Federal Office for Exports). The Bundesausfuhramt stated that the refusal to issue an export licence did not infringe the Export Regulation. The third recital in the preamble to that regulation provides that exports to non-member countries may be restricted at the initiative of the Member States if under the Treaty they are empowered to adopt measures. For that purpose the Federal Republic of Germany may, according to the Bundesausfuhramt, rely on Article 223(1)(b) of the Treaty, which permits certain measures provided that they are necessary in order to protect essential security interests. The Bundesausfuhramt also stated that the oven in issue could be used in the Libyan missile programme and that there was intelligence indicating that such use was indeed intended.

2 — OJ 1969 L 324, p. 25, as last amended by Council Regulation (EEC) No 3918/91, OJ 1991 L 372, p. 31.

9. On 12 February 1993 Firma Fritz Werner instituted proceedings against the decision rejecting its application before the Verwaltungsgericht Frankfurt-am-Main. Before that court, arguments were exchanged on Articles 36, 113 and 223 of the Treaty and on the Export Regulation. The referring court also mentions Articles 224 and 228a of the Treaty, although the latter provision, introduced by the Treaty on European Union, did not apply at the material time. It expresses doubts on the compatibility of the German rules with Community law, and asks this Court the following question:

'Does Article 113 of the EEC Treaty preclude national provisions on foreign trade requiring a licence for the export of a vacuum induction oven to Libya which in the present case was refused on the ground that refusal was necessary in order to protect the public security of the Member State owing to a feared disruption of foreign relations?'

10. In the formulation of its question the referring court only mentions Article 113 of the Treaty, but it is clear from the order for reference that it essentially seeks clarification of the compatibility of the German legislation on export controls, as applied in the case before it, with Community law in general. It will be convenient to examine the questions raised after setting out the background to the *Leifer* case.

The *Leifer* case

11. The defendants in the main proceedings are charged *inter alia* with the delivery to Iraq, in the years 1984 to 1988, of plant, parts of plant and chemicals without the requisite export licence contrary to Paragraphs 5 and 5a of the Regulation on Foreign Trade (AWV) (which, as mentioned above, implements the Law on Foreign Trade — AWG), in conjunction with certain other provisions of German legislation.

12. In its written observations the German Government gives further details on the adoption and contents of the provisions in question. It explains that in 1984 it received indications that Iraq was developing chemical weapons and had procured certain installations to be used in its chemical weapons programme from a German firm. It appeared, however, that at that time the German legislation on export controls provided insufficient coverage in relation to chemical weapons, both as regards the chemical substances themselves and as regards plants or

parts of plants which might be used for the production of such weapons. The German Government therefore adopted the 52nd Regulation of 14 May 1984, [3] which inserted No 1710 in the list of exports (Annex AL to the AWV), with the result that five additional chemical substances were subject to the licensing requirement of Paragraph 5 of the AWV. Among those substances is phosphorus oxychloride ($POCL_3$), one of the products Mr Leifer is accused of having exported to Iraq. In addition, the German Government adopted the 53rd and 56th Regulations of 6 August 1984, [4] which inserted a new section D in the list of exports, referring to plants, parts of plants and other equipment which are intended for use in the production of certain chemical substances, and a new Paragraph 5(a) in the AWV, imposing a licence requirement for the export of products covered by section D to countries other than the members of the OECD.

13. It may also be noted that pursuant to Paragraphs 34 and 70 of the AWG, as applicable at the material time, the non-authorized exportation of the products subject to a licensing requirement under Paragraphs 5 and 5(a) of the AWV is punishable if such exportation affects the security of the Federal Republic, disturbs the peaceful coexistence of nations or seriously disrupts the external relations of the Federal Republic (i. e. the grounds mentioned in Paragraph 7(1) of the AWG).

14. In the proceedings before the Landgericht Darmstadt Mr Leifer, joined by Mr Holzer, sought and obtained a stay of the proceedings and a reference to this Court. The referring court indicates that it has considerable doubt, in particular after taking note of the Commission proposal for a Council Regulation on the control of exports of certain dual-use goods and technologies and of certain nuclear products and technologies, [5] whether the Federal Republic of Germany has the competence to introduce a licensing procedure for trade with third countries and to introduce criminal sanctions in relation thereto. It therefore asks the Court the following questions:

'1. (a) Is Article 113 of the EEC Treaty to be interpreted as meaning that it covers national rules restricting the export to non-member countries of

3 — Bundesanzeiger No 91 of 15 May 1984, p. 4509.

4 — Bgbl. I, p. 1079-1080.

5 — OJ 1992 C 253, p. 13.

goods which may be used for both military and civil purposes (so-called dual-use goods) ...? [6]

(b) Are only the Community institutions competent therefore to impose such export restrictions, subject to any power in favour of individual Member States and subject to the exceptions provided for in the EEC Treaty?

