OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 16 October 1997 *

I — The subject-matter of these proceedings and the content of the national measure considered by the Commission to be contrary to Article 30 of the EC Treaty

1. In these proceedings the Commission of the European Communities has asked the Court to declare, pursuant to Article 171 of the EC Treaty, that, by adopting Ministerial Decree No 93-999 of 9 August 1993 relating to preparations with *foie gras* as a base, without taking account of the Commission's reasoned opinion of 1 February 1992 and its reasoned opinion of 14 October 1994, concerning mutual recognition, the French Republic has failed to fulfil its obligations under Article 30 of the Treaty.

2. The parties to these proceedings agree that since the 16th century the image of *foie gras* has been inseparably linked to French gastronomic tradition. Furthermore, France today still holds an extremely important position on the market in this product, being responsible for, on average, about 80% of world production of raw *foie gras* and 95% of its processing. In addition, about 90% of French production of raw *foie gras* and of preparations with *foie gras* as a base is consumed on the domestic market. [1]

That is not all: to this day the production, processing and marketing of *foie gras* are still organised, even in the other producer countries, according to professional practices and rules which gradually took hold in France and were subsequently codified by the French legislature. As a matter of fact — it is hardly surprising — in France the trade descriptions of *foie gras* and of preparations with *foie gras* as a base have been subject to detailed regulation since 1912. The names in French are furthermore widely used — often with a literal translation into the national language — in other Member States and in the United States of America.

3. Ministerial Decree No 93-999 of 9 August 1993 ('the Decree'), which entered into force on 1 January 1994, specifies in detail the composition and sets standards relating to the following preparations with *foie gras* as a base (see Article 2): whole *foie gras*, *foie gras*,

* Original language: Italian.

1 — According to data supplied by the French Government for 1995, the only Member States to reach a significant level of consumption of *foie gras* — apart from France (with about 12 500 tonnes) — were Spain, Belgium and Germany (with about 250, 150 and 100 tonnes' consumption respectively).

blocks of *foie gras* (these three preparations have a base of either goose or duck *foie gras*), liver *parfait*, liver medallions or pâté, galantine of liver or liver mousse (the last four preparations can have a basis of goose *foie gras* or duck *foie gras* or goose *and* duck *foie gras*).

In particular, for each of the products concerned the Decree specifies the minimum *foie gras* content (see Article 2), [2] and also those permitted ingredients which are necessary and those which are additional (see Articles 3 to 10). Article 12 lays down the maximum saccharose and seasoning content (0.2 and 4% respectively) for all the preparations covered by the Decree; in addition, for each of them, the Decree specifies the maximum percentage of fat given off and of homogenate (*homogénat*) [3] and/or water, the maximum degree of humidity and specific detailed rules concerning presentation or packaging (Articles 3 to 8). [4] Finally, in Articles 9 and 10 of the Decree, the French legislature laid down the conditions to which trade descriptions referring to truffles are subject, and the requirement to state 'in gelatine' in addition to the trade description.

4. Article 1 of the Decree prohibits the possession (with the view to sale or free distribution), marketing and giving away of preparations with *foie gras* as a base which do not satisfy the standards laid down by the Decree in respect of composition, production and presentation and which bear one of the trade descriptions listed above.

5. Nevertheless, the Decree permits charcuterie products of which the trade descriptions (as opposed to those defined in Article 2) refer to *foie gras* to be marketed, provided that the proportion of *foie gras* used in those products is at least 20%. In such case, the words 'with goose liver' or 'with duck liver' must be added to the trade description (Article 13).

II — Arguments of the parties

6. In the Commission's opinion, the Decree is contrary to the Treaty provisions concerning the free movement of goods, since it does not provide for the mutual recognition of preparations with *foie gras* as a base legally produced and marketed in other Member

2 — As provided in the decree, whole *foie gras*, *foie gras* and blocks of *foie gras* are composed solely of *foie gras* and seasoning; however the minimum *foie gras* content of liver *parfait* is 75%, and that of liver medallions or pâté, galantine of liver and liver mousse is 50%. It should be noted that the calculation of the percentage of *foie gras* does not take into account certain ingredients (for example the cooking fat (graisse de pochage) — defined as 'the fat released by *foie gras* when it is processed' — and meat trimmings in the case of liver *parfait*, galantine of liver and liver mousse).

3 — Homogenate is defined as 'all that part of the *foie gras* which has not remained in one piece after the pieces and fragments of less than 20 grammes weight have been packed together'.

4 — For example, the maximum number of pieces of the lobe of the liver (not less than 20 grammes in mass), in the case of prepacked whole *foie gras* of net mass not greater than 250 grammes (see Article 3), and the minimum total mass of pieces (not less than 10 grammes in mass), where their presence is shown on the labelling of a block of *foie gras* (see Article 5).

States — that is to say, in accordance with national legislation or proper production processes — with the same names as those governed by the Decree.

7. The Commission considers that, although the contested measure applies without distinction to domestic products and to those imported from other Member States, the fact that generic trade descriptions are reserved solely to preparations with *foie gras* as a base which satisfy the quality and composition requirements laid down by the French legislature is — in the absence of a mutual recognition clause — a measure having equivalent effect to a quantitative restriction on imports.

In particular, the Commission considers that the Decree entails a significant competitive disadvantage for producers, especially foreign producers, who intend to use the names prescribed by the French legislature in order to market products capable of replacing the traditional products, but which are innovative. Forced to use trade descriptions different from those already used on the market, those producers suffer a significant limitation of their freedom to compete.

8. According to the Commission, the imposition of restrictions on the marketing in France of food products lawfully manufactured and marketed in other Member States can be lawful only if it is intended to satisfy overriding public-interest requirements and in so far as it is in fact proportionate to the pursuit of that objective.

9. The Commission acknowledges that the Decree is in accordance with the overriding requirements of protection of French consumers and fair trading on the national market.

It observes, however, that the prohibition on the marketing in France, under any of the trade descriptions regulated by law, of preparations with *foie gras* as a base which do not comply with the requirements as to composition, production and presentation laid down by the Decree is so absolute that it applies — in the absence of a mutual recognition clause — even to foreign products which depart *only marginally* from the French rules.

According to the Commission, the measure in issue therefore creates obstacles to trade between Member States disproportionate to the objectives pursued.

10. The Commission agrees that the prevention of commercial offences relating to food standards constitutes a legitimate objective

but it challenges the solution adopted by the Decree in order to enable consumers to choose, with full knowledge of the facts, products to which they attribute specific qualities, because they are manufactured from particular raw materials or because they have a given content of a characteristic ingredient. The Commission maintains that less restrictive measures could be relied on for that purpose. Those means include, first of all, according to the case-law of the Court, [5] suitable labels concerning the nature of the product sold or the percentage of raw materials used: labelling equivalent, with regard to the information it contains and to how easily it may be understood by consumers in the importing State, to the trade description covered by the rules.

