OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 3 May 1990 *

Mr President,
Members of the Court,

A — Facts

1. In the proceedings on which I now give my Opinion the Court is once again called upon to interpret the expression 'quantitative restrictions on imports and all measures having equivalent effect' contained in Article 30 of the EEC Treaty and to construe, if appropriate, Article 36 thereof.

2. The interpretation is requested by the Chelmsford Crown Court in order to enable it to assess the validity under Community law of the Local Government (Miscellaneous Provisions) Act 1982 in force in England and Wales (hereinafter referred to as 'the Act'). To put it briefly at this stage, the Act covers trade in so-called sex articles (which are defined in detail), and it gives local authorities the power to decide that Schedule 3 of the Act shall apply with the consequence that trade in those articles, if it reaches a significant degree, may only be carried on with a licence from the appropriate authority.

3. A resolution to that effect — similar action was taken by some other local authorities but not throughout the Act's area of application — was adopted by the respondent in the main proceedings with effect from 23 June 1983. The appellants in the main proceedings are affected thereby as they, apparently in addition to other traders, some of whom are licensed, carry on within the respondent's area such trade in domestic and imported products. Since the appellants continued to carry on this trade despite the refusal of a licence, proceedings were brought against them in Southend Magistrates Court which resulted in their conviction in February 1986. They appealed to Chelmsford Crown Court. In those proceedings they submitted in support of their appeal *inter alia* that the Act was not compatible with Community law since it led to a restriction on imports within the meaning of Article 30 of the EEC Treaty (I shall go into the details of that argument later). Since the national court was not unimpressed by the force of this argument, it stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Where a Member State (once a Local Authority has resolved that the legislation is to apply to their area subject to the requirement for premises which are sex establishments to be licensed) prohibits the sale (*inter alia*) of lawful sex articles from unlicensed sex establishments, and where the effect of such a prohibition is to enable the Local Authority to exercise control over sex establishments within their area, and

* Original language: German.

where the effect is to have restricted the appellants from selling goods from other Member States since they have been attempting not to contravene the "Act" by their stocking policy and in doing so have been selling less imported material from Member States than would otherwise have been the case and thus to restrict the availability of sex articles manufactured in other Member States; is such a prohibition a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty?

(2) If the answer to Question 1 is in the affirmative, does such a measure benefit from the justification set out in Article 36?

(3) If the prohibition referred to in Question 1 contravenes Article 30 and is not justified under Article 36, is it totally unenforceable against a trader in the Member State or only unenforceable to the extent that it prohibits transactions involving goods manufactured in or imported from other Member States?'

4. On the basis of the written and oral observations submitted to the Court, my assessment is as follows.

B — Analysis

5. *1.* If one proceeds on the basis of the formula which was set out in relation to Article 30 in the judgment in Case 8/74 [1] and appears again and again in cases concerning that article (see for example the judgments in Cases 75/81 and C-69/88 [2]), that is to say if consideration is given to the question whether the provisions at issue are 'capable of hindering, directly or indirectly, actually or potentially intra-Community trade', there can be little doubt that this is the case.

6. It is indeed conceivable that, without the Act and the local authority resolutions adopted pursuant thereto, that is if so-called sex articles could be sold without hindrance, sales would be more extensive and imports therefore greater. For it may be assumed that the unrestricted growth of sex shops would create new demand and also lead to an increase in existing demand because that demand could more readily be satisfied than in a situation in which a potential customer has to travel to a different place (having licensed sex shops) or has to engage in the more complicated process of mail order. Regulating the sale of sex articles may therefore, it can safely be assumed, lead to a reduction in imports and thus justify application of Article 30.

1 — Judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.

2 — Judgment in Case 75/81 *Blesgen* v *Belgium* [1982] ECR 1211 and in Case C-69/88 *Krantz GmbH* v *Ontvanger der directe Belastingen von Kerkrade and the Netherlands* [1990] ECR I-583.