If so:

2. Are Articles 223(1)(b) and 224 of the EEC Treaty and Article 11 of Regulation No 2603/69 of the Council of 20 December 1969 establishing common rules for exports (Official Journal, English Special Edition 1969 (II), p. 590), as last amended by Council Regulation (EEC) No 3918/91 of 19 December 1991 (Official Journal 1991 L 372, p. 31) (hereafter "the Export Regulation"), to be interpreted as meaning that by way of exception they allow a Member State to adopt national provisions such as those described in Question 1 to restrict the export of dual-use goods to non-member countries?

3. Are Articles 223(1)(b) and 224 of the EEC Treaty and Article 11 of the Export Regulation to be interpreted as meaning that they allow Member States to adopt national provisions,

(a) which impose the whole burden of proving that dual-use goods are intended for civil use on the applicant as a condition for the grant of an export licence?

(b) according to which an export licence may be refused if the goods are objectively suitable for military use?

6 — The full text of Question 1 (a) is as follows:
'Is Article 113 of the EEC Treaty to be interpreted as meaning that it covers national rules restricting the export to non-member countries of goods which may be used for both military and civil purposes (so-called dual-use goods) as contained in Section A of Part I of the export list and in the 52nd Regulation of 14 May 1984 (Bundesanzeiger 91/84) together with the insertion of number 1710 in Section C of Part I of the export list and in the 56th Verordnung zur Änderung der Aussenwirtschaftsverordnung (regulation amending the foreign trade regulation) (hereafter "the AWV") together with the insertion of Paragraph 5a of the AWV of 6 August 1984 (Bundesgesetzblatt 1984 I, p. 1079) together with the 53rd Verordnung zur Änderung der Ausfuhrliste mit Einfügung des Abschnitts D in Teil I der Ausfuhrliste (regulation amending the export list together with the insertion of Section D in Part I of the export list) (Bundesgesetzblatt 1984 I, p. 1080)?'

4. (a) Should Article 1 of the Export Regulation be interpreted as meaning that the freedom to export provided for covers the freedom from export licensing procedures and national penalties for infringement of national export licensing regulations?

(b) Do penalties of the Member States have the effect of restricting the freedom to export within the meaning of Article 1 of the Export Regulation and have the individual Member States no power to adopt such penalties unless empowered by the Community institutions and subject to the exception in Article 11 of the Export Regulation?

5. (a) Are Article 223(1)(b) and 224 of the EEC Treaty and Article 11 of the Export Regulation to be interpreted as meaning that the individual Member States may exceptionally adopt export licensing procedures with penalties for infringement, not in order to safeguard their security, but merely in order to prevent considerable disturbance to the peaceful co-existence of nations or to prevent the external relations of the Member State concerned from being considerably disturbed (cf. the provisions of points 2 and 3 of Paragraph 7(1) of the German Aussenwirtschaftsgesetz (Foreign Trade Law) (hereafter "the AWG"))?

(b) Are Articles 223(1)(b) and 224 of the EEC Treaty and Article 11 of the Export Regulation to be interpreted as meaning that they permit the individual Member States exceptionally to adopt criminal provisions which allow a penalty to be imposed for the export without a licence of dual-use goods and $POCL_3$ which may be used for both military and civil purposes, as provided for in Paragraph 34(1), point 3, Paragraph 33(1) and Paragraph 7(1) of the AWG in conjunction with Paragraph 70(1), point 1, Paragraph 5 and Paragraph 5a of the AWV and Section A, C No 1710 and Section D of Part I of the export list in the versions of 14 May 1984 and 6 August 1984, and are such criminal provisions, which include imprisonment, compatible with the principle of proportionality?

(c) Are Articles 223(1)(b) and 224 of the EEC Treaty and Article 11 of the Export Regulation to be interpreted as meaning that they permit Member States in the event of the unauthorized export of dual-use

goods to impose imprisonment and fines if the goods may objectively be used for military purposes?

(d) Does Community law allow a penalty to be imposed only if it is proved that there is a reasonable likelihood of the military use of dual-use goods and that the exporter has knowledge thereof?

6. If the questions are answered wholly or partly in the negative:

Does Article 113 of the EEC Treaty and/or Article 1 of the Export Regulation have direct effect in favour of individual citizens with the consequence that Article 113 of the EEC Treaty and/or Article 1 of the Export Regulation create rights in favour of the individual Community citizen which the national courts must protect?'

15. Those questions can be summarized and reformulated as follows:

(1) Does Article 113 of the Treaty cover national rules restricting exports of dual-use goods to third countries, so that in principle the Community has an exclusive competence to enact such rules? If so, are such national rules none the less capable of being justified on the basis of Article 223(1)(b) or Article 224 of the Treaty or of Article 11 of the Export Regulation, even if they are not aimed at safeguarding the security of the Member State in question, but are merely aimed at preventing considerable disturbance of the peaceful co-existence of nations or at preventing the external relations of the Member State concerned from being seriously disrupted?

(2) In that connection, what is the scope for national rules

(a) imposing on the applicant the whole burden of proving that the goods are for civil use?

(b) allowing for the refusal of an export licence if the goods are objectively suitable for military use?