Moreover, the competent national supervisory authorities, according to the Commission, ensure that preparations of *foie gras* marketed in France under one of the trade descriptions provided for by the Decree in fact contain, to give just one example, the percentages of *foie gras* stated on the labelling. Since those responsible for selling a product which differs substantially from that corresponding to the name in question used could be prosecuted under the law, it follows that mutual recognition of preparations lawfully produced within the Community does not create any particular risk of unfair competition and misrepresentation to consumers.

11. In addition, there are, in the Commission's view, no grounds for considering that mutual recognition of preparations lawfully produced and marketed within the Community risks driving one or more French producers — to whom the stricter technical and commercial requirements laid down by the Decree would continue to apply — to establish themselves in another Member State (or to export all or part of their own production there, in order to reimport it into France) for the sole purpose of benefiting from less restrictive rules. The existence of such a risk is put forward by the French Government as evidence that the Decree is proportionate in nature.

In that connection, the Commission observes that, in order to avoid such risks of deflection of trade, it would have been sufficient for the French authorities to adopt a measure containing a mutual recognition clause, identical or similar to that earlier proposed by the Commission, [6] containing a reference to the criteria of 'unvarying' production and according to 'traditional' processes.

12. Finally, the Commission returns to the alleged incompatibility of the Decree with Article 30 of the Treaty, while acknowledging that a mutual recognition clause would have no immediate effect, given the absence of

5 — The Commission cites, in particular, Case 27/80 *Fietje* [1980] ECR 3839.

6 — From the documents in the case, it appears that the clause proposed by the Commission read as follows: 'Preparations with *foie gras* as a base produced in an unvarying and fair manner in accordance with traditional procedures existing in other Member States of the EEC may be marketed in France'.

equivalent legislation in the other Member States and the probable compliance by the other Community producers with the French measure.

By seeking to have such a clause inserted in legislation intended to last for some time, the Commission has focused its attention on the potential future effects of such legislation. The clause would ensure that where preparations with *foie gras* as a base which do not satisfy the conditions as to composition, manufacture and presentation laid down by the French legislation are lawfully manufactured and offered for sale in another Member State under one of the trade descriptions governed by the Decree, they could lawfully be marketed under the same names in France as well.

The Commission refers, in addition, to the settled case-law of the Court, according to which national legislation for the protection of consumers must not in any way be used to crystallise given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them. [7]

13. For its part, the French Government acknowledges — admittedly, in somewhat ambiguous terms — that the Decree 'may, on certain points, constitute a measure having equivalent effect'.

It maintains, however, that the purpose of the contested measure is not to impose the use of arbitrarily determined names, but rather to prevent certain customary names — which have now in practice become a sort of 'recognition mark' or 'guarantee of quality' — from being used to market products which do not satisfy the objective criteria of composition, production and presentation, to which those names traditionally correspond in the eyes of the purchasers.

The French Government therefore considers that the Decree is justified by overriding requirements of consumer protection and fair trading which would seem to be particularly deserving of protection in relation to rather expensive products. Furthermore, in its view, the Decree is proportionate to those requirements.

14. With particular reference to the trade descriptions 'whole *foie gras*', '*foie gras*' and 'blocks of *foie gras*' — which the Decree, as we have seen, reserves for preparations containing *solely foie gras*, whether whole or in pieces — the French Government argues that the measure in question is fully compatible with Directive 79/112/EEC relating to the

7 — See, *ex multis*, Case 178/84 *Commission* v *Germany* [1987] ECR 1227, paragraph 32.

labelling and the presentation of foodstuffs for sale to the ultimate consumer ('the Directive'), [8] which, in the absence of any harmonisation of the disputed trade descriptions, constitutes the only Community legislation applicable to them.

Article 2(1) of the directive provides that 'the labelling and method used must not:

(a) be such as could mislead the purchaser to a material degree, particularly:

(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production'.

15. In addition, the French Government observes more generally that the trade descriptions in issue were defined pursuant to Article 5(1) of the Directive, according to which 'the name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the Member State where the product is sold to the ultimate consumer or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused'.

16. In the opinion of the French Government, it follows from the Court's decision in *Deserbais* that the operative part of the Decree is proportionate to the imperative requirements of consumer protection and fair trading. [9] The disputed trade descriptions were in fact fixed on the basis of objective factors which give rise to the essential characteristics of preparations with *foie gras* as a base: namely, the composition of the products (in essence,

8 — Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1), as subsequently amended.

9 — See the judgment of 22 September 1988 in Case 286/86 *Ministère Publique* v *Deserbais* [1988] ECR 4907. In that judgment, the Court considered whether there are limits to the power of a Member State to raise obstacles, by means of measures restricting the trade name of a certain product (in that case, by making the use of the trade name Edam conditional on a minimum fat content of 40%), to imports of products of the same type — *even where adequate information about those products is ensured for consumers* — where the product presented outside the Member State of origin under the reserve trade name 'is so different, as regards its compositional production, from the products generally known by that name in the Community that it cannot be regarded as falling within the same category': ibid., paragraph 13 (it was not, however, necessary to settle that question in the circumstances of the case in the main proceedings which concerned imports into France of cheese containing 34% fat). See also the (slightly) earlier judgment of 14 July 1988 in Case 298/87 *Smanor* ([1988] ECR 4489, paragraphs 21 to 25), in which the Court left it to the national Court to decide whether the different characteristics (in particular, in relation to the number of live lactic bacteria) of deep frozen yoghurts lawfully produced and marketed in other Member States in relation to the quality requirements laid down by French rules relating to fresh yoghurts were so substantial as to justify for the former, on being imported into France, a name other than the reserved name of 'yoghurt'.

the percentage contained of the raw material) and the traditional production and presentation processes used. Furthermore, it is clear that a product containing significantly less *foie gras* than the minimum prescribed by the French legislature cannot aspire to any of the reserved trade descriptions if it is not to mislead consumers and adversely affect fair trading, since 'it cannot be regarded as falling within the same category' as each of the preparations covered by the Decree.

17. In emphasising that preparations with *foie gras* as a base are traditional products which cannot be placed on the same footing as modern food products, the French Government states that the trade descriptions in dispute, inherited from very old customs common to the majority of the French people, constitute the best means of supplying consumers with correct information.