7. 2. However, a comprehensive appraisal of the relevant case-law makes clear that this consideration is not in itself sufficient. In fact, that formula is merely a starting point for the requisite examination. Further factors must then also be taken into account and, as the Commission and other parties have shown, each case must be decided on its own merits.

8. (a) Accordingly, if the case-law is looked at more closely and it is borne in mind that, in the present case, there is no outright prohibition on the sale of certain products but rather that marketing rules apply which, under certain circumstances, preclude those products from being sold in certain places (where sales reach a significant degree), comparable situations may readily be encountered in earlier cases also concerning only the nature and method of marketing of products, in respect of which it was found that Article 30 did not apply (although some impact on imports could not be ruled out).

9. I would cite, for example, Case 155/80 [3] concerning the sale of bakers' wares which, at certain times of the night, could not be sold to individual consumers and retail outlets but only to wholesalers and dealers. A central feature of this case was the finding that intra-Community trade nevertheless remained possible, and, consequently, there was held to be no infringement of Article 30.

10. I would also cite the judgment in Case 75/81 (concerning the prohibition on the sale of certain alcoholic beverages in Belgian public houses). An important factor in that case was that the rules in question did not apply to other forms of sale and it was, therefore, found that Article 30 of the EEC Treaty did not apply since in reality the connection with imports was non-existent.

11. In this regard attention was also correctly drawn to Case 20/87 [4] concerning French provisions relating to authorizations to operate supermarkets which can result in a restriction of sales of goods including imported products. On this point the question as to the relevance of Article 30 was examined during the proceedings. The Advocate General concluded that it was not relevant and pointed out that, as a result of the provisions in question, sales on the domestic market of imported goods and those produced domestically were affected to the same extent. The Court evidently shared that assessment. In any event it is noteworthy that in the judgment Article 30 is not examined at all; there is only an appraisal in the light of Article 52 of the Treaty (right of establishment).

12. The quite recent judgment in Case C-145/88 [5] is also not without some

3 — Judgment in Case 155/80, *Sergius Oebel* [1981] ECR 1993.

4 — Judgment in Case 20/87 *Ministère public* v *Gauchard* [1987] ECR 4879.

5 — Judgment in Case 145/88 *Torfaen Borough Council* v *B & Q PLC* [1989] ECR 3851.

relevance. That case concerned the prohibition on the sale of certain goods on Sundays and is of interest because, in the first paragraph of the judgment containing the Court's assessment, it is pointed out that, regard being had to the fact that the rules in question apply to imported and domestic products alike, the marketing of products imported from other Member States is not in principle made more difficult than that of domestic products.

13. In the light of this case-law it has been suggested, in my view not without some justification, that a similar conclusion should be arrived at in the present case and it should be found that the provisions at issue in the main dispute are not within the scope of Article 30 of the Treaty. In fact, in this case as well there are good reasons for stating that the Local Government Act 1982 has nothing to do with international trade because the sale of the articles contemplated is in any case possible by means other than sex shops, in particular though businesses which require no licence (because the sale of sex articles does not reach a significant degree) or by means of mail order, even if in this case, as was stated at the hearing, certain restrictions apply (irrespective of the origin of the products).

14. (b) The other judgments mentioned in the proceedings are, it has to be said, basically not relevant and therefore provide no grounds for arriving at a different assessment in the present case.

15. Those judgments concern cases in which provisions were applicable without distinction to domestic and imported goods and the decisive question was whether imported products were in actual fact placed at any disadvantage, in which case Article 30 came into play. The Commission correctly pointed out that those cases mainly concerned provisions relating to the conditions which the products themselves had to comply with (and where consequently the need to adapt imported products accordingly could constitute a hindrance to trade — see the cases listed by the Commission at p. 10 of its written observations) or at least cases involving a restriction on the advertising of certain products (see judgments in Cases 152/78 and C-362/88 [6]), to which the facts of this case are likewise not comparable.