(c) imposing penalties, including imprisonment? Are such penalties in conformity with the principle of proportionality?

(3) Does Article 113 of the Treaty and/or Article 1 of Regulation 2603/69 have direct effect?

The relevant provisions of Community law

16. Article 113(1) of the Treaty provides:

'The common commercial policy shall be based on uniform principles, particularly in regard to ... export policy ... .'

17. Article 113 is implemented by the Export Regulation, which establishes common rules for exports. [7] 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'.

That 'basic principle' constitutes Title I of the regulation, and is clearly broad in scope. Certain products to which the basic principle does not apply are listed in the annex to the regulation but those exclusions are not relevant in these proceedings. It is clear in my view that the basic principle applies to dual-use goods. The central issue in this case is, as will be seen below, that of the scope of the derogations from the basic principle laid down in Title I of the regulation.

18. Titles II and III of the Export Regulation contain provisions on a Community information and consultation procedure and on protective measures. Title IV contains the

7 — Cited above note 2.

transitional and final provisions, including Article 11, which states:

'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'.

19. Articles 223 and 224 of the Treaty also refer to the security interests of the Member States. Article 223(1)(b) states:

'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'.

20. Article 223(2) furthermore provides:

'During the first year [8] after the entry into force of this Treaty, the Council shall, acting unanimously, draw up a list of products to which the provisions of paragraph 1(b) shall apply'.

In 1958, the Council indeed drew up such a list. The Council's decision was never published, but its text is annexed to the Commission's observations. The products in issue in the present case are not mentioned in that list, which has never been up-dated or otherwise amended.

21. Article 224 of the Treaty provides:

'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

8 — 'During the first years' in the English text of the Treaty, in the version published by the Office for Official Publications of the European Communities, is clearly erroneous.

affecting the maintenance of law and order, in the event of war [or] [9] 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'.

22. Finally, reference has been made in the proceedings to Article 228a of the Treaty, which was introduced by the Treaty on European Union, and was not in force at the material time. Article 228a states:

'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission'.

23. Article 228a refers to the common foreign and security policy of the European Union. Although Article L of the Treaty on European Union places the provisions on that policy (Articles J to J.11 of that Treaty) outside the jurisdiction of this Court, it may be noted that Article J.1(2) lays down that one of the objectives of the common foreign and security policy shall be 'to strengthen the security of the Union and its Member States in all ways'.

24. Article 228a is not the only case where decisions adopted in the framework of the common foreign and security policy may be accompanied by measures taken pursuant to the EC Treaty. In the course of 1992 the Commission adopted a proposal for a Council Regulation (EEC) on the control of exports of certain dual-use goods and technologies and of certain nuclear products and technologies. [10] At the hearing the Court was informed that in December 1994 the Council had acted on that proposal, but that the issue of the Official Journal containing the relevant texts had not yet been published. It was stated that the regulation now adopted by the Council is complemented by a decision pursuant to Article J.3 of the Treaty on European Union, laying down the lists of products and destinations subject to control. It was suggested that most of the products in issue in these cases are included in those lists. In the course of April 1995, the regulation and the decision were retroactively published in the Official Journal. [11]

9 — The English text in the version published by the Office for Official Publications of the European Communities is clearly erroneous.

10 — Cited above note 5.

11 — Council Regulation (EC) No 3381/94 setting up a Community regime for the control of exports of dual-use goods, OJ 1994 L 367, p. 1, amended by Council Regulation (EC) No 837/95, OJ 1995 L 90, p. 1; Council Decision 94/942/CFSP on the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods, OJ 1994 L 367, p. 8, amended by Council Decision 95/127/CFSP and Council Decision 95/128/CFSP, OJ 1995 L 90, pp. 2 and 3.

25. I now turn to consider the issues which are common to both these cases, starting with issues relating to the effect of Article 113 of the Treaty and of the Export Regulation. After attempting to establish the relevant principles, I will consider the application of the principles to each case in turn.

The scope and effect of Article 113 of the Treaty and of the Export Regulation

26. It is well established that the competence of the Community in the field of commercial policy under Article 113 of the Treaty is exclusive; [12] the Member States have no competence to take commercial policy measures unilaterally in the absence of a specific authorization by the Community. [13] The question therefore arises whether measures of the kind in issue in the present cases benefit from such an authorization. In order to answer that question it is necessary to examine the provisions of the Export Regulation, which implements Article 113 of the Treaty and constitutes an exercise of the Community's competence to regulate exports from the Community. That Regulation, as has been seen above, prohibits quantitative restrictions on exports (by Article 1) but (by Article 11) permits Member States to impose such restrictions on certain grounds. The essential questions are therefore first whether the measures in issue fall in principle within the scope of the prohibition in Article 1 and secondly whether they are nevertheless justified under Article 11 on one of the grounds there specified.