18. On the other hand, the use of labelling merely stating the proportion of *foie gras* contained in an individual preparation would be insufficient for that purpose.

First of all, the French Government submits that that alternative solution, proposed by the Commission, could not in any event serve to supply adequate information for purchasers concerning *other* factors responsible for the particular taste of the products in question: that is to say, the traditional production and presentation processes.

19. Second, with specific reference to possible imports of preparations with *foie gras* as a base which do not comply with the requirements of the French recipe, the imposition by the national authorities of a trade description including an additional statement concerning the use of those ingredients — as suggested by the Commission — would be in conflict with the case-law of the Court; more specifically, it would be so in conflict whenever ingredients not covered by the Decree already appear in the usual list of ingredients for that product. [10]

The Commission therefore proposed that producers in other Member States should, *on a purely voluntary basis*, resort to fixing labels mentioning the limited content of *foie gras* and indicating the minimum quantity of that ingredient expressed as a percentage, as provided for by Article 7(1) of the Directive. In

10 — See Case C-51/94 *Commission* v *Germany* [1995] ECR 1-3599, in which the Court held that it is contrary to Article 30 of the Treaty for a Member State to require — as condition for marketing certain foodstuffs in its territory which contain an ingredient which is not in accordance with the prescriptions of a national recipe — the trade description to carry an additional statement indicating that that ingredient has been used, even if it is already included in the list of ingredients prescribed by Article 6 of the Directive.

this connection, however, the French Government maintains that 'relying on the goodwill' of foreign competitors would constitute a manifestly unsatisfactory means of protecting French consumers.

20. Third, the French Government acknowledges — with regard to the two-fold criterion laid down by the Court in *Fietje* [11] — that, if the labelling of a product of another Member State which is not in conformity with the Decree indicates specifically not only the composition, but *also the production method*, that label would in fact contain 'at least the same information' supplied by the applicable trade name governed by the Decree.

In any event, however, the second condition laid down by the Court's case-law is not satisfied, since that condition requires the information on such a label to be as comprehensible to French consumers as the trade description determined by the national legislation. According to the French Government, the average consumer does not know exactly what is the minimum content of *foie gras* traditionally contained in each type of preparation, still less the combination of factors, connected to the production method, which creates the special tastes characteristic of each preparation. Therefore, even a long and complex description of the composition and production method on the label of the product cannot replace any traditional names, to which consumers have been accustomed for a long time, and which represent in synoptic form precise qualities of production and taste, all the decisive elements of which are not necessarily known to purchasers.

21. Furthermore, contrary to the Commission's submissions, the application of the Decree to imported products is not in any way liable to lead to crystallising the habits of French consumers of preparations with *foie gras* as a base, so as to consolidate the advantage acquired by the national industry.

The French Government claims that foreign producers too remain entirely at liberty to offer for sale on the French market new preparations containing *foie gras*, so long as they use names other than those governed by the Decree, and always without prejudice to the prohibition on referring to *foie gras* in the description if the percentage of raw material used is less than 20%. In other words, the effects of the Decree on the free movement of goods, as a fundamental freedom, are those minimal effects allowed by the overriding requirement of consumer protection.

22. Finally, with regard to the absence of any mutual recognition clause in the Decree — which, as I have pointed out, constitutes the specific subject-matter of these infringement proceedings — the French Government

11 — See above, footnote 5, and the relevant part of the judgment.

contends that the alleged obstacles to the free movement of goods which the Commission challenges in the present case are not only not actual, but *not even potential.*

It argues that imports into France — a market which, as we have seen, is virtually reserved to domestic production — of preparations with *foie gras* as a base from other Member States [12] are not only marginal in quantity, but also still consist only of products which comply with the quality requirements laid down by the Decree. [13]

23. Consequently, as the representative of the French Government observed at the hearing, the position adopted by the applicant in these proceedings appears contradictory when compared with the approach it previously followed in the case of the trade description 'caviar'. [14] In that case, the Commission considered that the term 'caviar' could 'be regarded as generally recognised within the Community to indicate a product with a basis of sturgeon eggs', despite the fact that two Member States allowed the use of that term as generic description of fish eggs in general.

According to the French Government, it must therefore be concluded that France is entitled to prohibit the use of the names prescribed by the Decree on the French market for preparations which do not possess the essential characteristics corresponding to those names; such a conclusion is *a fortiori* essential in the present case, since *in no other Member State* is it permitted to use the trade names in question to indicate different products. [15]

24. Given, therefore, to the absence, already noted, of equivalent rules in the other Member States, the introduction into the Decree of a mutual recognition clause, as requested by the Commission, would not only not give rise to any benefit in terms of the free movement of goods in question within the Community, but would even give rise to a damaging legal uncertainty for French consumers and producers alike. The content of the

12 — According to data supplied by the French Government, the other major *foie gras* producing States are Hungary, Bulgaria, Poland and Israel. Within the Community, a significant production of *foie gras* is to be found only in Spain (165 tonnes a year) and Belgium (around 60 tonnes a year), both of which States are net importers.

13 — The French Government states that it is not by chance that even Spain, the only State to have submitted a detailed opinion, which had originally challenged the validity of the draft French law, subsequently the Decree, eventually agreed that 'it was not clear that a mutual recognition clause was necessary'.

14 — In that case, the Commission concluded that the importing Member States are entitled to prohibit on their territory the use of that trade description for products, such as lump fish eggs, which do not display the essential characteristic, generally known within the Community, of being composed exclusively of sturgeon eggs: see the Commission's interpretative communication concerning the trade descriptions of foodstuffs (OJ 1991 C 270, p. 2, in particular p. 4).

15 — In this connection, the French Government regards as unacceptable the criterion proposed by the Commission distinguishing between the present case and the caviar case ('[caviar] is a product sold almost exclusively in the raw state, whereas *foie gras* always needs a further preparation stage before it is sold to the final consumer'). The French Government points out that not only does the salting of sturgeon eggs — which alters their chemical, taste and nutritional properties — constitute a genuine *processing* of the product, but furthermore it is hard to see how the Commission can introduce different legal treatment for *foie gras* based on the products physico-chemical state at the moment of sale rather than on its essential characteristics.

description of 'goods produced in a traditional and fair manner, in accordance with existing traditional processes' in the Member State of production would not be anchored to concrete objective criteria. Proving that that description could lawfully be applied to a preparation with *foie gras* as a base which did not comply with the Decree, being imported into France, would therefore give rise, it may be foreseen, to serious difficulties. There would consequently be an immediate grave risk that preparations with *foie gras* as a base produced by processes not covered by the rules of the industry or subject to any quality control in the Member State of origin would benefit from automatic recognition of conformity within France — to the detriment of fair trading.

