In Case 34/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the House of Lords for a preliminary ruling in the proceedings pending before them between

REGINA

and

MAURICE DONALD HENN AND JOHN FREDERICK ERNEST DARBY

on the interpretation of Articles 30 and 36 of the Treaty, bearing in mind the national and conventional provisions prohibiting the importation of articles which are of a pornographic character.

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart and G. Bosco, Judges

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the observations submitted pursuant to Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The national legislation applicable

Section 42 of the Customs Consolidation Act, 1876, prohibits the importation into

the United Kingdom of "indecent or obscene" articles, and provides that articles imported contrary to the prohibition shall be forfeited and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct. The seventh schedule to the Customs and Excise Act, 1952, provides a procedure for testing the liability of goods to forfeiture under section 42 either in the High Court of Justice or in a court of summary jurisdiction.

Section 304 of the Customs and Excise Act, 1952, makes it a criminal offence for any person to be in any way knowingly concerned in the fraudulent evasion or attempted evasion of the prohibition on importation. Infringement is made punishable by the imposition of a financial penalty of three times the value of the goods involved or £100, whichever is the greater, and/or imprisonment for a term not exceeding two years.

These two customs statutes apply to all constituent parts of the customs territory of the United Kingdom, that is to say, England, Scotland, Wales, Northern Ireland and the Isle of Man. It does not apply to the Channel Islands, which are not a part of the United Kingdom.

Two different and distinct criteria are recognized and applied by several constituent parts of the customs territory of the United Kingdom when dealing with articles of the kind found in this case:

(a) The first, hereinafter referred to as Standard A, relates to the words "indecent or obscene". These words are to be given their ordinary dictionary meaning of repulsive, filthy, loathsome or lewd, generally but not exclusively, with reference to sexual matters. The words convey, from an objective standpoint, a single idea, namely, offending against recognized standards of propriety, "indecent" being at the lower end, and "obscene" being at the upper end, of the scale.

(b) The second, hereinafter referred to as Standard B, relates to the word "obscene" used alone. This word applies to a more restricted class of material, namely that which tends to deprave and corrupt those exposed to the material.

Section 42 of the Customs Consolidation Act, 1876, applies Standard A. In addition, the constituent parts of the customs territory of the United Kingdom have separate laws which are applicable only in their respective legal districts. Save for the Isle of Man (which applies only Standard A) they apply in differing ways both Standards A and B, as well as incorporating other offences which do not fall under either of those standards.

The mere possession of articles which offend against either Standard A or Standard B by a person in any part of the territory of the United Kingdom is not made a criminal offence.

2. The Facts

On 14 October 1975 a lorry arrived at the port of Felixstowe in the United Kingdom from Europoort at Rotterdam. In it were a number of boxes containing a large consignment of films and magazines of a sexually explicit nature. The lorry was cleared through customs, the necessary entry for customs purposes declaring the cargo to consist of mixed goods. Later the Appellant Maurice

Donald Henn met the lorry on the road from Felixstowe to Ipswich. He was seen to collect the boxes and put them into his car. He was followed to London where on 15 October he was arrested and the boxes and contents seized by officers of customs under section 42 of the Customs Consolidation Act, 1876, on the ground that their importation was prohibited. The appellant John Frederick Ernest Darby was arrested the same day in London where he was waiting to make arrangements with Henn to collect and distribute the films and magazines.

At the material time both appellants were concerned in distributing by post in England articles of the kind which had been seized. They advertised the films and magazines in brochures sent by post from an accommodation address in Holland and then supplied any orders received from an unknown source in the United Kingdom. The brochures were sent out by them unsolicited.

Examination of the films and magazines imported on 14 October showed that they had originated in Denmark, Germany and Sweden.

On 17 May 1977 at Ipswich Crown Court the appellants were indicted, *inter alia,* with being knowingly concerned in the fraudulent evasion of the prohibition of the importation of indecent or obscene articles contrary to section 42 of the Customs Consolidation Act, 1876, and section 304 of the Customs and Excise Act, 1952.

Both the films (which were of a size ordinarily used in domestic projectors) and the magazines depict detailed and explicit sexual activities, including aberrant sexual behaviour. The films include a number of scenes of violence and two of the magazines contain only photographs of naked girls between about five and fourteen years old engaging in or having engaged in sexual activity with an adult man. Five of the magazines contain advertisements inviting readers to apply to a "Model Contact", and one magazine advertises for models for another magazine which depicts acts of buggery. All the films and magazines included in the charge were made by a firm called "Color Climax" and originated in Denmark.

The films and magazines depict the commission of acts which are contrary to the criminal law of the United Kingdom in a variety of ways.

At the outset of the trial application was made to the trial judge by counsel acting for both appellants to quash the count which is the subject of this reference on the grounds that since the accession of the United Kingdom to the European Communities by reason of section 2 (1) and Schedule I part 1 paragraph 2 of the European Communities Act, 1972, Article 30 of the EEC Treaty operated so as to invalidate section 42 of the Customs Consolidation Act, 1876, in so far as it related to goods coming from a Member State and defined by Article 9 of the Treaty. This application was rejected. The appellants pleaded "Not Guilty" to the charge. The application was renewed at the end of the case for the prosecution. It was again rejected.

