JUDGMENT OF THE COURT (Fifth Chamber)
15 September 1994 *

In Case C-293/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arrondissementsrechtbank, Zutphen (Netherlands) for a preliminary ruling in the criminal proceedings pending before that court against

Ludomira Neeltje Barbara Houtwipper

on the interpretation of Articles 30 and 36 of the EEC Treaty,

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida (Rapporteur), President of the Chamber, R. Joliet, G. C. Rodríguez Iglesias, F. Grévisse and M. Zuleeg, Judges,

Advocate General: C. Gulmann,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mrs Houtwipper,

* Language of the case: Dutch.

— the Netherlands Government, by J. G. Lammers, Legal Adviser, acting as Agent,

— the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

— the Greek Government, by Dimitrios Raptis, State Legal Adviser, and Fotini Dedoussi, Legal Agent of the State Legal Service, acting as Agents,

— the French Government, by Catherine de Salins, Deputy Director at the Directorate of Legal Affairs in the Ministry of Foreign Affairs, and Claude Chavance, Secretary for Foreign Affairs, acting as Agents,

— the Portuguese Government, by Luis Fernandes, Director in the Legal Service of the Ministry of Foreign Affairs, and Margarida Afonso, Lawyer in the Directorate-General for the European Communities at the same Ministry, acting as Agents,

— the United Kingdom, by J. D. Colahan, of the Treasury Solicitor's Department, acting as Agent,

— the Commission of the European Communities, by Hendrik van Lier, Legal Adviser, and Virginia Melgar, a national official on secondment to its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Houtwipper, the Netherlands Government, represented by J. S. van den Oosterkamp, Deputy Legal Adviser, acting as Agent, the Greek Government, represented by V. Kontolaimos, Deputy Legal Adviser at the State Legal Council, and Fotini Dedoussi, acting as Agents, the French Government, represented by Claude Chavance, acting as Agent, the Portuguese Government, represented by Luis Fernandes, acting as Agent, the United Kingdom, represented by J. D. Colahan, acting as Agent, and N. Green, Barrister, and the Commission, represented by P. van Nuffel, of its Legal Service, at the hearing on 14 April 1994,

after hearing the Opinion of the Advocate General at the sitting on 9 June 1994,

gives the following

Judgment

1 By order of 17 May 1993, received at the Court on 24 May 1993, the Arrondissementsrechtbank, Zutphen (Netherlands), referred to the Court for a preliminary ruling under Article 177 of the Treaty a question on the interpretation of Articles 30 and 36 of the EEC Treaty to enable it to assess the compatibility with Community law of the Waarborgwet 1986 (the Netherlands Law on guaranteed standards for precious metals, hereinafter 'the Waarborgwet').

2 That question was raised in criminal proceedings before the Arrondissementsrechtbank, Zutphen, against Mrs Houtwipper, who is being prosecuted for having had in her possession, or traded, gold and silver rings not bearing the hallmark required by the Waarborgwet.

3 Article 1 of the Waarborgwet provides that articles of precious metal must have the following standards of 'fineness' (quantity of pure precious metal used):

— platinum: 950 parts per thousand;

— gold: 916, 833, 750 or 585 parts per thousand;

— silver: 925, 835 or 800 parts per thousand.

The same article provides that those standards of 'fineness' are to be guaranteed by hallmarks affixed in accordance with that law.

Article 7 provides for the appointment of a legal person whose task is to test articles for the abovementioned standards of 'fineness', to affix hallmarks to them and to check that they are in conformity with the law in force. It is required to be completely independent in performing that task.

Articles 9 and 10 provide that works of precious metal must bear: (i) a mark of fineness, (ii) the mark of the official body which carried out the hallmarking, (iii) a letter indicating the date and (iv) for works consisting of several pieces which cannot be separately hallmarked, a mark indicating the respective weights of those pieces.

7 Article 30(1) provides:

'No dealer shall have in his possession, or shall trade in, any work of platinum, gold or silver that is required to be hallmarked pursuant to this law, unless it bears the required hallmarks ...'.

8 Article 48 provides an exception from the hallmarking requirement in the case of articles of precious metal imported from Belgium or Luxembourg that have been officially hallmarked in those countries.