III — Opinion

25. Analysis of the infringement of Article 30 of the Treaty of which the Commission complains must in my opinion start from certain premisses which can be deduced from the Court's settled case-law concerning actions for failure to fulfil Treaty obligations. In the context of proceedings taken under Article 169 of the Treaty, it is incumbent upon the Commission to prove that an obligation has not been fulfilled; the Commission cannot rely on any presumptions and it is obliged to submit to the Court the evidence necessary to enable the Court to give a decision on the point. [16] None the less, the existence of the failure to fulfil obligations which is the subject-matter of the action must be determined in the light of the legal situation as it exists *at the close of the period set by the Commission for the Member State*, in the preceding pre-litigation stage of the procedure, *to comply with its reasoned opinion.*

It is true that the Court laid down that principle with reference to the situation in which the Member State concerned seeks to avoid, by adopting belated measures, a judgment declaring its failure to fulfil obligations. This is not allowed, since the Court cannot — when considering whether the action is well founded — take account of any changes which have occurred after the end of that period. [17] The fact remains, however, that the principle in question means also that all the material elements of the alleged breach of fulfil obligations must be in existence at the close of the period prescribed in the reasoned opinion. [18]

16 — See, *ex multis*, the judgments in Case 97/81 *Commission* v *Netherlands* [1982] ECR 1819, paragraph 6, Case 141/87 *Commission* v *Italy* [1989] ECR 943, paragraph 15, Case C-375/90 *Commission* v *Greece* [1993] ECR I-2055, paragraph 33 and Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 61.
On the other hand, if the Commission produces sufficient evidence to establish the alleged infringement of Community law, the facts which it has alleged must be considered to have been proved, unless the Member State concerned is able to contest substantively and in detail the information produced and the consequences thereof (see Case 272/86 *Commission* v *Greece* [1988] ECR 4875, paragraph 21).

17 — See, *ex multis*, Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13 and Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 15.

18 — See Case C-61/94 *Commission* v *Germany*, cited above at footnote 16, paragraph 42; rejecting the argument of the German Government that the existence of an infringement must be assessed in the light of legislation which entered into force several months after the end of the period prescribed in the Commission's reasoned opinion, the Court stated that 'in such proceedings [pursuant to Article 169 of the Treaty] the existence of an infringement must be assessed in the light of the Community legislation in force at the close of the period prescribed'.

26. The Commission asks the Court to declare that the Decree — although it allows producers and distributors of the preparations containing *foie gras* which do not satisfy national quality regulations to offer them for sale on the French market — is liable to hinder intra-Community movement of the goods in question, at least by making imports from other Member States *potentially* more costly and difficult.

27. Two facts have not, however, escaped the Commission: (i) there is no harmonising Community legislation relating to production and marketing of the products concerned and the Member States may for the time being regulate these matters provided that the effects of this are restricted to their own territories; (ii) the Decree applies without distinction to French and imported products alike.

According to the Commission, in the absence of a clause for the mutual recognition of products from other Member States, preparations with *foie gras* as a base which might one day be produced within the Community according to composition and preparation rules different from those laid down by the Decree could be sold in France only under trade names different from those reserved by law, which are more attractive from the commercial point of view. If the percentage of raw material used in a given preparation were less than 20%, that product could be sold on the French market only under names which did not refer to *foie gras*. The measure in issue must therefore be characterised as a measure having equivalent effect to a quantitative restriction on imports. [19]

Therefore, in accordance with the line of case-law beginning with the Court's *Cassis de Dijon* judgment, [20] in order for the Court to hold that the burden of proving the alleged infringement of Article 30 of the Treaty has been discharged, the Commission would have to demonstrate that the requirements laid down by the Decree *cannot* be regarded as *necessary* to satisfy overriding public-interest requirements — such as those concerning fair trading [21] and consumer protection, [22] cited here by the French Government — which

19 — According to the Court's settled case-law, the concept of a measure having effect equivalent to quantitative restrictions includes 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' (see judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5). For the purposes of the prohibition laid down in Article 30 of the Treaty, it is not a necessary condition that those measures should have an appreciable effect on intra-Community trade (see judgment in Case 16/83 *Prantl* [1984] ECR 1299, paragraph 20).

20 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8. In a subsequent judgment (Case 788/79 *Gilli and Andres* [1980] ECR 2071, paragraph 6) the Court held that the permissibility of obstacles to intra-Community trade caused by disparity between national rules relating to the sale of those products depends upon there being no discrimination by the national legislation to the disadvantage of imported products. See also judgments in Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, paragraph 10 and Case 59/82 *Schutzverband gegen Unwesen in der Wirtschaft* v *Weinvertriebs* [1983] ECR 1217, paragraph 11.

21 — See Case 25/88 *Wurmser and Others* [1989] ECR 1105 and Case C-93/92 *CMC Motorradcenter* v *Baskiciogullari* [1993] ECR I-5009.

22 — See Case 6/81 *Industrie Diensten Groep* v *Beele* [1982] ECR 707 and Case 220/81 *Robertson* [1982] ECR 2349.

would prevail over the requirements of free movement of goods between Member States.

Finally, even if the Decree should, *ex hypothesi*, appear reasonable and technically appropriate with regard to those overriding requirements, it would still have to be declared unacceptable if it were established: (i) that the French legislature could — for the purposes of protecting consumers against unfair trading — have had recourse to other, equally effective, measures less restrictive of the free movement of goods; [23] or (ii) that the Decree is being used for the purposes of arbitrary discrimination or a disguised restriction on trade between Member States. [24]

28. Conversely, in the absence of a public-interest objective capable of prevailing over the requirements of the free movement of goods, the principle — also laid down by the Court in *Cassis de Dijon* [25] — according to which any Member State is required to authorise the entry into its territory of goods lawfully produced *or* marketed in other Member States, [26] even if they are produced according to technical or quality requirements different from those in force in the importing State, [27] would in this case be applicable to the French Republic.

It is precisely that principle, which I have just set out, to which the obligation of mutual recognition of equivalent rules and procedures relating to production, approval, control and certification of goods is attached as a corollary. [28] It is therefore that principle — according to certain writers [29] — *of equivalence* that the Commission considers has been

23 — See, *ex multis*, judgments in Case 261/81 *Rau* v *De Smedt* [1982] ECR 3961, paragraph 12, and Case 382/87 *Buet and Another* v *Ministère Publique* [1989] ECR 1235, paragraph 11.