Both appellants were convicted. On 15 July they were sentenced: Henn to eighteen months' imprisonment, Darby

to two years' imprisonment. They were further ordered to pay a financial penalty.

Both appellants appealed against their convictions. The appeals were heard by the Court of Appeal (Criminal Division) on 4 to 7 July 1978. The court refused to refer any questions to the Court of Justice under Article 177 of the Treaty and dismissed the appeals. The court certified in accordance with section 33 of the Criminal Appeal Act, 1968, that a point of law of general public importance was involved in the appeals, namely:

"Whether section 42 of the Customs Consolidation Act, 1876, is effective to prevent the importation of pornographic articles from Holland notwithstanding Articles 30 and 36 of the European Economic Community Treaty".

The court refused leave to appeal to the House of Lords.

On 9 November 1978 leave to appeal was granted to both appellants by an Appeal Committee of the House of Lords. On 29 January 1979 on the hearing of the appeals the House determined that a question of interpretation of the EEC Treaty arose and should be referred to the Court of Justice in accordance with Article 177.

3. The preliminary questions

By order of 22 February 1979, the House of Lords asked the Court the following preliminary questions:

1. Is a law of a Member State which prohibits the import into that State of pornographic articles a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty establishing the European Economic Community?

2. If the answer to Question 1 is in the affirmative, does the first sentence of Article 36 upon its true construction mean that a Member State may lawfully impose prohibitions on the importation of goods from another Member State which are of an indecent or obscene character as understood by the laws of that Member State?

3. In particular:

   (i) is the Member State entitled to maintain such prohibitions in order to prevent, to guard against or to reduce the likelihood of breaches of the domestic law of all constituent parts of the customs territory of the State?

   (ii) is the Member State entitled to maintain such prohibitions having regard to the national standards and characteristics of that State as demonstrated by the domestic laws of the constituent parts of the customs territory of that State including the law imposing the prohibition, notwithstanding variations between the laws of the constituent parts?

4. If a prohibition on the importation of goods is justifiable on grounds of public morality or public policy, and imposed with that purpose, can that prohibition nevertheless amount to a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36?

5. If the answer to Question 4 is in the affirmative, does the fact that the prohibition imposed on the importation of such goods is different in scope from that imposed by the criminal law upon the possession and publication of such goods within the Member State or any part of it

necessarily constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States so as to conflict with the requirements of the second sentence of Article 36?

6. If it be the fact that the prohibition imposed upon importation is, and a prohibition such as is imposed upon possession and publication is not, capable as a matter of administration of being applied by customs officials responsible for examining goods at the point of importation, would that fact have any bearing upon the answer to Question 5?

7. Independently of the questions posed above, may a Member State lawfully impose prohibitions on the importation of such goods from another Member State by reference to obligations arising from the Geneva Convention, 1923, for the suppression of the traffic in obscene publications and the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976), bearing in mind the provisions of Article 234 of the Treaty?

The order of the House of Lords was received at the Court Registry on 1 March 1979.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, the appellants, represented by Louis Schaffer, Barrister-at-Law, instructed by Messrs. Hallinan, Blackburn Gittings & Co., solicitors, the United Kingdom Government, represented by R. D. L. Du Cann Q. C., and D. T. Donaldson, instructed by R. D. Munrow, Treasury Solicitor's Department, and the Commission of the European Communities, represented by its Legal Adviser Trevor Townsend, acting as Agent, assisted by Alan Newman, Barrister-at-Law, submitted written observations.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided that a preparatory inquiry was not necessary.

II — Summary of the written observations submitted to the Court

1. Observations of the appellants

First question

It is submitted by the appellants that section 42 of the 1876 Act by reason of the fact that it contains a total prohibition of articles which have a money value and which are traded in commercially is a trading rule which is capable of hindering intra-Community trade. Its potential for disruption of trade in the Community of books, newspapers, magazines and films is considerable. It could result in the necessity for editing out of articles, passages or film sequences which fall within the very wide definition of what is described in the agreed statement of facts and law as Standard A., thus making importation more difficult and costly.

Second question

The appellants contend that in view of the strict interpretation to be given to Article 36 it is a *sine qua non* of justification for the retention of section 42 that there exists in England a clearly defined public policy and/or clear and consistent rules of public morality relating to indecent or obscene articles.

In his speech in the Appellate Committee of the House of Lords in the case of *Director of Public Prosecutions* v *Whyte and Another* (1972) A.C. 849 at page 861 Lord Wilberforce observed that as a result of the Obscene Publications Act,

1959, instead of a presumed consequence of obscenity, a tendency to deprave and corrupt became the test of obscenity and became what had to be proved. One consequence was that the section does not hit "articles" which merely shock however many people.