27. On both questions I would refer to my Opinion in Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'*. [14] That case concerned the confiscation, by the Luxembourg customs authorities, of a microetch due to be exported to the Soviet Union. The confiscation took place because the exporter had not obtained an export licence in Luxembourg, such a licence being required under rules adopted to give effect to arrangements made within the framework of COCOM (the Coordinating Committee for Multilateral Export Controls, which it appears no longer exists). I took the view that that case concerned a restriction on exportation to a third country, that the restriction fell within the scope of Article 1 of the Export Regulation but that, subject to the principle of proportionality, it was capable of being justified under Article 11 of the regulation. The

12 — See most recently Opinion 1/94 on *the Agreement establishing the World Trade Organization* [1994] ECR I-5267.

13 — Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921, paragraph 32 of the judgment; Case 174/84 *Bulk Oil* v *Sun International* [1986] ECR 559.

14 — [1991] ECR I-4621, paragraphs 15 to 29 of the Opinion.

Court did not share that view, but considered the facts from the perspective of the Community rules on transit, [15] and consequently the judgment does not refer to the Export Regulation. [16]

28. In the present cases doubts have again been expressed on various grounds about the applicability of the regulation. As I have already stated, I do not think that there is any reason to exclude dual-use goods from the scope of the regulation.

29. A more difficult point is that, in contrast with Article 34 of the Treaty, Article 1 of the regulation prohibits quantitative restrictions on exports but does not mention measures having equivalent effect.

30. In the *Richardt* case it was contended that the measures in issue in that case were not quantitative restrictions but rather measures having equivalent effect and so fell outside the prohibition in Article 1 of the regulation. That contention seemed to me impossible to sustain. [17]

31. In the present cases it has again been suggested that the measures in issue here may fall outside the scope of Article 1 of the regulation on the ground that they are not quantitative restrictions but merely measures having equivalent effect. In my view, even if it is arguable that Article 1 does not apply to all measures having equivalent effect, it must certainly be regarded — as the French Government rightly argues — as prohibiting measures whose effect is tantamount to a total ban on specific categories of exports. In particular, a licensing system the object and effect of which is to prevent all exports of certain products to certain States must be regarded as running counter to the principle that the exportation of products from the Community shall be free and as falling within the prohibition of Article 1 of the regulation unless it is justified under other provisions of the regulation.

32. It is also clear in my view that Article 11 of the Export Regulation is in principle capable of justifying the contested national measures. By authorizing measures taken by Member States on the ground of public security (among other grounds), Article 11 includes within its purview the kind of measures and the type of justification which are in issue in the present cases. It cannot in my view be contended that the scope of Article 11 is in this respect too wide and

15 — See paragraph 13 of the judgment.

16 — See Govaere and Eeckhout, 'On Dual Use Goods and Dualist Case Law: The *Aimé Richardt* Judgment on Export Controls', *Common Market Law Review* 1992 Vol. 29, pp. 941 to 965.

17 — See paragraphs 19 to 22 of my Opinion.

confers on Member States wider powers than are compatible with the Community's exclusive competence in the field of commercial policy. [18] As I shall attempt to demonstrate below, security measures are still largely a matter for Member States.

33. That is so even after the introduction of Article 228a of the Treaty (paragraph 9 above) which was not, as I have already noted, in force at the material time. Article 228a merely empowers the taking of Community action to give effect to the incipient common foreign and security policy of the European Union. It seems plain however that in the absence of any common position or joint action adopted pursuant to Title V of the Treaty on European Union, the Member States remain free to act in furtherance of security interests, which may be shared or individual.

34. The position in short is therefore that, notwithstanding the exclusive competence of the Community in the commercial policy field, Member States may take action on grounds of public security unilaterally, but that such measures, so far as they affect exports to third countries, must be justified under Article 11 of the Export Regulation.

Public order, public security, and the protection of health and life of humans

35. For the reasons which I gave in my Opinion in the *Richardt* case [19] I have no doubt that the concept of public security, referred to in Article 11 of the Export Regulation, is in principle broad enough to embrace restrictions on the transfer of goods or technologies of strategic importance to countries which are thought to pose a military threat. It will be recalled that Article 11 permits restrictions on exports to third countries on the same grounds as Article 36 of the Treaty permits restrictions on imports, exports or goods in transit between Member States. Similar principles should, as I shall suggest, govern the interpretation of both provisions, and guidance can therefore be provided by the judgment of the Court in *Richardt*, which examined whether the confiscation of the microetch, as a restriction on transit, was compatible with Article 36 of the Treaty. The Court first recalled that the purpose of Article 36 is not to reserve certain

18 — Compare *Bulk Oil* (above note 13) at paragraphs 32 to 36 of the judgment.