24 — See, *ex multis*, Case 16/83 *Prantl*, cited above, footnote 19, paragraphs 21 and 24. On the interpretation of the condition set out in the text in connection with Article 36 of the Treaty, see also Case 8/74 *Dassonville*, cited at footnote 19 above, paragraph 7, Case 34/79 *Henn and Darby* [1979] ECR 3795, paragraphs 20 and 21, Case 40/82 *Commission* v *United Kingdom* [1982] ECR 2793, paragraphs 36 to 40, Case 50/83 *Commission* v *Italy* [1984] ECR 1633, paragraphs 6 to 9, Case 121/85 *Conegate* [1986] ECR 1007, paragraphs 15 to 16, and Case C-317/91 *Deutsche Renault* v *Audi* [1993] ECR I-6227, paragraphs 18 to 28.

25 — See *Cassis de Dijon*, cited at footnote 20, points 14 and 15.

26 — Although the literal wording in *Cassis de Dijon* and the Court's subsequent case-law refers to products lawfully produced *and* marketed in a Member State other than that of importation, the principle of equivalence must, correctly understood, be taken as applying to the obligation to accept goods lawfully produced *or* marketed in another Community country. That was expressly recognised by the Court (see, for example, *Schutzverband*, cited at footnote 20 above, paragraph 12, and Case C-131/93 *Commission* v *Germany* [1994] ECR I-3303, paragraph 10). By contrast, the following fall outside the scope of application of that principle: (i) products from non-member countries (see R. Barents: 'The Image of the Consumer in the Case-law of the European Court', *EUR. Food L. Rev.*, 1990, p. 6, in particular p. 11, note 23), (ii) products which do not comply with the technical rules of the Member State of origin, which are not marketed there and which comply with the rules of the importing Member State (see A. Mattera Ricigliano: 'La libre circulation des produits alimentaires à l'intérieur de la Communauté et la mise en oeuvre du principe de la reconnaissance mutuelle', *Eur. Food L. Rev.*, 1990, p. 72, in particular p. 77), and (iii) products produced in a Member State other than that of direct export, which comply with the technical requirements in force in the former but not with those applicable in the latter (see P. Oliver: *Free Movement of Goods in the European Community*, London, 1996, 3rd ed., p. 117).

27 — See also the communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('*Cassis de Dijon*'), OJ 1980 C 256, p. 2.

28 — See Mattera Ricigliano, cited above at footnote 26, p. 81.

29 — See A. Bernel, *Le principe d'équivalence ou de 'reconnaissance mutuelle' en droit communautaire*, Zurich, 1996, p. 136, and the works cited therein at notes 471 and 472. The principle in question is called the principle 'of the country of origin' by Barents, cited above at footnote 26, p. 12. As regards the basis of that principle, see footnote 30 below and the relevant part of the text.

infringed by the French authorities in adopting the Decree.

The undertakings mutually entered into by the Member States by acceding to the Treaty mean that each of them 'demonstrates its trust in the capacity of the others to supervise the manufacture of goods, the supply of services and the training of economic operators in their trade or business. Thus the idea emerges that the legislative action of one Member State may be equivalent to that of another, as regards their respective protective effects'. [30]

As is well known, the instrument favoured by the Commission in order to enable the products lawfully or fairly manufactured in other Member States to have free access in practice to the market in the country of importation, an instrument which has been recognised by the Court, consists of adding an equivalence clause to new drafts of the technical rules in question. [31]

29. Certain of the Court's decisions following the *Cassis de Dijon* judgment have reiterated that any national rules which require imported products to comply literally and exactly with the same provisions or the same technical characteristics prescribed for national products are contrary to the principle of proportionality, even though the imported goods already guarantee the same level of protection of the imperative requirement concerned as the rules of the Member State of importation are intended to guarantee. [32]

30. In particular, the decisions of the Court referred to by the Commission in this case defined the conditions to which technical and commercial rules of the type in issue in these proceedings — based on the imperative requirement of consumer protection with regard to unfair trading practices — may legitimately give rise in the prohibition or restriction of sales, in the Member State concerned, of products which do not comply with the quality rules of the national recipe, but which are lawfully or fairly produced or marketed in other Member States.

According to the Court, in the absence of Community harmonisation of legislation, national measures which are necessary in order to ensure that products are accurately described are not incompatible with the Treaty

30 — See *Bernel*, cited above, at footnote 19, p. 110, for a reference to the principle of 'mutual trust', see *Wurmser*, cited above at footnote 21, paragraph 18. According to the Commission, 'acceptance [of the principle that any product lawfully produced and marketed in one Member State must be admitted to the market of any other Member State] implies that Member States, when drawing up ... rules [concerning the composition, designation, presentation and packaging of products, or requiring compliance with technical provisions], liable to affect the free movement of goods, may not take an exclusively national view point and take account only of requirements confined to domestic products. The proper functioning of the common market demands that each Member State also give consideration to the legitimate requirements of the other Member States' (see the communication from the Commission, cited above, at footnote 27, p. 2).

31 — See A. Mattera Ricigliano, *Il mercato unico europeo. Norme e funzionamento*, Turin, 1990, p. 155.

32 — See, *ex multis*, Case 188/84 *Commission* v *France* [1986] ECR 419, paragraph 16, and Case 215/87 *Schumacher* v *Hauptzollamt Frankfurt am Main-Ost* [1989] ECR 617, paragraphs 19 to 22.

rules on the free movement of goods provided that they avoid any confusion on the part of consumers and ensure fair trading. [33]

However, the requirements of free movement prevail over the imperative requirements in question whenever it may be considered that consumers are adequately protected by means of appropriate requirements as to labelling concerning the nature, ingredients and characteristics of the product offered for sale. [34]

31. In other words, it must be held that the goods the import of which is in issue guarantee a level of protection equivalent to that guaranteed by the trade description regulated by the State of importation where the information on the original label contains — in the Court's opinion — [35] information concerning at least the same elements and is as comprehensible to the consumers in the Member

33 — See Case C-51/94 *Commission* v *Germany*, cited above at footnote 10, paragraph 31, and Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 11.