9 Since the national court considered that the effect of the Waarborgwet was to prohibit trade in gold and silver articles imported into the Netherlands where those articles do not bear a Netherlands, Belgian or Luxembourg hallmark, even if they bear the hallmark of another Member State, it referred the following question to the Court of Justice for a preliminary ruling:

'Is a provision such as that contained in Article 30 of the Waarborgwet 1986 (Stb. 38/1987) compatible with Articles 30 and 36 of the Treaty establishing the European Economic Community (Treaty of 25 March 1957, Trb. 1957, 74 and 91)?'

10 The answer to that question can be given only on the basis of Article 30 of the Treaty, to the exclusion of Article 36, since measures such as those provided for by the rules in question do not fall within the scope of the exceptions listed exhaustively in Article 36 (see the judgment in Case 220/81 *Robertson* [1982] ECR 2349, paragraph 8).

11 It is established by the case-law beginning with 'Cassis de Dijon' (Case 120/78 *Rewe-Zentral* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649) that, in the absence of harmonization of legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marked, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

12 The market for articles of precious metal is the subject of differing national rules, in particular with regard to the acceptable standards of fineness, the type and number of hallmarks, the maximum tolerance with regard to the amount of precious metals in alloys, and the methods of supervising hallmarks.

13 Legislation, such as the Waarborgwet, which requires articles of precious metal imported from other Member States, in which they are lawfully traded and hallmarked in accordance with the legislation of those States, to be given an additional hallmark in the importing Member State, renders the imports more difficult and costly. As the German Government has observed, it requires action by an importer, the payment of fees to the supervising authority and leads to delays in marketing the products, which increase the costs of those products.

14 However, the requirement that an importer cause to be affixed on articles of precious metal a hallmark indicating their fineness, that is the quantity of pure precious metal used, is in principle of a nature such as to ensure effective protection for consumers and to promote fair trading. Since the consumer is not able to deter-

mine, by touch or by eye, the exact degree of purity of an article of precious metal, he may, in the absence of a hallmark, easily be misled when purchasing such an article.

15 That is why the Court stated in its judgment in *Robertson*, cited above, that a Member State cannot require a fresh hallmark to be affixed to products imported from another Member State in which they have been lawfully marketed and hallmarked in accordance with the legislation of that State, where the information provided by that hallmark, in whatever form, is equivalent to that prescribed by the Member State of importation and intelligible to consumers of that State.

16 It is for the national court to make the findings of fact needed to determine whether or not such equivalence exists.

17 The rules in question also require that the trademark be affixed by a legal person satisfying certain requirements as to competence and independence.

18 It is not open to a Member State to prevent the marketing in its territory of articles of precious metal hallmarked in the Member State of exportation by an independent body, on the ground that in its contention it is only action by the competent body in the State of importation which can ensure that the hallmark functions as a guarantee.

19 The Court has consistently held that the existence of double controls in the State of exportation and in the State of importation cannot be justified if the results of the control carried out in the Member State of origin satisfy the requirements of

the Member State of importation (see in particular the judgment in Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277, paragraph 15). The hallmark functions as a guarantee where it is affixed by an independent body in the Member State of exportation.

20 In that respect is it necessary to reject the argument of the German Government to the effect that a Member State may not prohibit the marketing in its territory of articles of precious metal hallmarked by the producers themselves in the Member State of exportation, where compliance with the law and, consequently, consumer protection and the safeguarding of fair trading are assured by a range of measures capable of ensuring that the hallmark functions as a guarantee. It argues that such is the case under the German legislation, which provides for quality rules for the manufacturer, penalties under public law if those rules are infringed, action under the Law against Unfair Competition by certain associations vested with the power to issue warnings, the manufacturer's guarantee and, finally, special training given to gold-and silversmiths.

21 As the United Kingdom has observed, there is a danger that fraud may take place, in particular on the market for articles of precious metal. Small changes in the quantity of precious metal may have a very great impact on the manufacturer's profit margin. According to the United Kingdom, reducing the quantity of precious metal by one part per thousand may increase the profit margin by up to 10%.