The appellants base their submission that there must be shown to exist a clearly defined public policy or rules of public morality before a restriction can be said to be justified under Article 36 on an analogy with the case-law of the Court on Article 48 (see Case 41/74, *Van Duyn* [1974] ECR 1337). Although it is not necessary for the activities of an organization considered socially harmful to be made unlawful, if legislation is not considered appropriate, the competent authorities of the Member State must have a clearly defined standpoint as regards those activities and have taken administrative measures to counteract them if it is to rely upon the concept of public policy. Not only does English law not display a consistent policy or have clearly defined rules of public morality in relation to pornography but the outgoing British Government recognized this fact, but did not itself clearly define its standpoint or take any administrative measures.

Third question

The answer to the first part of the third question is to be found in those judgments of the Court which have established that the term "justified" in Article 36 means "necessary". The measure must not involve a greater restriction on imports than is strictly necessary and must be the only means suitable to attain that objective. In particular, a restriction will not be justified, however beneficial, if its purpose is merely to lighten the load of the administration, for example make it easier for the police to enforce domestic laws, unless its absence will impose a burden on the authorities in terms of effort and/or expenditure which is intolerable. It must be shown that there are no effective measures available to attain the objectives desired which do not hinder intra-Community trade. The appellants submit that the restriction on the import of articles within Standard A is not necessary to prevent those articles' being sold in the streets or exhibited publicly. So far as the prevention of publication of articles within Standard B is concerned the prohibition in section 42 is too wide as covering a more extensive range of articles than those falling within Standard B so that section 42 cannot be said to be proportionate to the aim it is sought to achieve.

As far as the second part of the third question is concerned, the argument of the Crown that the lack of customs barriers between the constituent parts of the United Kingdom makes a restriction, not justifiable under Article 36 in relation to one part of the United Kingdom, necessary because it is justified in another part, is a *non-sequitur*. So long as the constituent parts of the United Kingdom have separate systems of law which permit different treatment of pornography within the same category then the public policy and/or rules of public morality for each of the

constituent parts must be examined separately to discover whether they justify the exceptions permitted by Article 36 in that particular constituent part. If the argument of the Crown is accepted it might result in restrictive measures contrary to Article 30 being preserved or introduced in a constituent part of a Member State like England, whose population is in the region of 46 000 000 with considerable trade with the Community, because the restrictions could be justified exceptions under Article 36 for a much smaller constituent part with significantly smaller intra-Community trade, such as Scotland with a population of approximately 5 500 000, or even a tiny part such as the Isle of Man with a population of 50 000 and an insignificant trade with the Community.

Fourth question

The appellants submit that the true meaning of Article 36 is that Member States are permitted to retain restrictions on imports if they are able to frame provisions which are necessary to attain the objectives afforded by that article which do not discriminate between Member States. In Case 8/74 *(Procureur du Roi* v *Benoît & Gustave Dassonville* [1974] ECR 837), the Court gave the clearest ruling that the second sentence was of overriding effect. It ruled that if the measure constituted a means of abritrary discrimination then it is not necessary to consider whether it can be justified as a suitable means of attaining the objective authorized by Article 36. In the second sentence of Article 36 the words "disguised restriction" apply to those measures which are intended to be discriminatory and the words "amount to arbitrary discrimination" apply to those measures which whatever their true intention have the effect of being discriminatory.

Fifth question

In Case 4/75 *(REWE-Zentralfinanz* [1977] ECR 843), the Court held that an inspection at the frontier on goods imported from a Member State might constitute arbitrary discrimination if domestic products are not subject to an equivalent examination. The different treatment of imported and domestic products would not be discriminatory if effective measures are taken in order to prevent the distribution of contaminated domestic produce and if there was reason to believe on the basis of previous experience that there was a risk of contamination spreading if no inspection was held on importation. Applying that test to the material covered by section 42 of the 1876 Act it may be seen that the fact that there is a total prohibition at the frontier and that domestically there is not a total prohibition *prima facie* constitutes discrimination and since there is not prohibition domestically it cannot be said that effective measures have been taken to prevent the distribution of the articles concerned. The appellants submit that the fact that the prohibition imposed on the importation of such goods in section 42 of the 1876 Act is different in scope from that imposed by the criminal law domestically constitutes a means of arbitrary discrimination so as to conflict with the requirements of the second sentence of Article 36.

Sixth question

The appellants submit that the simplification of the work of the administrative authorities could not be

justified in the context of Community law if it led to an effective reduction of the freedom of movement of goods for dealers. Section 42 of the 1876 Act cannot be justified solely on the ground that it provides a test which can be easily and effectively applied by customs officers. It must be shown that the customs authorities could not apply a test which is less of a hindrance to intra-Community trade such as Standard B. This manifestly could not be the case if public policy or the rules of public morality are so clear that they justify the retention of the prohibition.

Seventh question

The appellants demonstrate that in so far as English domestic law has followed the 1923 Convention it has not consistently regarded the definition of "obscene" as being that of Standard A.

