OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 17 March 1988

My Lords,

Pursuant to the International Convention on the Use of Designations of Origin and Names for Cheeses, 'the Stresa Convention', of 1 June 1951, to which *inter alia* France and the Netherlands are parties but to which the Federal Republic of Germany is not, French legislation prohibits the marketing of cheese under the appellation 'Edam' unless it has a minimum dry-matter content of 52% and a fat content of 40%. Gérard Deserbais, the manager of the French company Fromex SARL imported into France cheese originating in the Federal Republic of Germany which had a dry-matter content of 50.4% and a fat content of 34.3%. That cheese was prepacked and labelled (in French):

'German Edam cheese
Fat content 30%
Imported by Fromex, Strasbourg'

In respect of that importation, he was prosecuted and convicted of passing off ('usurpation d'une dénomination') liable to mislead the buyer as to the nature and inherent qualities of the goods concerned. He appealed to the Court of Appeal, Colmar, on the basis that Community law allowed him to import the cheese into France under the appellation 'Edam' because it was lawfully manufactured and marketed under that name in the Federal Republic of Germany.

To resolve the issue, the Court of Appeal, Colmar, referred the following question to the Court of Justice for a preliminary ruling by an order of 30 October 1986:

'Must Article 30 *et seq.* of the EEC Treaty be interpreted as meaning that national legislation which, for the purpose of protecting a trade name,

(1) restricts that trade name to national products or those of another State, to the exclusion of the products of other Member States;

(2) makes the right to use the trade name of a cheese imported from a Member State conditional on the observance of a minimum fat content, even though the imported cheese is lawfully and traditionally produced and marketed in its country of origin in accordance with different technical and quality requirements

constitutes a quantitative restriction on imports or a measure having equivalent effect thereto?'

Mr Deserbais relies on Article 30 as interpreted in the Court's case-law on the free movement of goods, asserts that consumers were adequately protected by the information on the label, and submits that the

question should be answered along the lines that Article 30 of the EEC Treaty prohibits a Member State from applying to cheese of the same type imported from another Member State national rules which allow a trade name to be used for that cheese only if a condition stipulating a minimum fat content is complied with, where the imported cheese is lawfully and traditionally produced according to different technical and quality requirements and marketed under the same name in its State of origin and where appropriate information of purchasers is ensured.

The Netherlands Government contends that, although the appellation 'Edam' is now applicable to cheese manufactured outside the Edam region of the Netherlands it must be confined to cheese complying with a certain technical description and in particular having a fat content of at least 40%. It argues that both the Stresa Convention and the *Codex Alimentarius* represent an international effort to guarantee the maintenance of these characteristics for cheese bearing that name. It contends that respect for the traditional production techniques fixed and accepted at the international level for Edam cheese requires the Member States of the EEC to be able to prohibit imports from other Member States of cheese not complying with such techniques, even if the consumer is informed of the difference of composition of the product. It therefore proposes that the question should be answered along the lines that Community law does not prohibit national provisions which allow a name to be used for cheese only if certain characteristics are complied with such as those stipulated *inter alia* in the Stresa Convention and the *Codex Alimentarius.*

The Commission adopts an interpretation of the law on free movement of goods similar to Mr Deserbais's and, in relation to the effect of international agreements, it refers to Article 234 of the Treaty, Case 812/79 (*Burgoa* [1980] ECR 2787, at p. 2802) and Case 121/85 (*Conegate* [1986] ECR 1007, at pp. 1024 and 1025), in support of its contention that agreements concluded prior to the entry into force of the EEC Treaty cannot be relied on in dealings between Member States in order to justify restrictions on intra-Community trade. Therefore, it contends, no reliance can be placed on the Stresa Convention to exclude the application of the provisions of Article 30. It submits accordingly that the question should be answered along the lines that national rules which, for the purpose of protecting a trade name, prohibit the marketing of cheese having a different fat content from that stipulated are to be regarded as measures having an effect equivalent to a quantitative restriction contrary to Article 30 of the Treaty where such cheese has been imported from another Member State where it has been lawfully and traditionally marketed under the same name but in accordance with different quality requirements, and where the labelling and packaging clearly indicate its true composition and origin.