34 — See, *ex multis*, *Cassis de Dijon*, cited above at footnote 20, paragraph 13, on the prohibition of marketing alcoholic beverages in Germany (such as the fruit liqueur Cassis de Dijon, produced in France having an alcohol content lower than the minimum prescribed for the relevant category; *Gilli and Andres*, cited above at footnote 20, paragraph 7, and Case 193/80 *Commission* v *Italy* [1981] ECR 3019, paragraph 27, concerning the prohibition on marketing in Italy products containing acetic acid not originating in the acetic fermentation of wine, such as apple vinegar produced in Germany; *Fietje*, cited above at footnote 5, paragraph 12, on the extension of the prohibition of the sale of certain alcoholic beverages under a description other than that prescribed by national law for drinks of the same type to products imported from other Member States, thereby making it necessary to alter the label under which the products in question were lawfully marketed in the Member State of export; *Rau* v *De Smedt*, cited at footnote 23, paragraph 17, on the prohibition on marketing margarine or edible fats in Belgium where the product or its external packaging does not have cubic shape; Case 51/83 *Commission* v *Italy* [1984] ECR 2793, paragraph 15, on the restriction of imports of confectionery products which contained more than 1% of animal gelatine; Case 178/84 *Commission* v *Germany*, cited above at footnote 7, paragraph 35, on the prohibition on marketing under the designation *bier* of beers manufactured in part with raw materials (such as rice and maize) other than those prescribed by the German tax law on beer; Case 216/84 *Commission* v *France*, cited above at footnote 33, paragraphs 9 and 11, and Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraphs 15 to 18, concerning prohibitions of imports of substitutes for milk powder and concentrated milk under any name whatsoever; Case 407/85 *Drei Glocken* [1988] ECR 4233, paragraph 16 on the prohibition of marketing in Italy pasta products made from common wheat or from a mixture of common wheat and durum wheat; Case C-51/94 *Commission* v *Germany*, cited above at footnote 10, paragraphs 33 and 37, on the requirement that béarnaise and hollandaise sauce made with vegetable fats and certain pastry products containing an additive should carry a trade description with an additional statement indicating that the substance in question has been used.

35 — In all the actions for infringement brought by the Commission in the field in question, the Court has without fail concluded that the label fixed to the imported product gave consumers sufficient information.
For a minute analysis of the limits of the preference demonstrated by the Court for labelling with regard to quality standards and to the reservation of trade names as a proportionate means of informing consumers, see H.-C. von Heydebrand und der Lasa, 'Free Movement of Foodstuffs, Consumer Protection and Food Standards in the European Community: Has the Court of Justice Got It Wrong?', *Eur. L. Rev.*, 1991, p. 391, in particular, pp. 406 to 413. By contrast, for an appreciative assessment, see W. and G. Wils, 'Free Movement of Goods and Quality Regulation of Foodstuffs', *Eur. Food L. Rev.*, 1990, p. 92, and H. L. Clark, 'The Free Movement of Goods and Regulation for Public Health and Consumer Protection in the EEC: The West German "Beer Purity" Case', *Va. J. Int'l L.*, Vol. 28, 1988, p. 753.
Furthermore, Barents invites the reader not to identify the basis of the case-law under discussion with the Court's presumed deference to the legislative notion of the 'informed consumer' (see op. cit., at footnote 26). But see Case C-51/94 *Commission* v *Germany*, cited above at footnote 10, paragraphs 34 and 36, in which the Court — in rejecting the argument of the German Government that the contested requirements relating to the labelling and packaging of the products concerned were necessary in order to ensure that consumers were correctly informed and to ensure fair trading — stated that 'consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required ... Even though consumers may sometimes be misled, that risk remains minimal'. See also S. Weatherhill, 'The evolution of European consumer law and policy: From well informed consumer to confident consumer?', in *Schriftenreihe des Vereinigten Instituts für Europäisches Wirtschafts- und Verbraucherrecht* (edited by H.-W. Micklitz), Vol. 1, *Rechtseinheit oder Rechtsvielfalt in Europa?*, Baden-Baden, 1996, p. 423, in particular p. 430. Weatherhill observes, however, that out of recent secondary Community legislation for the protection of consumers' economic interests (such as that relating to misleading advertising, contracts negotiated away from commercial premises, package travel and package tours, consumer credit and unfair contractual terms there has developed a new Community definition of consumers, that of the 'confident consumer', who — no longer a mere passive beneficiary of freedom to trade and incidental beneficiary of the harmonisation of legislation — has been encouraged to effect cross-border commercial transactions, in the knowledge that he is protected vis-à-vis the operation of the market by a minimum network of protective measures. Weatherhill hopes that this new legislative concept will rapidly be able to influence the Court's decision-making practice (ibid., pp. 457 to 465).

State of importation (see above, paragraph 10). [36]

The principle of 'mutual trust' described above at point 28 means — with regard to consumer protection in the specific field of food products — that 'if the laws of the Member State of exportation also protect consumers in the territory of the Member State of importation (for example, by means of rules concerning composition), there is no need to apply similar rules in the Member State of importation. Rather, it is enough to inform the consumer that those rules have been applied in the exporting Member State. There will be an objective reason for applying the legislation of the importing Member State only where the legislation of the exporting Member State does not offer that protection [, whereas application of rival national rules having only one object and concerning the same product remains prohibited,] thus restricting the consumer's freedom of choice more than is necessary'. [37]

The principle I have just set out admits of only one exception: that created by the Court's decision in *Deserbais*, cited above, [38] concerning cases of fraudulent imports. [39]

32. Finally, the Court has stated that the principle of equivalence remains applicable even in the absence of *legislation* governing the production and/or marketing of the product concerned in the Member State of origin.

In the absence of imperative public-interest requirements of a higher order, it will therefore be goods produced in compliance with the *fair and traditional practices observed* in the State of exportation which benefit from free movement between Member States. [40] In that case, it will not be possible — when assessing whether the State measure declared to be restrictive as regards the imperative requirement in point is proportionate — to compare *in the abstract the relevant laws* of the Member States of export and of import (or rather, the material requirements which

36 — The idea of 'equivalent level of protection' assumes that parallel national rules pursue the same objective, but not necessarily that the means or techniques chosen by the various Member States in order to pursue the material requirements respectively targeted should be identical (see Bernel, op. cit. at footnote 29, pp. 39 and 109). See also Case C-293/93 *Houtwipper* [1994] ECR I-4249, according to which Article 30 of the Treaty does not preclude the application of national rules on guaranteed standards of precious metals which prohibits the sale of articles not bearing a hallmark, indicating their fineness (that is to say, the quantity of pure precious metal used) in accordance with the requirements of those rules, are fixed by an independent body where: (i) those articles do not bear a hallmark, in accordance with the legislation of the Member State of exportation, containing information which is equivalent to that provided by the hallmarks required by the rules of the Member State of importation and which is intelligible to consumers in that Member State or (ii) where those articles have been hallmarked in the Member State of exportation by a non-independent body.

37 — See Barents, op. cit., footnote 26, p. 12.

38 — See above, footnote 9 and the relevant part of the text.