19 — See paragraph 28 of the Opinion.

matters to the exclusive jurisdiction of the Member States, but merely to allow national legislation to derogate from the principle of the free movement of goods. Since Article 36 is an exception to a fundamental principle of the Treaty, it must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure. [20]

36. The Court went on to state that the concept of public security within the meaning of Article 36 covered both a Member State's internal security and its external security, and that it was common ground that the importation, exportation and transit of goods capable of being used for strategic purposes might affect a Member State's public security, which it was therefore entitled to protect pursuant to Article 36 of the Treaty. [21]

37. It seems to me that those principles also govern the interpretation of Article 11 of the Export Regulation. Hence the purpose of that provision is likewise not to reserve certain matters to the exclusive jurisdiction of the Member States. It merely allows national legislation to derogate from the fundamental rule of freedom to export, and as an exception to a fundamental rule it should be interpreted strictly. Further, it is obvious that, since Article 36 of the Treaty is interpreted as allowing restrictions on intra-Community transit with the aim of protecting a Member State's external security, Article 11 of the Export Regulation, which deals specifically with exports to third countries, also allows a Member State to protect its external security: the latter is more likely to be affected by exports of strategic products to third countries than by intra-Community trade in such products.

38. It might be argued that Article 11 of the Export Regulation should not be interpreted as strictly as Article 36 of the Treaty, because Article 11 does not derogate from a fundamental Treaty provision; it only derogates from Article 1 of the Export Regulation, according to which exports shall not be subject to any quantitative restriction. That is not a persuasive argument, however. The common commercial policy, as an indispensable complement to the customs union on which the Community is based, is no less vital for the functioning of the Community than the Treaty provisions on the internal market. It will be obvious that restrictions imposed by Member States on exports to non-member States are liable to affect intra-Community trade, as for example where the goods pass in transit through another Member State, as in the *Richardt* case. That the Treaty itself does not lay down the basic rules of the common commercial policy does not mean that there are no such basic rules. In the field of export policy the basic rule is

20 — See paragraphs 19 and 20 of the judgment.

21 — See paragraph 22 of the judgment.

contained in the Export Regulation: exports from the Community shall be free. Moreover, one should not lose sight of the fact that, although Article 11 does not derogate from a substantive Treaty provision, it may be interpreted as derogating from the rule of exclusive Community competence in the field of commercial policy, a rule inherent in Article 113 of the Treaty. [22]

39. I therefore take the view that Article 11 of the Export Regulation is to be interpreted in much the same way as Article 36 of the Treaty, at least in an area such as strategic export controls, where one and the same objective is at stake: namely to safeguard the external security of a Member State, either through restrictions on intra-Community trade or on exports to third countries.

40. Paragraph 7 of the AWG, however, permits interference with contracts and activities in the sphere of foreign trade not only to protect the external security of the Federal Republic of Germany, but also with the aim of preventing a disturbance of peaceful coexistence, or preventing the external relations of the Federal Republic of Germany from being seriously disrupted. It appears that in both the *Werner* case and the *Leifer* case the national authorities had the latter aims particularly in mind. In the *Werner* case, the Commission considers that there may be doubt whether the exportation in issue constitutes a genuine threat to German security. That leads the Commission to examine whether, on the assumption that the referring court were to establish that the oven in issue is not capable of playing an essential role in the production of armaments, the mere disruption of Germany's foreign relations could justify the refusal to issue a licence. After analysing the terms 'public policy' and 'public security' in Article 11 of the Export Regulation, the Commission ultimately concludes that the contested decision is capable of being justified on the basis of a combined application of those grounds.

41. In my view it is difficult, for reasons which will appear below, to draw a hard and fast distinction between foreign policy and security policy considerations, not least because a disruption of foreign relations can have serious security implications. In any event, it is clear I think that Community law leaves Member States a large measure of freedom, subject always to the application of the principle of proportionality, in both areas. In the field of restrictions on exports to third countries, Article 11 of the Export Regulation seems designed to recognize that freedom, without any need to examine too closely whether 'public policy' or 'public security' is in issue.

22 — See above note 12.

42. Moreover, the issues raised by considerations of foreign policy and security policy are, in general, not readily susceptible to judicial review, as I sought to show in my Opinion in Case C-120/94 *Commission* v *Greece* concerning the Greek embargo against the former Yugoslav Republic of Macedonia. [23] Thus the scope for judicial review of strategic export controls is inevitably limited, and those limits are well illustrated by the present cases. It is not easy for this Court, or for a national court, to examine the reality of the threat posed to the security of the Federal Republic by the exportation of the goods in issue in these cases.

43. In some respects, indeed, Community law is less well placed to consider such questions than national law, since security concerns may differ substantially between different Member States. As the United Kingdom Government points out, each Member State may have specific security concerns, whether because of its location, because of its internal situation, or because of specific external threats. That is confirmed, in my view, by Title V of the Treaty on European Union, which makes provision for a common foreign and security policy. Article J.4 (1) provides that 'The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence'. But Article J.4 (4) provides that that policy shall not prejudice the specific character of the security and defence policy of certain Member States.

44. As the United Kingdom Government also points out, the security concerns of the Member States may also be indirect, in the sense for example that the exported goods themselves do not pose a direct threat, but instead may pose an indirect threat because they may be used to manufacture military goods, or because they may be adapted for military use or the manufacture of military goods, rather than being immediately suitable for military purposes.

