That an agreement between individuals intended to prohibit the importation of such goods may not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 22 January 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 20 NOVEMBER 1980 [1]

Mr President,
Members of the Court,

1. The Court of Justice has had many occasions on which to deliver rulings regarding the limits within which exceptions to the principle of the free movement of goods may be made on the basis of industrial or intellectual property rights or through the need to curb practices involving unfair competition. The principal issue which this case raises is of that kind even although the case presents another aspect which arises from the Community rules protecting freedom of competition.

First of all I shall summarize the facts. In 1978 a Danish company, Imerco, which is an organization for the wholesale purchase of hardware goods whose shareholders retail such goods throughout Denmark, ordered a number of china services from a Britsh manufacturer, Broadhurst. The services in question were intended to mark the fiftieth anniversary of Imerco and they were accordingly to be decorated in conformity with the instructions and patterns supplied by that company and to include on the reverse side *inter alia* the words "Imerco Fiftieth Anniversary". Imerco intended to sell those products in Denmark exclusively through its own members. However, since about 1 000 services were not fully in accordance with the stringent quality standards laid down by it, Imerco permitted the manufacturer to market those services in the

1 — Translated from the Italian.

United Kingdom (except for certain parts normally visited by Danish tourists) and in specified non-European countries. The substandard services were thus sold by Broadhurst to certain British wholesalers subject to a prohibition on their resale to Denmark.

Nevertheless 300 of those services came to be acquired by Dansk Supermarked A/S, Århus (through a Danish middleman who had himself acquired them in the United Kingdom) and to be offered by that company for sale in its own supermarkets at prices appreciably lower than those charged by members of Imerco for perfect versions of the same products.

In those circumstances Imerco sought and obtained from the Danish courts an injunction prohibiting Dansk Supermarked from continuing to sell the services in question. The injunction was granted by the Byret [court of first instance], Århus, by an order of 22 June 1978 and was subsequently upheld by the Sø- og Handelsret [Maritime and Commercial Court], Copenhagen, by a judgment of 19 March 1979. The Danish courts in fact held that Dansk Supermarked was in breach of the relevant national provisions (Articles 1 and 5 of Law No 297 of 14 June 1974) by offering for sale without Imerco's consent articles bearing the name of Imerco and not intended for "normal sale". In substance, the wrongful act committed by Dansk Suspermarked was held to consist in benefiting from a distinctive mark which did not belong to it. Another contention of Imerco, which, however, the Sø- og Handelsret did not uphold, was that by giving false information Dansk Supermarked had persuaded customers that the articles in question were perfect.

In its appeal to the Højesteret [Supreme Court] against the judgment of the Sø- og Handelsret Dansk Supermarked relied upon Articles 30 and 85 of the EEC Treaty and on Regulation (EEC) No 67/67 of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements, contending that Community law guarantees the right to effect parallel imports and that national legislation may not stand in the way of that right.

By an order of 14 February 1980 the Højesteret stayed the proceedings and requested the Court of Justice to deliver a preliminary ruling under Article 177 of the EEC Treaty on the following question:

"Do the provisions of the EEC Treaty or measures in implementation thereof preclude the application to the case of the Danish laws on copyright, trade marks and marketing?"

It is clear that this question has been imperfectly framed since instead of requesting an interpretation of certain Community provisions the national court has requested this Court to establish whether the present case must be considered subject to Community law as well as Danish law. Nevertheless, taking into account the arguments advanced by the parties in the proceedings before the Højesteret, it is easy to identify in Articles 30 and 85 of the EEC Treaty and Regulation (EEC) No 67/67 of the Commission the Community provisions which the national court might find relevant in arriving at its decision in the main action. Article 30 is at the centre of the problem; the issue is precisely whether that article is capable of pre-

cluding the application of national provisions on copyright, trade marks and unfair competition which prevent the marketing in a Member State of products which have been imported in parallel under circumstances of the kind which have been described above!

I therefore consider that the question to be answered may be understood as meaning the following:

"Is it compatible with Articles 30 and 85 of the EEC Treaty (and, if appropriate, with Regulation (EEC) No 67/67 of the Commission) that the marketing in one Member State of a given product which has already been duly placed on the market in another Member State be prohibited by the national courts on the ground of the protection of copyright or trade mark or under provisions against unfair competition or, finally, pursuant to an agreement with territorial limitations on sales?"