It is well established in the case-law of the Court that a marketing restriction which operates by way of a restriction on the use of a name, rather than directly on the product, can none the less be a restriction for the purposes of Article 30 of the EEC Treaty: see, for example, the judgment of 26 November 1985 in Case 182/84 *Miro* [1985] ECR 3731 and the judgment of 12 March 1987 in Case 178/84 *Commission* v *Germany* (the 'beer' Case).

National legislation such as the French legislation in issue in the present case does restrict or may restrict the sale of goods imported from other Member States, which brings it within the definition of a measure having an effect equivalent to a quantitative restriction on imports laid down by the Court in its case-law, particularly Case 8/74 *Dassonville* [1974] ECR 837. Accordingly, it is prohibited by Article 30 of the EEC Treaty unless it falls within one of the exceptions in Article 36 or, if applicable, one of the 'mandatory requirements' recognized by the Court in Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (the 'Cassis de Dijon' Case) and subsequent cases.

As the Netherlands Government admits, 'Edam' long ago ceased to be reserved for cheese made in the Edam region of the Netherlands, and so it cannot be regarded as a designation of origin. Indeed in the Stresa Convention 'Edam' is not classified among the 'designations of origin' but only among the 'names' of cheeses for which a lesser degree of protection is provided. It is now a name for a type of cheese but no longer with any geographical limitation on its place of production.

Decisions of the Court have laid down that Member States are not allowed to restrict a generic term to one national variety alone to the detriment of other varieties lawfully produced in other Member States: Case 12/74 *Commission* v *Germany* [1975] ECR 181 ('Sekt' and 'Weinbrand'), Case 193/80 *Commission* v *Italy* [1981] ECR 3019 ('vinegar'), Case 182/84 *Miro* ('gin' or 'genever') and the 'beer' Case. It is difficult to say when a name which was originally specific to an area becomes a generic name, but it seems on all the evidence that 'Edam' has now become a generic name and falls within the rule just stated. In any event as I see it 'Edam' does not fall within the provisions of Article 36 of the EEC Treaty relating to the protection of industrial and commercial property.

In the present state of Community law there are no Community rules governing the names or designations of origin of different types of cheese within the Community. As the Court held at paragraph 8 of 'Cassis de Dijon', in the absence of such common rules, 'it is for the Member States to regulate all matters relating to the production and marketing of [the product] on their own territory. Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to . . . the fairness of commercial transactions and the defence of the consumer'.

The Stresa Convention, with its specifications *inter alia* for 'Edam' cheese, has been signed by Denmark, France, Italy and the Netherlands but not by the other Member States. In the Federal Republic of Germany in particular it appears that the legislation allowing 'Edam' cheese to be manufactured with a fat content as low as 30% dates back to 1934: 54 years ago. Moreover, it appears that in recent years

Edam with a 30% fat content has represented one third of German production of Edam cheese. In such circumstances I do not consider that any mandatory requirement as to the fairness of commercial transactions can justify one Member State in banning the sale of Edam with a 30% fat content from another Member State.

As regards the defence of the consumer, it is well-established in the Court's case-law (for example, the 'beer' Case) that such a total ban is disproportionate to the purpose of protecting the consumer from deception if the same purpose can be achieved by less restrictive means such as labelling. That rule seems to me to apply in the present case, and it appears from the order for reference that the cheese in question was adequately labelled. Furthermore, the need to protect consumers from fraud must be set against the rule that national legislation 'must not crystallize given consumer habits so as to consolidate an advantage acquired by national industries concerned to comply with them': judgment in the 'beer' Case, paragraph 32.