39 — Accordingly, it would seem difficult to deduce from the Court's case-law on this point (see footnote 9 above and the relevant part of the text) certain and objective criteria in order to establish whether a food product, the import of which is in question, is so different, as regards its composition or production, from the products generally known by that name in the Community that it cannot be regarded as falling within the same category (see G. Duncan, N. MacGowan, 'Does Community law allow Member States to restrict the use of certain trade descriptions to products which contain a certain proportion of their characteristic ingredients?', *Irish J. Eur. L.*, 1994, p. 65, in particular p. 68).

40 — *Prantl*, cited at footnote 19, paragraphs 27 to 30, and Case 182/84 *Miro* [1985] ECR 3731, paragraphs 24 to 27.

production or marketing of the product in question must satisfy respectively). By contrast, the point to be determined *in concreto* is whether there is equivalence between the levels of protection for the consumer concerning, on the one hand, the national product, and on the other hand, the imported product. [41]

33. The principles that I have just set out are those which govern this field. It is not, however, necessary in this case to go further into the question whether the Decree is proportionate with regard to the imperative requirements of consumer protection and fair trading which inspired its adoption.

I shall instead confine myself to considering the argument put forward as a preliminary point by the French Government (see above, point 22). The failure to fulfil obligations which is the subject-matter of this action would exist only if it were proved that, at the end of the period (of two months from notification) fixed by the Commission in its reasoned opinion of 14 October 1994, the Decree hindered, directly or indirectly, actually or potentially, intra-Community trade. Should that condition not be satisfied, the Decree would fall outside the scope of Article 30 of the Treaty; the question whether or not it was justified would therefore not even arise.

34. Now let me come to the point. Current imports into France of preparations with *foie gras* as a base from other Member States, marginal in volume, concern in any event — as I said above (see point 2) — products which comply with the quality requirements laid down by the Decree. In other words, even in those Member States — and even in non-member countries — in which *foie gras* is produced (in however small a quantity), that production complies with practices and quality rules of the industry identical to those which have prevailed on the French market for centuries. And this is not by chance: *foie gras* is a product inseparably linked to French gastronomic tradition. That situation is reflected in the wide and widespread use of those trade descriptions in French.

Finally, in no other Member State is there any legislation of the same type as that adopted in France in the Decree governing the production and marketing of the products concerned. Moreover, the French quality rules go back — as we see — to a time when the Community was not yet in existence, when national governments had at their disposal, in

41 — It has been observed that it is in some cases far from easy to carry out a comparative assessment of the degrees of protection guaranteed by two sets of national rules respectively, relating to a series of special factors in the individual case and also the socio-economic context of the Member States concerned (see *Bernel*, op. cit., at footnote 29, p. 143; *Oliver*, op. cit., footnote 26, p. 116). To my mind, this difficulty is all the greater where — as in the case in the present proceedings — the terms of comparison are the same products manufactured in accordance with fair and traditional practice in the exporting Member State. In that case, moreover, the problem may arise of a reliability of checks already carried out in the Member State of origin and of the compatibility with Community law of any repetition in a Member State of destination (see *Bernel*, op. cit., at footnote 29, pp. 37 to 42).

their 'legislative armories', measures to protect domestic food producers from much stronger effects such as subsidies, direct restrictions on imports or customs duties. [42] It should be observed that none of those claims made by the French Government has been challenged in substance by the Commission, which has, on the contrary, acknowledged not only that the Decree has not the slightest restrictive effect at present, but also that it will not have any such effect in the near future (see above, point 12).

35. It follows from what we have seen so far that the requirement of mutual recognition for the purposes of lawful marketing on national territory — which, according to the Commission, is incumbent on France — concerns not preparations with *foie gras* as a base 'lawfully produced or marketed in other Member States' (a category which is non-existent at present), but solely goods of that type produced 'in accordance with fair and traditional practices' in the Member State of origin.

Furthermore, that observation would appear to be confirmed by the wording of the equivalence clause originally proposed by the Commission to the French authorities. [43]

Accordingly — having regard, as we must, to the fact that the fair and traditional practices followed in France and in the other Member States which produce preparations with *foie gras* as a base are equivalent — the Decree does not, to my mind, produce any effects, *either actual or potential*, restrictive of imports of the products concerned.

36. In other words, I consider that the Commission has leapt to a conclusion for which its process of reasoning provides no justification. It is not possible to accept its argument that the requirement to insert an equivalence clause in the Decree — the provisions of which are probably destined to regulate the area in question for years to come — would fill a preventative role. Indeed that argument seems to me to be irreconcilable with the clear doctrine expounded by the Court, to which I have referred above several times, and according to which, in assessing whether an action for failure to fulfil obligations is well founded, the Court is obliged to refer to the legal situation as 'crystallised' at the close of the period fixed by the Commission for the Member State concerned to do what is necessary to comply with the reasoned opinion. That principle certainly applies — here there can be no doubt — also to the economic and market context from which the underlying factors must be deduced to which the allegedly infringed provisions refer.

37. Proof that the Decree is liable to hinder, if only potentially, intra-Community imports

42 — See Heydebrand und der Lasa, op. cit., at footnote 35, p. 392.

43 — See above, footnote 6 and the relevant part of that document.

would certainly have required evidence also of flows of imports from other Member States of preparations with *foie gras* as a base which comply either with national rules on quality or with gastronomic traditions *other than those of the Decree*. That follows unarguably from the Court's judgments finding a State to have failed to fulfil its obligations through infringing the Treaty provisions on the free movement of goods. [44]

It must, however, be borne in mind that, at the present time, outside France there do not exist — still less did there exist in December 1994 on the expiry of the period fixed by the Commission in its reasoned opinion — any national legislative measures concerning the composition, production and trade descriptions of the products concerned. Not until the day that another Member State adopts such legislation, and not before, will it be possible to speak of potential flows of trade from other Member States, capable of being unlawfully hindered or restricted, within the meaning and for the purposes of Article 30 of the Treaty.

38. *Mutatis mutandis*, the foregoing observations apply to preparations with *foie gras* as a base which might, in future, be produced according to practices different from those required by the Decree, but which are fair and traditional practices in another Member State.