45. The conclusion must be that in the absence of Community legislation it is essentially for the competent authorities of each Member State to decide in which cases exports of certain dual-use products may raise security concerns, and that judicial review is confined to ensuring that no manifest errors of appraisal have occurred and that national authorities have not abused the powers conferred by Article 11 of the Regulation. However, that conclusion still leaves open the question whether those authorities

23 — Opinion delivered on 6 April 1995, not yet reported in the ECR.

may rely on legislation aimed at preventing the foreign relations of a Member State from being seriously disrupted. I think that, in so far as that aim can be regarded as complementing the more general aim of protecting a Member State's security, such legislation is in principle permissible under Article 11 of the Export Regulation. The German legislation in issue in the main proceedings appears to be so designed. Paragraph 7 of the AWG is entitled 'Protection of security and external interests', and other provisions of that law also indicate that the aim is essentially to control exports for security reasons.

46. Increasingly, moreover, the security of a State cannot be looked at in isolation. It is closely linked to the security of the international community at large, and of its various components. The reference to public security in Article 11 of the Export Regulation should therefore be interpreted as embracing export restrictions on dual-use goods aimed at safeguarding the security of a Member State, including its role in safeguarding the security of the international community at large.

47. Having thus sought to establish the applicable principles, I turn now to consider the application of those principles to the cases before the Court, taking first the *Werner* case and second the *Leifer* case.

The *Werner* case

48. The German Government explains in its observations the criteria set out in Paragraph 7 of the AWG and their application in this case. The reference to peaceful coexistence serves to combat the use of force at lower levels than a state of war, for example to counter international terrorism. The German Government also states that the contested decision serves to protect the external security of at least one other Member State, namely Italy, a country apparently within reach of the kind of missiles Libya is attempting to produce. The decision thus also contributes, according to the German Government, to protecting human life and health, one of the grounds mentioned in Article 11 of the Export Regulation.

49. The German Government also seeks to justify the criterion of avoiding a serious disruption of its foreign relations. It states that such a disruption may affect the operation of international agreements concerning the security of a State, as well as its room for

manoeuvre in conducting foreign policy and protecting its foreign policy interests. According to the German Government, the refusal to issue an export licence in the present case must be seen against the background of earlier incidents involving exports from Germany to Libya, including the notorious Rabta case where German companies participated in the construction of a Libyan factory producing poisonous gas. The German Government states that that incident seriously disrupted its relations with the United States and Israel in particular. It wishes to prevent any further incidents of that kind. The German Government also points to UN Security Council Resolutions proclaiming an embargo of all armaments exports to Libya, including material that could be used in the production of armaments.

50. Although it is for the referring court to decide whether the decision in issue in the main proceedings is justified on those grounds, those considerations will clearly be relevant to it in reaching that decision.

51. Having reached the conclusion that the restrictions in issue fall in principle within the scope of Article 11 of the Export Regulation, I do not think it is necessary to examine the possible application of Articles 223 and 224 of the Treaty. For Article 223 I refer to my observations below (paragraphs 62 and 63) in relation to the *Leifer* case, where it has been principally debated.

52. As for Article 224, that article refers to 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 [or] 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'. At first sight, none of those circumstances appears to be present in the context of these proceedings. Although the German Government does refer to UN Security Council Resolutions, it does not argue that those resolutions oblige it to adopt the measure in issue. Moreover, Article 224 must itself be interpreted restrictively. [24]

53. It remains to examine the effect of the principle of proportionality in the application of Article 11 of the Export Regulation. Here again guidance can be obtained from

24 — See Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 and my Opinion in Case C-120/94 *Commission* v *Greece*, above note 23, paragraphs 44 et seq.

the *Richardt* case. In its judgment in *Richardt* the Court set out the following principles: [25]

'... in order to verify the nature of goods described as strategic material, the Member States are entitled under Article 36 of the Treaty to make their transit subject to the grant of a special authorization.

As regards the penalties laid down for failure to comply with the obligation to obtain such authorization, it should be stated ... that a measure involving seizure or confiscation may be considered disproportionate to the objective pursued, and thus incompatible with Article 36 of the Treaty, in a case where the return of the goods to the Member State of origin could suffice.

However, it is for the national court to determine whether the system established complies with the principle of proportionality, taking account of all the elements of each case, such as the nature of the goods capable of endangering the security of the State, the circumstances in which the breach was committed and whether or not the trader seeking to effect the transit and holding documents for that purpose issued by another Member State was acting in good faith.'

54. In my Opinion in *Richardt* I interpreted Article 11 of the Export Regulation in a similar way: [26]

'... 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. 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

25 — Paragraphs 23 to 25.

26 — Paragraphs 28 and 29 of the Opinion.

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.'

The *Leifer* case

The first question

55. While the application of the principle of proportionality to the facts of this case is a matter for the national court, it seems to me that there are adequate reasons to satisfy the national court that the requirements of the principle have been respected. Indeed, once it is accepted that the security of a Member State may be at stake, there is little scope for the courts to review whether export restrictions serve the aim of safeguarding that security. Nor could it really be suggested that the aim could be achieved by less restrictive means, since the requirement of authorization to export must be the minimum requirement necessary to prevent exports which may threaten the security of the State. Moreover the information provided by the German authorities suggests that the application for an export licence was duly considered in the present case.