The second contention is that the conventions cannot be used to justify restrictions on the importation of pornography which are not otherwise justified by virtue of Article 36. The obligations of the United Kingdom under the Conventions in so far as they have been implemented by Act of Parliament are enforceable only in so far as they do not conflict with the provisions of the Treaty. In so far as they are binding in international law the second sentence of Article 234 imposes on the United Kingdom the duty of eliminating any incompatibilities between obligations under the Conventions and obligations under the Treaty. It follows, therefore, that section 42 of the 1876 Act, if contrary to Article 30, is only saved if it can be brought within the sections authorized by Article 36.

The Lausanne Convention came into force on 1 January 1976 and is therefore not affected by Article 234 of the Treaty. However, if on a true analysis of the law section 42 is found to be incompatible with Article 30 of the Treaty and not an exception authorized by Article 36 it cannot be a justification for its retention that other rules such as section 11 of the Post Office Act, 1953, are just as, or more, restrictive in operation.

2. *Observations of the United Kingdom Government*

First question

In the view of the United Kingdom Government a total prohibition of imports represents a greater invasion of the fundamental principle of free movement of goods than a partial restraint on imports. Moreover the wording of Article 36 expressly recognizes that Article 30 embraces not only partial but also total prohibitions.

Second question

The United Kingdom Government submits that while Article 36 permits derogations from the principle set out in Article 30, decisions of the Court make clear that Article 36 is to be strictly construed, and that any measure *prima facie* contrary to Article 30 is permissible only if, and to the extent to which, it is necessary for the attainment of one of the objectives listed in Article 36. As stated by the Court in Case 30/77 (*Regina* v *Bouchereau* [1977] ECR 1999)

". . . recourse . . . to the concept of public policy presupposes . . . the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society".

Questions of "indecency and obscenity" are plainly capable of constituting a "fundamental interest of society".

The term "public morality" does not appear elsewhere in the Treaty. Nor has it been the subject of consideration or comment by the Court. Unlike the term "public policy", it is suggested that the term "public morality" is comparatively self-defining. Like "public policy", however, the content of "public morality" must clearly be a matter varying from country to country and indeed time to time. It is thus quite inappropriate for any absolute international standard, and a greater area of discretion must be granted to the Member State than might be appropriate with regard to some of the other, more objective grounds of derogation. The definition of the precise content to be given to the words "indecent and obscene" in the United Kingdom or any of its constituent parts can only be for the State and its tribunals.

Third question

The United Kingdom Government submits that, so far as "public policy" is concerned, the question is whether the State can be said to have adopted a policy on a matter which concerns a fundamental interest of society. This may still be the case if the overall pattern of the laws of the State is hostile to indecent or obscene material or activities, notwithstanding some regional variation in the content of those laws. One must also have regard to the international obligations which the State has undertaken and adheres to. Thus the United Kingdom remains a party of the Geneva Convention for the Suppression of the Circulation of and Traffic in Obscene Publications of 1923, and has ratified the new version of the Universal Postal Convention, having been a party to the old form of the Convention. This is clearly indicative of an attitude and policy on the part of this government towards indecent and obscene materials.

So far as "public morality" is concerned matters of "indecency and obscenity" fall within that concept and the content of the domestic law of the Member State — and any variation between constituent parts of that State — do not affect that question.

Fourth, fifth and sixth questions

For the United Kingdom Government, if a prohibition on the import of prescribed material is justifiable on grounds of public morality or public policy, that prohibition, though it may discriminate against trade between Member States, cannot be said to be a means of arbitrary discrimination.

In any event, whether a measure constitutes an arbitrary discrimination or a disguised restriction on trade involves two considerations.

First, it is necessary to show that the alleged discrimination or restriction arises in relation to trade. The fact that mere possession by a private individual with no view to commercial exploitation is treated differently at the frontier and internally is irrelevant to this question. The relevant inquiry is whether United Kingdom legislation is essentially more favourable to domestically-produced pornography as regards trade in such material. An analysis of the laws obtaining in the various parts of the United Kingdom indicates that this is not so: the foreign producer is placed at no disadvantage compared with the home producer and deprived of no serious trading opportunity by having his goods stopped at the frontier, since there is no lawful domestic market to which he might thereby be denied access.

Secondly, though discrimination or restriction may exist where there is a difference in treatment of imported and domestically-produced goods, this will not be the case where the differential treatment can be justified objectively by reference to considerations which apply only to imported goods and are necessary for the purpose of achieving the object covered by the ground of derogation specified in Article 36 on which the Member State relies. The criteria applied internally in the United Kingdom in statutes incorporating the test of "indecency or obscenity" could thus not be directly transposed to the frontier situation, since they presuppose matter which cannot exist at that point — for example public display or sale. The obvious adaptation would be to make confiscation at the frontier dependent on whether a breach of an internal law was threatened. It would be often difficult and sometimes impossible to ascertain this with any reasonable degree of certainty; and a customs official would be faced with an inquiry more difficult than that required to deal with domestically produced material — where the question of, for example, public display or sale would be one of historical fact as opposed to future speculation.