I shall not, in this Opinion, attempt to resolve the very thorny question of what are the legislative parameters for determining whether an unregulated industrial and commercial

44 — Leaving aside here the earlier cases in which the Court held that the contested State measure was not applicable without distinction or had *actual* restrictive effects on imports, see, *ex multis*, the judgments in Case C-193/80 *Commission* v *Italy*, cited above at footnote 34, paragraphs 20 to 26 (the Court held that reserving the designation 'vinegar' to wine vinegar and prohibiting the marketing in Italy of vinegars of agricultural origin other than those originating in the acetic fermentation of wine had potential restrictive effects); Case 51/83 *Commission* v *Italy*, cited above, footnote 34, paragraph 18, in which the Court declared that restricting the marketing in Italy of confectionery products containing more than 1% of animal gelatine, which were lawfully manufactured and placed on the market in other Member States, produced potential restrictive effects); Case 179/85 *Commission* v *Germany* [1986] ECR 3879, paragraph 8 (in which the Court held that the prohibition on marketing in Germany beverages such as 'pétillant de raisin' in traditional champagne-type bottles, that is to say, in the presentation in which pétillant had been traditionally produced and sold in France since 1956 had potential restrictive effects); Case 176/84 *Commission* v *Greece* [1987] ECR 1193, paragraphs 26 and 32 (the Court found that potential restrictive effects were produced by the Beer Tax Law and the Greek code on foodstuffs and beverages with respect to imports of beers lawfully manufactured and marketed in other Member States (i) from raw materials other than malted barley or (ii) with the use of enzymes or (iii) containing additives authorised in the Member State of manufacture); Case 178/84 *Commission* v *Germany*, cited above at footnote 7, paragraphs 29 and 40 (the Court found potential restrictive effect produced by the 'purity law' for German beer in respect of imports of beers lawfully manufactured in other Member States (i) from raw materials other than malt and barley (and in particular rice and maize) or (ii) containing additives authorised in the Member State of manufacture); Case C-210/89 *Commission* v *Italy* [1990] ECR I-3697, paragraph 9 (the Court held that the prohibition on marketing in Italy cheeses with the fat content lower than the minimum prescribed by legislation on imports of products coming from other Member States — such as France — in which they were lawfully manufactured and marketed had potential restrictive effect). I note how, not by chance, in many of the cases just cited the Commission set in motion the mechanism of the Article 169 procedure on the complaint of the interested traders or of other Member States.

practice is 'fair and traditional': [45] suffice it to say here that it will not be until there is an unvarying and fair production of preparations with *foie gras* as a base — other than that of French origin and in competition with the latter — that we shall be able to say that there exists in the Community any real possibility of a commercial flow of imports on to the French market, in relation to which the Decree will be seen to constitute a measure equivalent to a quantitative restriction.

That condition — I would repeat — was not, however, satisfied in 1994, at the close of the period fixed in the Commission's reasoned opinion. The Court has repeatedly held that, in order for measures adopted by Member States to be contrary to Article 30 of the Treaty, it is sufficient to prove 'that they may merely hinder "imports *which could otherwise take place*"': [46] in the present case it must, to my mind, be concluded that the imports which might have taken place, were it not for the Decree, would not differ in quantity, by so much as a tonne, from those recorded while that measure is in force.

In the case before the Court, the technical and commercial rules under consideration do not seek to impose on French consumers — on the basis of a subjective and arbitrary definition of quality — the national recipe for preparations with *foie gras* as a base, raising it to the level of a Community recipe, to the disadvantage of preparations which differ in their composition or their production method, widespread and appreciated in other Member States. In reality, the 'generally known' Community concept of the products in question seems to coincide with the French concept, and it seems that habits of consumption of preparations with *foie gras* as a base in the Member States were 'crystallised' a long time before the Decree was adopted. This is evidenced by the fact that neither in December 1994 nor today has the importer into France of preparations with *foie gras* as a base from

45 — The extension of the scope of the obligation of mutual recognition between Member States from the level of the legislative action in point to the level of *tradition* — which is a concept of no intrinsic value in terms of quality, and implies, *ex hypothesi*, the absence of monitoring in the State of origin — appears to be not entirely rational (see Heydebrand und der Lasa, cited above, footnote 35, pp. 409 and 410). It is perhaps the case that the relevant decisions of the Court can find a plausible explanation only in the light of their respective factual contexts, from which it may be deduced that the emphasis placed on the traditional nature of the imported product was, in every case, intended in essence to reject the argument — more or less covertly developed by the authorities of the importing State — that the product in question had been manufactured specifically in order to place on the market in the importing Member State a product of inferior quality and reduced price, attractive to the consumers on that market, using to its own advantage the lack of technical and commercial legislation in the Member State of origin (see O. Brouwer, 'Free movement of foodstuffs and quality requirements: Has the Commission got it wrong?', *Common Market Law Review*, 1988, p. 237, in particular, p. 253, note 39). Advocate General Sir Gordon Slynn observed, in Case 179/85 *Commission* v *Germany*, cited above at footnote 44, pp. 3892 and 3893), that 'Whereas the "fair and traditional usage" test may be appropriate in a case like *Prantl* where the question of indirect designation of origin arose, it does not seem to me that it has to be established in every case. If it did the development and marketing of new products would be stifled'.
In addition, as the French Government has pointed out in these proceedings, the criterion of equivalence between traditional products is so vague as to be irreconcilable with the fundamental requirement of legal certainty: neither the Court nor the Commission has yet explained 'in what quantities and for how long a product must be manufactured and marketed before it can satisfy that criterion' (see Brouwer, cited above, p. 254; Oliver, cited above at footnote 26, p. 241).

46 — See, *ex multis*, Case 12/74 *Commission* v *Germany* [1975] ECR 181, paragraph 14, and Case 124/85 *Commission* v *Greece* [1986] ECR 3935, paragraph 7 (emphasis added).

other Member States been faced with the problem of adapting the trade description and/or the labelling with which the product is marketed in the Member State of production.

Consequently, failure to insert a mutual recognition clause in the Decree cannot be said to be contrary to Community law.

By contrast, however, it must be recognised that there exists a line — perhaps not yet clearly defined, but not, as a matter of principle, open to question — that marks a distinction between the bringing of an action under Article 169 of the Treaty to contest a State measure capable at present of producing potential restrictive effects (which is permitted), and the bringing of such an action to contest a State measure which can produce such effects only in the future (which is not permitted), subject, possibly, to the condition that the legal situation and the underlying economic context have altered, as compared with those existing at the end of the period fixed in the reasoned opinion.

39. I do not intend, in this Opinion, to repeat the proposal that a *de minimis* rule, which the Court has already rejected, should be introduced in the field of actions for failure by a State to fulfil its Treaty obligations. [47]

40. On the basis of the above, I consider that the French Republic has not failed to fulfil its obligations under Article 30 of the Treaty, as alleged in these proceedings.

IV — Conclusion

In the light of the observations set out above, I propose that the Court:

— should dismiss the application and

— order the Commission to pay the costs.

47 — See Case C-209/89 *Commission* v *Italy* [1991] ECR I-1575, paragraph 6, and Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871, paragraph 20.