Mere labelling would not be sufficient if the product proposed was something radically different from the product usually recognized as 'Edam' in the importing Member State, e. g. blue cheese or cream cheese. That, however, is not this case. The argument that the 'Cassis de Dijon' rule on free movement might open the floodgates to imported products bearing wholly inappropriate designations can easily be exaggerated: first, in order to qualify, the imports must have been 'lawfully produced and marketed' in the exporting Member State. That condition should in most cases operate to ensure that the goods in question do not bear a wholly inappropriate designation. That seems to me to be the present case. Secondly, in the exceptional case where the exporting Member State's law does allow the production and marketing of a product under a name which might seriously mislead consumers in an importing Member State, the mandatory requirement of consumer protection would come into play so as to allow measures more restrictive than a mere labelling requirement to be applied, subject always to a condition of proportionality ('*necessary* in order to satisfy mandatory requirements': paragraph 8 of 'Cassis de Dijon'). I do not consider, therefore, that applying the 'Cassis de Dijon' principle of free movement in the area of cheese names presents a real risk of robbing those names of their meaning.

Reference has been made in the present case to the criterion of respecting the 'fair and traditional practices' of the various Member States, which was applied in Case 16/83 *Prantl* [1984] ECR 1299 and in *Miro*. While I have no doubt that such a criterion could be fulfilled in the present case in view of the long history of production and marketing of 'Edam' with a fat content below 40% in Germany, I consider it inappropriate to apply that criterion here. In my view, in a case such as the present, its application unnecessarily narrows the conditions for free movement of goods laid down in Article 30 and developed in 'Cassis de Dijon'. As I said in my Opinion in Case

179/85 *Commission* v *Germany* (the 'pétillant de raisin' Case), '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. The appropriate test in a case like the present is in my view that stated in 'Cassis de Dijon' — whether the product was "lawfully produced and marketed" in one Member State. If it is, it may be marketed in another Member State subject to mandatory requirements of the kind indicated in 'Cassis de Dijon' and subject to the provisions of Article 30 of the Treaty'. Although the judgment in that case (4 December 1986) made reference again to the 'fair and traditional practice' test, in the subsequent 'beer' Case judgment (of 12 March 1987), the Court did not use the 'fair and traditional practice' test but struck down the German restriction on foreign beers simply on the condition that they had been lawfully manufactured and marketed in their Member State of origin. In my view a similar approach should be followed in the present case.

For the reasons given above I do not consider that any of the relevant mandatory requirements under 'Cassis de Dijon' or the relevant provisions of Article 36 apply to a national measure such as that at issue in the present case. Accordingly, in my view, a prohibition such as that contained in the French legislation in question may not be applied to a product such as the German Edam in issue because it has been lawfully produced and marketed in its Member State of origin.

It remains to be considered whether the existence of the Stresa Convention alters that result. I think not.

The Netherlands Government has argued that the Stresa Convention, along with the *Codex Alimentarius*, represents an internationally agreed quality standard which deserves to be protected under Community law. Since a number of Member States, particularly the Federal Republic of Germany, have not accepted the standard thus proposed, I find it difficult to say that they are rules of Community law which override or qualify the rule in Article 30.

As the Court held in its judgment of 11 March 1986 in Case 121/85 *Conegate* v *Customs and Excise* [1986] ECR 1007 (paragraph 26 of the judgment and point 2 of the operative part), Article 234 of the EEC Treaty must be interpreted as meaning that an agreement concluded prior to the entry into force of the EEC Treaty (which the Stresa Convention was) may not be relied upon in order to justify restrictions on trade between Member States.

Different factors would fall for consideration if the name in question was an appellation or designation of origin.

Accordingly, I would answer the question referred along the lines that:

'National legislation which, for the purpose of protecting a trade name,

(1) restricts that trade name to national products or those of another State, to the exclusion of the products of other Member States;

(2) makes the right to use the trade name of a cheese imported from a Member State conditional on the observance of a minimum fat content, even though the imported cheese is lawfully produced and marketed in its country of origin in accordance with different technical and quality requirements

constitutes a measure having an effect equivalent to a quantitative restriction on imports contrary to Article 30 of the EEC Treaty'.

The costs of Mr Deserbais in these proceedings fall to be decided by the national court. The costs of the Commission and the Netherlands Government are not recoverable.