56. In my view therefore it is difficult to discern any factors in the *Werner* case which might lead to the conclusion that as a matter of Community law the contested decision was not justified.

57. The answers to the first question in the *Leifer* case, as reformulated above (paragraph 15), follow in part from my previous observations. However the issues raised in the *Leifer* case are somewhat different from those in the *Werner* case. In *Leifer* the proceedings are concerned with exports to Iraq of certain products apparently suitable for the production of chemical weapons. Those exports took place at the time of the first Gulf war, between Iran and Iraq, in which chemical weapons are alleged to have been used. It might be argued that that war did not involve even an indirect threat to the external security of the Federal Republic, and that therefore the German restrictions cannot be justified on the ground of public security. Again I think that such an approach is based on too narrow a view of security issues. As I have already suggested, the notion of security should be understood as extending to the security of the international community in general. A Member State has a legitimate concern in preventing the spread of chemical weapons regardless of where they may be used.

58. The German Government also refers in its observations to the protection of human life and health under Article 11 of the Export Regulation. It argues that the restrictions on exports, as described above, served to prevent the use of chemical weapons in the Iran-Iraq war, and thus to protect the health and life of countless people.

59. In reply to that argument it was suggested at the hearing by counsel for Mr Leifer that the grounds mentioned in Article 11 of the Export Regulation may only be invoked where there is a close link with the Member State relying on those grounds. However, where the health and life of humans is at stake that view must surely be wrong. When the Council adopted the Export Regulation it cannot have been its intention only to allow the Member States to protect the health and lives of their own nationals. As a rule, of course, a Member State will in the first place act so as to protect its own citizens. Where however a war is waged between certain third countries, entailing a great deal of bloodshed, it would be indefensible to interpret Article 11 of the Export Regulation as not allowing certain export restrictions aimed at not aggravating the loss of life.

60. It may also be noted that the chemicals allegedly exported by the accused in the main proceedings (phosphorus oxychloride or $POCL_3$) were, subsequently to the facts of the *Leifer* case, covered by Council Regulation (EEC) No 428/89 concerning the export of certain chemical products. [27] That regulation followed an international conference on chemical weapons and a consensus reached by the Member States in the context of European Political Cooperation that it was necessary to take urgent measures to control the export of certain chemical products which could be used for the production of chemical weapons. The regulation provided that the products listed in an annex, including phosphorus oxychloride, should be subject to the issue by the competent authorities in the Member States of a prior export authorization, or to equivalent measures (Article 1). It also provided that no authorization should be issued if there was reason to believe that the products under consideration would be used for the development or production of chemical weapons or that there was a risk of their being delivered directly or indirectly to belligerent countries or to areas of serious international tension (Article 2). The regulation has now been repealed and replaced by Council Regulation No 3381/94, [28] which establishes a general Community regime for the control of exports of dual-use goods. Although the regulations were not in force at the material time, they show that all the Member States, and not only the Federal Republic of Germany, take the view that phosphorus oxychloride could be used for the production of chemical weapons.

27 — OJ 1989 L 50, p. 1.
28 — Above, note 11.

61. It is difficult therefore to reach any conclusion other than that the restrictions of the type in issue in the present proceedings come within the scope of Article 11 and are capable of justification, not only on the ground of public security, but also on the ground of the protection of health and life of humans.

62. As regards Articles 223 and 224 of the Treaty, it is again unnecessary in my view to examine their possible application (see paragraphs 51 to 52 above). The applicability of Article 223 in the *Leifer* case is however supported by several Member States which have submitted observations in this case. Greece, Italy and Spain consider that the conditions for the application of Article 223(1)(b) (whose terms are set out in paragraph 19 above) are satisfied. France and Germany consider that those provisions cannot be invoked in respect of products not included in the list drawn up in 1958 pursuant to Article 223(2) (paragraph 20 above). The United Kingdom, on the other hand, argues that that list should not be regarded as exhaustive, and that Article 223(1)(b) is capable of applying to products which were not included in that list.

63. If it were necessary to examine Article 223 it would be necessary to resolve that issue and also to consider whether Article 223(1)(b) can be construed so broadly as to encompass dual-use goods generally. However I am satisfied that those difficult questions simply do not arise here. Article 223(1)(b), like Article 224, is a wholly exceptional provision, since it permits a derogation from the entire Treaty, [29] and it is unnecessary to invoke it where, as here, a specific derogation, namely Article 11 of the Export Regulation, is clearly in point. Moreover it would be inappropriate to address the difficult and important issues which would need to be considered under Articles 223 and 224 when the questions referred in the present cases can be adequately considered independently of those issues.