As was made clear by the Court in Case 104/75 *(De Peijper* [1976] ECR 613) different treatment of imported and domestic goods cannot be justified by a concern to lighten the administrative burden or reduce public expenditure, unless the burden or expenditure would exceed reasonable limits. A Member State cannot be called upon to invest any significant amount of its financial or manpower resources merely to ensure that its suppression of traffic in such material is completely even-handed as between foreign and domestic products.

Seventh question

The United Kingdom Government remains bound to all States which are still party to the Geneva Convention to comply with the obligations entered into in that Convention regardless of the identity of the exporting State in any particular case. Article 234 of the Treaty is therefore applicable (cf. Cases 21 to 24/72 (*International Fruit Co.* [1972] 2 ECR 1219).

The United Kingdom notified approval of the Lausanne Convention on 23 February 1976, that is, after the events in this case. However, since the importation in the present case did not involve the postal services, the applicability of Article 234 as regards the Convention is purely hypothetical.

3. Observations of the Commission

First question

It appears to the Commission from the judgment of the Court of Appeal (Criminal Division) that that court held the view that because the prohibition was a total prohibition on the importation into the United Kingdom of indecent or obscene articles, it was therefore not measured by quantity and was not therefore a "quantitative restriction". The Commission would observe however that such a prohibition constitutes a quantitative restriction, within the meaning of Article 30, as it clearly results both from the wording of Chapter 2 of

the Treaty, and from the jurisprudence of the Court. If quantitative restrictions do not include total prohibitions this would seriously undermine the principle of free movement of goods which is one of the foundations of the Community.

A comparison of the United Kingdom customs legislation, namely section 42 of the Customs Consolidation Act, 1876, and section 304 of the Customs and Excise Act, 1952, with the provisions of law operative in the various constituent parts of the United Kingdom territory reveals that the importer of pornographic articles is subject to more onerous restrictions than persons within the United Kingdom, in at least two respects.

(i) Under the customs legislation mere possession of articles offending against Standard A is made an offence, whereas the same is not the case within the United Kingdom.

(ii) With the exception of the Isle of Man, the sale *per se* of articles offending against Standard A is not prohibited, except under the Scottish Burgh Police (Scotland) Act, 1892, section 380 (3), which lays down comparatively minor penalties for infringement; under the customs legislation, importation for the purpose of sale of articles offending against Standard A is made an offence which attracts heavy penalties.

However, the Commission would submit that in the circumstances of the present case the difference in penalties imposed by customs legislation and those imposed by the other provisions of the criminal law does not affect the free movement of goods. In the view of the Commission, the relevant question for consideration is whether the prohibitions at issue, imposed by the customs legislation, are justified in all cases by the terms of Article 36. If the answer be "yes", then the penalties imposed by the customs legislation cannot hinder in any way the movement of the goods in question, since Community law itself permits their movement to be prohibited. However, if the answer be "no", then any penalty so imposed, however slight, would constitute a measure of equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty, so far as those goods which were entitled to move freely were concerned.

Second question

The Commission submits that the position is as stated by Mr Advocate General Warner in his opinion in the above-mentioned Case 30/77. The Commission concludes that Article 36 permits a Member State to prohibit the importation of goods from another Member State which the first Member State considers are of an indecent or obscene character provided that the means adopted are justified for the attainment of the objective of safeguarding public morality, or an objective of public policy, and that the prohibition does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States within the meaning of that article.

Third question

The Commission submits that in determining the proper basis for the invocation of grounds of public policy or public morality for the purposes of Article 36, assistance may be gleaned from Case 30/77. In this regard the Commission remarks that if one transposes this reasoning to the imperatives of Article 36, then recourse by a national authority to the concept of public policy would be permissible in circumstances where a fundamental interest of society would be seriously harmed in the absence of national measures designed to safeguard it. In determining what matters are of fundamental interest to society it is legitimate to have regard to the domestic law of the Member State. The fact that

variations exist between the laws of the constituent parts of that State is only one factor to be taken into account in determining whether a matter of fundamental interest to society exists.

Fourth question

The Commission submits that a prohibition on the importation of goods, otherwise justified on the grounds of public morality or public policy, and imposed with that purpose, will nevertheless not fall within the exception specified in Article 36 of the Treaty if it constitutes a means of arbitrary discrimination or a disguised restriction on trade, or if the same objectives could be achieved by measures which do not restrict intra-Community trade so much.

Fifth question

The Commission draws an analogy with the abovementioned Case 4/75, and submits that a prohibition imposed on the importation of such goods which is different in scope from that imposed by the criminal law upon the possession and publication of similar goods may constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States, so as to conflict with the requirements of Article 36. However, where those goods are placed in non-comparable situations, and the difference in treatment which is accorded to them in those situations is necessary in order effectively to sageguard public morality, or to achieve an object of public policy, justified by Article 36, such difference in treatment will not constitute arbitrary discrimination or a disguised restriction on trade within the meaning of that article.