16. However, if the criteria developed in the abovementioned judgments are nevertheless included in an examination of the present case, which may be appropriate in the light of the indication by the national court that the appellants in the main proceedings have been restricted in the sale of products imported from other Member States, in the final analysis this should indeed make no difference to the assessment

6 — Judgments in Case 152/78 *Commission* v *French Republic* [1980] ECR 2299 and in Case C-362/88 *GB-INNO-BM* [1990] ECR I-667.

of the applicability of Article 30 of the EEC Treaty.

17. In this connection, it will be recalled, the appellants argue as follows: it is clear that, where the Act is applied and a sex shop is refused a licence, trade in the relevant articles cannot be carried on to a significant degree. That affects imported goods in particular, in so far as they are conspicuous in appearance which does not permit them to be exhibited and sold in smaller shops. They are also particularly affected because the business arrangements made necessary by the refusal of a licence allow only a small stock to be held, whereas it is beyond dispute that imports can only be profitable if they achieve a considerable volume.

18. On this point it should in fact be said that the first-mentioned argument (conspicuous appearance of imported products) was evidently not taken up by the national court in its comments on the assessment of the present case and, consequently, may be disregarded. Perhaps the reason was that it was not satisfied that imported goods are characterized by their particularly conspicuous appearance. The United Kingdom did state on this point that the production structure is not in fact different in this respect in the Member States, and 'conspicuous' sex articles are certainly also produced in the United Kingdom. Another factor might have been that the criterion of 'significant degree' used in the Act is merely to be construed as catching businesses which are engaged *principally* (and not merely on a secondary basis in addition to the sale of newspapers and magazines) in the sale of sex articles (on which point a number of cases were cited in the United Kingdom's written observations). This, however, in no way precludes conspicuous sex articles from also being sold in non-licensed businesses as long as that is not the principal object of the business.

19. On the other hand it should be noted, with regard to the second part of the appellant's arguments, that no mention was made in the proceedings of a reduction in *overall* imports of sex articles (this was emphatically contested by the United Kingdom by reference to the fact that sales by means of outlets other than sex shops are possible); rather it was merely presumed that the appellants' imports were reduced. For the purposes of Article 30, however, it is plainly the former kind of reduction which is relevant. Moreover, justified doubts were also expressed as regards the alleged trend in the appellants' import activities. Those doubts stem from the fact that the appellants carry on business on a large scale (because they apparently belong to a group of companies which, according to the observations made at the hearing, operate more than 50 sex shops in the United Kingdom). For the appellants, therefore, imports in worthwhile quantities are certainly possible, not least because, as the representative of Southend Borough Council convincingly explained, the Act does not in any way relate to the holding of *stock* and the extent

thereof. The Act can therefore hardly be said to entail a specific hindrance of imports.

20. (c) Accordingly, following examination of all the factors which, on the basis of the past cases, are relevant to Article 30 of the EEC Treaty, the only conclusion which may be drawn is that the Act should not be held to be incompatible with Article 30 of the EEC Treaty.

21. *3.* If that is correct, there is in actual fact no longer any need to examine the further question of whether such a measure may be justified, in particular with reference to Article 36 of the Treaty. But for the sake of completeness, in the unlikely event that the Court should arrive at a different assessment on the application of Article 30, allow me to make the following comments.

22. (a) In the first place, reference may be made to the principles regarding observance of 'mandatory requirements' — affording justification — developed in the case-law, with respect to marketing rules applicable without distinction to domestic and imported products. Relevant factors are 'in particular' (which indicates that the list is not exhaustive) the fairness of commercial transactions and consumer protection (see judgments in Cases 120/78[7] and 16/83[8]). Environmental protection is also mentioned in the judgment in Case 302/86,[9] and the judgment in Case C-145/88 *B & Q* refers generally to the legitimate pursuit of economic and social policy objectives.

23. In the present case, it is evidently particularly appropriate to assess whether there is justification from the point of view of consumer protection.

24. Although the goods in question are not in themselves excluded from sale, consumer protection could be relevant because under the Act marketing may be restricted in certain areas of contested legislation (where it is deemed appropriate in order to protect young persons or particularly vulnerable sections of the population) and also because, by limiting the number of sex shops, certain areas may be saved from saturation by such articles which could give rise to a deterioration in morals. However, these aspects ought rather to be raised, in my view, under Article 36 (restrictions on imports on grounds of public morality).