22 In the absence of Community rules, the Member States have a wide discretion, and it is for them to choose the appropriate measures to deal with that risk. The choice between prior control by an independent body and a scheme such as that in the

Federal Republic of Germany is a matter for the legislative policy of the Member States; the Court will review that choice only where there has been a manifest error of assessment. That has not occurred in this case, as the Advocate General has shown in points 27 and 28 of his Opinion.

23 It is for the national court to examine whether the hallmarking of articles of precious metal imported from other Member States has been carried out by a body providing guarantees of independence, those guarantees not necessarily having to be the same as those required by the national legislation.

24 The Netherlands legislation in question also requires that articles of precious metal be marked with a letter indicating the date. Accordingly, it must be examined whether a prohibition on marketing articles of precious metal which do not bear such an indication is justified as a measure for the protection of consumers and of fair trading.

25 Even assuming that some, or all, consumers wish to know the year of manufacture of articles of precious metal, that is not an interest which can justify such an appreciable barrier to the free movement of goods.

26 As the German Government has rightly pointed out, such an interest can relate only to certain articles, and it can be left to the manufacturer to satisfy it with respect to those articles. On the other hand, consumers have, as a rule, no interest in knowing the date of manufacture of items of jewelry which are sold on the market at low or medium prices and which are similar to articles of fashion. Finally,

when the hallmarking is performed by an independent body, the indication of the year of hallmarking may not always provide reliable information regarding the year of manufacture, since it may differ from the year in which the hallmark is affixed, above all in the case of imported goods.

Accordingly, the reply to be given to the question put to the Court by the Arrondissementsrechtbank, Zutphen, is as follows:

'1. Article 30 of the Treaty must be interpreted as meaning that it does not preclude the application of national rules prohibiting the sale of articles of precious metal not bearing a hallmark indicating their fineness in accordance with those rules, provided that those articles do not bear a hallmark, in accordance with the legislation of the Member State of exportation, containing information which is equivalent to that provided by the hallmarks required by the rules of the Member State of importation and which is intelligible to consumers in that Member State.

2. Where national rules require the hallmark to be affixed by an independent body, the marketing of articles of precious metal imported from other Member States may not be prohibited if those articles have in fact been hallmarked by an independent body in the Member State of exportation.

3. The findings of fact required in order to determine the equivalence of the information provided by the hallmark are a matter for the national court, which must also examine whether the articles of precious metal have been hallmarked by an independent body in the Member State of exportation.

4. Article 30 of the Treaty precludes the application of national rules which prohibit the marketing of articles of precious metal which do not indicate the date of their manufacture, where those articles have been lawfully marketed without that indication in other Member States, from which they have been imported.'

Costs

28 The costs incurred by the Netherlands, German, Greek, French, Portuguese and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Fifth Chamber),

in answer to the question referred to it by the Arrondissementsrechtbank, Zutphen, by order of 17 May 1993, hereby rules:

1. Article 30 of the Treaty must be interpreted as meaning that it does not preclude the application of national rules prohibiting the sale of articles of precious metal not bearing a hallmark indicating their fineness in accordance

with those rules, provided that those articles do not bear a hallmark, in accordance with the legislation of the Member State of exportation, containing information which is equivalent to that provided by the hallmarks required by the rules of the Member State of importation and which is intelligible to consumers in that Member State.

2. Where national rules require the hallmark to be affixed by an independent body, the marketing of articles of precious metal imported from other Member States may not be prohibited if those articles have in fact been hallmarked by an independent body in the Member State of exportation.

3. The findings of fact required in order to determine the equivalence of the information provided by the hallmark are a matter for the national court, which must also examine whether the articles of precious metal have been hallmarked by an independent body in the Member State of exportation.

4. Article 30 of the Treaty precludes the application of national rules which prohibit the marketing of articles of precious metal which do not indicate the date of their manufacture, where those articles have been lawfully marketed without that indication in other Member States, from which they have been imported.

Moitinho de Almeida Joliet Rodríguez Iglesias

Grévisse Zuleeg

Delivered in open court in Luxembourg on 15 September 1994.

R. Grass

Registrar

J. C. Moitinho de Almeida

President of the Fifth Chamber