Sixth question

For the Commission, any prohibition on mere possession of such goods at the point of importation cannot be justified as a matter of administrative convenience unless it would be unreasonable to require customs officers to make the same distinction between mere possession and possession for public action which police officers are obliged to make for the purposes of the criminal law. It is appropriate to point out that the difference in treatment which applies to the goods in question on importation, as contrasted with that which applies when they are found within the national territory, may stem, not from matters of administrative convenience, but from the nature of the policy which the United Kingdom Government feels constrained to carry out. It is possible that in circumstances such as those which govern the present case, the nature of the policy requirements of a Member State may demand a rigorous control at its border, in order to prevent indecent or obscene articles, which would endanger its policy, entering its territory, whereas the threat to its policy posed by indecent or obscene articles already within its territory may pose a danger of a lesser order.

The Commission therefore concludes that the prohibition imposed on the importation of pornographic articles from another Member State is different in scope from that imposed by the criminal law upon possession and publication of such goods within the Member State and will constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States contrary to Article 36 of the Treaty, if it is explained primarily by a concern to lighten the administrative burden or to reduce public expenditure, unless such burden or expenditure clearly would exceed the limits of what can reasonably be required of an administration operating in a normal manner.

Seventh question

In the view of the Commission, the restrictions on the free movement of goods, so far as intra-Community trade is concerned, provided for in the Conventions above mentioned would almost certainly fall within the exceptions to Articles 30 and 34 provided for by Article 36.

In the case of the Geneva Convention, the Member States, in assuming later obligations under the Treaty, *ipso facto*, by virtue of the principles of international law, gave up the exercise of their rights under that Convention to the extent necessary for the performance of their new obligations. Accordingly, in matters governed by it, the Treaty takes precedence over agreements concluded between Member States before its entry into force. Therefore, the restrictions on the free movement of goods provided for in that Convention, if they are not justified by the provision of Article 36, cannot be maintained as between Member States on the basis of Article 234.

By contrast, the Universal Postal Convention is not within the ambit of Article 234, since it was renewed at Lausanne on 5 July 1974 (the United Kingdom notification of approval being deposited on 23 February 1976), that is to say after the entry into force of the Treaty. So far as the United Kingdom is concerned, Article 5 of the Act of Accession provides that Article 234 of the Treaty shall apply, for the new Member States, to agreements or Conventions concluded before accession. Accordingly, if the provisions of the Convention were found to conflict with Community law, so far as the free movement of goods between Member States is concerned, Community law would be applicable.

Answering a question posed by the Court, the United Kingdom Government submits that, at the time when it ratified the Geneva Convention, it took the view that the law then in force was adequate to give effect to the Convention. Such changes in the law as have been made since that time have not changed the position.

The appellants, represented by Alan Campbell, Q.C., Louis Schaffer, Barrister-at-law, and Ernle Money, Barrister-at-law, the United Kingdom Government, represented by the Rt. Hon. Sir Michael Havers, Q.C., Attorney General, R. Du Cann, Q.C., D. T. Donaldson, and R. D. Munrow, Treasury Solicitor's Department, and the Commission of the European Communities, represented by its Agent, Trevor Townsend, assisted by Alan Newman, Barrister-at-law, presented oral argument at the hearing on 25 September 1979.

The Advocate General delivered his opinion at the hearing on 25 October 1979.

Decision

1 By order of 22 February 1979, received at the Court of Justice on 1 March 1979, the House of Lords, pursuant to Article 177 of the EEC Treaty, referred to the Court a number of questions concerning the interpretation of Articles 30, 36 and 234 of the Treaty. These questions have arisen in the context of criminal proceedings against the appellants who, on 14 July 1977, were convicted at Ipswich Crown Court of a number of offences. Only one of the charges brought against the appellants is relevant to the present reference — that of being "knowingly concerned in the fraudulent evasion of the prohibition of the importation of indecent or obscene articles, contrary to section 42 of the Customs Consolidation Act, 1876, and section 304 of the Customs and Excise Act, 1952."

2 The articles involved in the charge against the appellants formed part of a consignment of several boxes of obscene films and magazines which had been brought into the United Kingdom on 14 October 1975 by a lorry which arrived at Felixstowe by ferry from Rotterdam. The charge related to six films and seven magazines, all of Danish origin.

3 The appellants appealed against their conviction to the Court of Appeal of England and Wales. That court dismissed their appeals by judgment of 13 July 1978. On 9 November 1978 the House of Lords granted both appellants leave to appeal. On 29 January 1979, after hearing the appellants, the House of Lords decided that it was necessary to refer to the Court of Justice, in accordance with Article 177 of the Treaty, the questions set forth in the order seeking a preliminary ruling.

4 The appellants contended that the United Kingdom had no consistent policy of public morality in regard to indecent or obscene articles. In that respect they pointed to differences in the law applied in the different constituent parts of the United Kingdom. They contended furthermore that a complete prohibition of the importation of indecent or obscene articles resulted in the application to importation of stricter rules than those which applied internally and constituted arbitrary discrimination within the meaning of Article 36 of the Treaty.