25. Furthermore, the Act may help to ensure the defence of the consumer by making a certain degree of supervision of licensed business premises possible. In this way, and by means of periodic checks, sales to under-age persons (who are banned from entering sex shops) may be prevented, and also the threat of the withdrawal of a licence may exert an influence on the

7 — 7 Judgment in Case 120/78 *REWE-Zentral* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

8 — Judgment in Case 16/83 *Prantl* [1984] ECR 1299.

9 — Judgment in Case 302/86 *Commission* v *Denmark* [1988] ECR 4607.

conduct of business in such a way as to eliminate improper practices (as regards prices and quality).

26. Moreover, it should be recognized that the legislation does not disregard the principle of proportionality (whose importance was underlined, for example, in the judgment in Case 302/86 *Commission* v *Denmark*) because local authorities' licensing practice, which remains of course subject to review by the courts, may in fact have regard to an appropriate level of trade in articles which cannot exactly be regarded as common commercial wares. On the other hand, I would not attach any major importance to the fact that consumer protection, as I have described it, is not uniform throughout the whole country, since such a requirement is not to be found in the case-law and is not implicit in the nature of the matter.

27. (b) Regard may, however, also be had to the application of Article 36 of the EEC Treaty whereby, *inter alia*, restrictions on imports may be justified on grounds of public morality, and for public policy and public security reasons.

28. The former clearly play a role inasmuch as the contested legislation may afford a certain degree of protection for young persons and vulnerable sections of the population. The latter reasons may be relevant in so far as the legislation may serve to prevent sex shops from being set up in certain areas (for example in residential districts in which high levels of trade would be regarded as disruptive).

29. In this connection, it was correctly pointed out, notwithstanding the arguments to the contrary raised by the appellants in the main proceedings, that there is no requirement that there should be a uniform yardstick applicable to the whole country (as may in particular be deduced from the judgments in Cases 34/79 [10] and 121/85 [11]). Therefore, no objection may be raised against the fact that the application of the Act is left to local authorities, who are in the best position to assess the relevant circumstances. It was also correctly observed that the Court has held (see judgment in Case 34/79 *Henn and Darby*) that it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the level of protection necessary in this area and that, in the maintenance of public order, the Member States are granted an area of discretion (see judgment in Case 30/77 [12]), which may result in situations which differ from one period to another and from one place to another.

30. Moreover, those defending the legislation at issue are surely right in saying that the confining of the licensing requirement to businesses which trade in sex articles to a significant degree is to be endorsed in the interests of the principle of proportionality, even if, in consequence, the appraisal may

10 — Judgment in Case 34/79 *Henn and Darby* [1979] ECR 3795.

11 — Judgment in Case 121/85 *Conegate Ltd* v *HM Customs and Excise* [1986] ECR 1007.

12 — Judgment in Case 30/77 *R.* v *Bouchereau* [1977] ECR 1999.

be subject to some uncertainty which is only gradually disappearing as a result of definition on a case-by-case basis.

31. (c) Since, finally, there is no indication that the last sentence of Article 36, which is intended to preclude arbitrary discrimination and disguised restrictions on trade, might be applicable (it was, of course, not argued that the Act itself brings about arbitrary discrimination but merely that it could be operated in an arbitrary manner), the only possible conclusion is that the legislation in issue, even were it to be caught by Article 30 of the Treaty, could in any event be justified by means of the considerations set out above.

C — Conclusion

32. On the basis of the foregoing I propose that the Court should reply as follows to the questions raised by Chelmsford Crown Court:

'Interpretation of Article 30 of the EEC Treaty in accordance with the relevant case-law reveals no factors to support the assumption that the application of the Local Government (Miscellaneous Provisions) Act 1982 in an area of a local authority leading to the prohibition on the sale of sex articles in non-licensed sex shops could be regarded as a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30.'