The second question

64. The second question, as reformulated above, essentially concerns the application of the principle of proportionality. The

29 — See my Opinion in Case C-120/94 *Commission* v *Greece*, above note 23, paragraph 46.

referring court asks whether Community law permits national rules (a) imposing on the applicant the whole burden of proving that the goods are for civil use as a condition for the grant of an export licence, (b) allowing for the refusal of an export licence if the goods are objectively suitable for military use and (c) imposing penalties, including imprisonment.

65. As I have suggested in paragraph 54 above, where a Member State relies on the exceptions in Article 11 of the Export Regulation the principle of proportionality is fully applicable. However, the nature of the issues that arise where the external security of a Member State is at stake will usually prevent a court of law from adopting a strict proportionality test. The risk that certain exports may pose for the security of a State is often assessed on the basis of intelligence the accuracy of which cannot be checked by the courts. The nature and gravity of that risk are likely to determine the tightness of the export restrictions. It follows that it is difficult for the courts to review (a) whether the restrictions in issue are necessary and appropriate for achieving the aims pursued and (b) whether those aims could not be achieved by less restrictive means.

66. The principles stated in the *Richardt* case (above, paragraphs 53 to 54) are again relevant; it is clear that the requirement of an export authorization may be enforced by a system of penalties, and it seems obvious that a penalty of imprisonment is not necessarily disproportionate where the external security of a Member State is at stake, or where the health and life of humans is endangered by a state of war. Guidance on the subject of penalties is provided by Council Regulation No 3381/94, [30] which introduced a general regime for the control of exports of dual-use goods. Article 17 provides:

'Each Member State shall take appropriate measures to ensure proper enforcement of all the provisions of this Regulation. In particular, it shall determine the penalties to be imposed in the event of breach of the provisions of the Regulation or of those adopted for its application. Such penalties must be effective, proportionate and dissuasive.'

Although the regulation was not in force at the material time, that article can be regarded as formulating established principles. In reply to the third limb of the second question it may therefore be stated that Community law does not preclude the adoption of

30 — Above, note 11.

national rules providing for effective penalties, including imprisonment.

67. The referring court also asks whether the whole burden of proving that the goods are for civil use can be imposed on the applicant, and whether an export licence can be refused if the goods are objectively suitable for military use. Those questions have given rise to considerable argument. The German Government takes the view that the referring court has not interpreted the relevant legislation correctly. It is clear, however, that in proceedings under Article 177 this Court must assume that the referring court has properly construed its own national law and must answer the questions referred on that basis.

68. It is in my view not difficult to answer those questions. The concept of dual-use goods implies that those goods are suitable for military use despite the fact that such use is not necessarily intended when the goods are produced or exported. Where the export of such goods threatens the external security of a Member State, or the health and life of humans, precisely because there is a risk of military use, it cannot be disproportionate to require the applicant for an export authorization to demonstrate that the goods will only be put to civil use. Nor is it necessarily disproportionate to refuse an export licence if the goods are objectively suitable for military use. That is not to say that the application of such national rules will never infringe the principle of proportionality. Much depends on the specific circumstances of each case, and it is for the referring court to ensure that in the present case that principle is observed.

The third question

69. The third question, as reformulated above, concerns the direct effect of Article 113 of the Treaty and Article 1 of the Export Regulation. In my view, it is sufficient to state that the Export Regulation, like all regulations, is directly applicable, in accordance with Article 189 of the Treaty, and that its provisions can be invoked, wherever their terms so permit, in the courts of the Member States. That includes not only the rule of free exportation in Article 1, but also the exceptions in Article 11.

Conclusion

70. Accordingly, in the *Werner* case I am of the opinion that the question asked by the Verwaltungsgericht Frankfurt-am-Main should be answered as follows:

Article 113 of the Treaty, as implemented by Council Regulation (EEC) No 2603/69, does not preclude a Member State from requiring a licence for the export to a non-member State of a product capable of being used for military purposes or the refusal of such a licence on the ground that refusal was necessary to protect the security of the Member State owing to the risk of a serious disruption of its external relations.

71. In the *Leifer* case, I am of the opinion that the questions referred by the Landgericht Darmstadt should be answered as follows:

(1) National rules restricting exports to a non-member State of products capable of being used for military purposes in order to prevent a substantial disturbance of the peaceful coexistence of nations or to prevent the external relations of the Member State concerned from being seriously disrupted are justified on the basis of Article 11 of Council Regulation (EEC) No 2603/69 in so far as those aims are linked to the external security of the Member State concerned, or in so far as the restrictions serve to protect the health and life of humans, as in cases where the country of destination is at war.

(2) Export restrictions and penalties for failure to obtain an export authorization must be proportionate to the aims pursued. National rules (a) imposing on the applicant the whole burden of proving that the goods are for civil use, (b) allowing for the refusal of an export licence if the goods are objectively

suitable for military use, and (c) imposing penalties, including imprisonment, are not disproportionate where the external security of the Member State concerned or the health and life of humans are at stake.

(3) Council Regulation (EEC) No 2603/69 is directly applicable and its provisions can be invoked in the courts of the Member States.