5 According to the Agreed Statement of Law accompanying the order seeking the preliminary ruling, it is true that, in this field, the laws of the different parts of the United Kingdom, that is to say, England and Wales, Scotland, Northern Ireland and the Isle of Man, differ from each other and that each is derived from a number of different sources, some of which are to be found in the common law and others in statute.

6 According to the same statement, the various laws of the United Kingdom recognize and apply two different and distinct criteria. The first, referred to in the statement as "Standard A", relates to the words "indecent or obscene" which appear in the customs legislation and in certain other legislation and are also used to indicate the ambit of the English common law offence of "outraging public decency". These words convey, according to the statement, a single idea, that of offending against recognized standards of propriety, "indecent" being at the lower end of the scale, and "obscene" at the upper end.

7 The second criterion, referred to in the statement as "Standard B", relates to the word "obscene" as used alone in the Obscene Publications Acts, 1959 and 1964, (which apply to England and Wales only) and in describing the ambit of certain common law offences in England and Wales, Scotland and Northern Ireland. According to the statement, this word applies to a more restricted class of material, namely that which tends to "deprave and corrupt" those exposed to the material.

8 The Obscene Publications Acts, 1959 and 1964, create certain offences in regard to the publication of obscene articles but exclude from their field of application "obscene articles", as defined therein, if their publication is justified on the ground that it is in the interests of science, literature, art or learning or other objects of general concern.

9 The mere possession, for non-commercial purposes, of articles which offend against either Standard A or Standard B is not a criminal offence in any part of the United Kingdom.

10 The relevant provisions concerning the importation of pornographic articles are section 42 of the Customs Consolidation Act, 1876, and section 304 of the Customs and Excise Act, 1952. They apply throughout the United Kingdom. Put shortly, they provide that indecent or obscene articles are liable for forfeiture and destruction upon arrival in the United Kingdom and that whoever attempts fraudulently to bring such articles into the United Kingdom shall be guilty of an offence. The seventh schedule to the Customs and Excise Act, 1952, provides a procedure for testing before a court the liability of goods to forfeiture.

First question

11 The first question asks whether a law of a Member State which prohibits the import into that State of pornographic articles is a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

12 That article provides that "quantitative restrictions on imports and all measures having equivalent effect" shall be prohibited between Member States. It is clear that this provision includes a prohibition on imports inasmuch as this is the most extreme form of restriction. The expression used in Article 30 must therefore be understood as being the equivalent of the expression "prohibitions or restrictions on imports" occurring in Article 36.

13 The answer to the first question is therefore that a law such as that referred to in this case constitutes a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

Second and third questions

14 The second and third questions are framed in the following terms:

"2. If the answer to Question 1 is in the affirmative, does the first sentence of Article 36 upon its true construction mean that a Member State may lawfully impose prohibitions on the importation of goods from another Member State which are of an indecent or obscene character as understood by the laws of that Member State?

3. In particular:

(i) is the Member State entitled to maintain such prohibitions in order to prevent, to guard against or to reduce the likelihood of breaches of the domestic law of all constituent parts of the customs territory of the State?

(ii) is the Member State entitled to maintain such prohibitions having regard to the national standards and characteristics of that State as demonstrated by the domestic laws of the constituent parts of the customs territory of that State including the law imposing the prohibition, notwithstanding variations between the laws of the constituent parts?"

It is convenient to consider these questions together.

15 Under the terms of Article 36 of the Treaty the provisions relating to the free movement of goods within the Community are not to preclude prohibitions on imports which are justified *inter alia* "on grounds of public morality". In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory. In any event, it cannot be disputed that the statutory provisions applied by the United Kingdom in regard to the importation of articles having an indecent or obscene character come within the powers reserved to the Member States by the first sentence of Article 36.

16 Each Member State is entitled to impose prohibitions on imports justified on grounds of public morality for the whole of its territory, as defined in Article 227 of the Treaty, whatever the structure of its constitution may be and however the powers of legislating in regard to the subject in question may be distributed. The fact that certain differences exist between the laws enforced in the different constituent parts of a Member State does not thereby prevent that State from applying a unitary concept in regard to prohibitions on imports imposed, on grounds of public morality, on trade with other Member States.

17 The answer to the second and third questions must therefore be that the first sentence of Article 36 upon its true construction means that a Member State may, in principle, lawfully impose prohibitions on the importation from any

other Member State of articles which are of an indecent or obscene character as understood by its domestic laws and that such prohibitions may lawfully be applied to the whole of its national territory even if, in regard to the field in question, variations exist between the laws in force in the different constituent parts of the Member State concerned.

Fourth, fifth and sixth questions

18 The fourth, fifth and sixth questions are framed in the following terms:

"4. If a prohibition on the importation of goods is justifiable on grounds of public morality or public policy, and imposed with that purpose, can that prohibition nevertheless amount to a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36?

5. If the answer to Question 4 is in the affirmative, does the fact that the prohibition imposed on the importation of such goods is different in scope from that imposed by the criminal law upon the possession and publication of such goods within the Member State or any part of it necessarily constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States so as to conflict with the requirements of the second sentence of Article 36?

6. If it be the fact that the prohibition imposed upon importation is, and a prohibition such as is imposed upon possession and publication is not, capable as a matter of administration of being applied by customs officials responsible for examining goods at the point of importation, would that fact have any bearing upon the answer to Question 5?"

19 In these questions the House of Lords takes account of the appellants' submissions based upon certain differences between, on the one hand, the prohibition on importing the goods in question, which is absolute, and, on the other, the laws in force in the various constituent parts of the United Kingdom, which appear to be less strict in the sense that the mere possession of obscene articles for non-commercial purposes does not constitute a criminal offence anywhere in the United Kingdom and that, even if it is generally forbidden, trade in such articles is subject to certain exceptions, notably those in favour of articles having scientific, literary, artistic or

educational interest. Having regard to those differences the question has been raised whether the prohibition on imports might not come within the second sentence of Article 36.

20 According to the second sentence of Article 36 the restrictions on imports referred to in the first sentence may not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".

21 In order to answer the questions which have been referred to the Court it is appropriate to have regard to the function of this provision, which is designed to prevent restrictions on trade based on the grounds mentioned in the first sentence of Article 36 from being diverted from their proper purpose and used in such a way as either to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products. That is not the purport of a prohibition, such as that in force in the United Kingdom, on the importation of articles which are of an indecent or obscene character. Whatever may be the differences between the laws on this subject in force in the different constituent parts of the United Kingdom, and notwithstanding the fact that they contain certain exceptions of limited scope, these laws, taken as a whole, have as their purpose the prohibition, or at least, the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character. In these circumstances it is permissible to conclude, on a comprehensive view, that there is no lawful trade in such goods in the United Kingdom. A prohibition on imports which may in certain respects be more strict than some of the laws applied within the United Kingdom cannot therefore be regarded as amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination between goods of this type depending on whether they are produced within the national territory or another Member State.

22 The answer to the fourth question must therefore be that if a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the Member State concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36.

23 In these circumstances it is not necessary to answer the fifth and sixth questions.

Seventh question

24 The seventh question asks whether, independently of the questions posed above, a Member State may lawfully impose prohibitions on the importation of such goods from another Member State by reference to obligations arising from the Geneva Convention, 1923, for the suppression of traffic in obscene publications and the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976), bearing in mind the provisions of Article 234 of the Treaty.

25 Article 234 provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between one or more Member States on the one hand, and one or more third countries on the other, are not to be affected by the provisions of the Treaty. However, to the extent to which such agreements are not compatible with the Treaty, the Member State concerned is to take all appropriate steps to eliminate the incompatibilities established.

26 It appears from a comparison of the foregoing considerations with the provisions of the Conventions to which the House of Lords refers that the observance by the United Kingdom of those international Conventions is not likely to result in a conflict with the provisions relating to the free movement of goods if account is taken of the exception made by Article 36 in regard to any prohibitions on imports based on grounds of public morality.

27 The answer to the seventh question should therefore be that, in so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 of the Treaty, the provisions of Article 234 do not preclude that State from fulfilling the obligations arising from the Geneva Convention, 1923, for the suppression of traffic in obscene publications and from the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976).

Costs

28 The costs incurred by the Government of the United Kingdom and by the Commission, which have submitted observations to the Court, are not recoverable.

29 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the House of Lords by order of 22 February 1979, hereby rules:

1. **A law of a Member State prohibiting any importation of pornographic articles into that State constitutes a quantitative restriction on imports within the meaning of Article 30 of the Treaty.**

2. **The first sentence of Article 36 upon its true construction means that a Member State may, in principle, lawfully impose prohibitions on the importation from any other Member State of articles which are of an indecent or obscene character as understood by its domestic laws and that such prohibitions may lawfully be applied to the whole of its national territory even if, in regard to the field in question, variations exist between the laws in force in the different constituent parts of the Member State concerned.**

3. **If a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the Member State concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36.**

4. In so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 of the Treaty, the provisions of Article 234 do not preclude that State from fulfilling the obligations arising from the Geneva Convention, 1923, for the suppression of traffic in obscene publications and from the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976).

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Bosco

Delivered in open court in Luxembourg on 14 December 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 25 OCTOBER 1979

My Lords,

This case has the distinction of being the first to come to this Court by way of a reference for a preliminary ruling by the House of Lords. It also has the distinction of being the first in which the Court has been called upon to consider the scope of the exception in Article 36 of the EEC Treaty for prohibitions or restrictions on the free movement of goods between Member States "justified on grounds of public morality".

The appellants in the House of Lords are Maurice Donald Henn and John Frederick Ernest Darby. They, it seems, used to conduct in England a mail order business in which the goods sold were pornographic films and literature. On 14 July 1977 they were convicted at Ipswich Crown Court of a number of offences against English law. Mr Henn was sentenced to a total of 18 months' imprisonment and ordered to pay £ 20