2. With regard to the prohibition of measures having an effect equivalent to quantitative restrictions referred to in Article 30 of the Treaty, the Court of Justice has of course consistently held that that prohibition affects all national measures which hamper the importation or sale of a product which has been duly placed on the market in another Member State. In this connexion it appears to me irrelevant whether the product in question has particular characteristics required by the person commissioning that product in order to commemorate an event of significance to himself. The decisive factor is that the product has been duly placed on the market in another Member State (as occurred in this case where the 1 000 china services were sold by the manufacturer in the United Kingdom).

That said, it is necessary to consider the extent to which any national measures of the type I have described may be permitted under the derogation contained in Article 36 of the EEC Treaty even though they are at variance with the principle contained in Article 30. As the Court is aware, that provision states that *inter alia* restrictions on imports justified on grounds of the protection of industrial and commercial property (to which intellectual property rights, that is copyright, can undoubtedly be assimilated) are not precluded provided, however, that this does not entail an arbitrary discrimination or a disguised restriction on trade between Member States. Nevertheless, none of the said exclusive rights may be legitimately relied upon to prohibit the marketing in one Member State of products duly placed on the market in another Member State with the consent of the owner of the right. The case-law of the Court of Justice has clearly established this point (cf. the judgment of 22 June 1976 in Case 119/75 *Terrapin* v *Terranova* [1976] ECR 1039, paragraphs 5 and 6 of the decision).

That principle must still be upheld even where the person commissioning a given product is the owner of a trade mark or other exclusive right over that product and has authorized the manufacturer to sell some of those products on his own account but in one Member State alone (in this case, Imerco authorized Broadhurst to market the substandard services in the United Kingdom but not in Denmark). In fact a contractual clause in such terms cannot prevent the right claimed by the person commissioning

the goods from being exhausted — throughout the territory of the Community — as soon as the goods have been placed on the market, with his consent, in one Member State.

Naturally the person commissioning the goods remains entitled to claim compensation for the damage sustained if there has been a breach of contract by the manufacturer or persons deriving title from him who accepted a territorial limitation on the marketing of the product, provided always that an agreement of, this nature is not incompatible with Article 85 (1) of the EEC Treaty, which I shall consider later.

3. Similar reasoning to that set out in relation to rights of industrial, commercial and intellectual property also applies to restrictions on the movement of goods which may result from national provisions intended to counter practices of unfair competition (the papers in the case show that this is also the purpose of the provisions "on marketing" referred to by the Danish court in its question). In fact the suppression of unfair competition is not included amongst the grounds on which Article 36 permits exceptions to the prohibition in Article 30. Nevertheless in the judgments of 11 July 1974 in Case 8/74 *Dassonville* [1974] ECR 837 and of 20 February 1979 in Case 120/78 *REWE* [1979] ECR 649 the Court of Justice held that in the absence of Community rules on marketing it is necessary to accept obstacles to the free movement of goods resulting from national laws intended to meet specified mandatory requirements, in particular requirements relating to the fairness of commercial transactions and the defence of the consumer. Nevertheless the restrictive measures justified by such objectives are lawful only in so far as they are "reasonable" that is to say, are not discriminatory and are limited to the indispenable minimum. This case-law was recently confirmed in the judgment of 26 June 1980 in Case 788/79 *Gilli* [1980] ECR 2071 in which the Court of Justice ruled that "it is only where national rules, which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to ... the fairness of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising under Article 30".

In short, as I have already had occasion to point out — most recently in my opinion of 29 May 1980 in the aforementioned case of *Gilli* — the Court has gone beyond Article 36 of the EEC Treaty in that it has extended the scope of the lawfulness of national measures which are excepted from the ambit of Article 30, provided that such measures "serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community" (paragraph 14 of the said judgment in Case 120/78, *REWE*).

In this case it appears that the Danish provisions on marketing were invoked against Dansk Supermarked because it had injured the reputation of Imerco by placing on the market substandard china

bearing its name. It is for the Danish court to establish, in the light of the criteria which. I have endeavoured to clarify, whether the difference in quality between the services commissioned by Imerco for its members and those distributed by Dansk Supermarked constitutes a sufficient ground to justify the prohibition of sale imposed on the latter. In this connexion the Commission properly points out that Imerco authorized the sale of the substandard services in the United Kingdom thereby showing that the marketing of those services did not injure its reputation, even leaving out of account the consideration that Imerco does not produce china.

On the other hand Imerco might suffer commercial loss if the substandard services were offered for sale, obviously at a lower price, in such a way as to give customers the impression that the quality was identical to that of the perfect services marketed by Imerco's members. In this connexion I would observe that the requirement of protecting the legitimate commercial interests of a trader marketing a perfect product must be regarded as being satisfied where the substandard product is offered to the public — even without express notice that it is a "substandard product" — in such a way that reasonable doubts as to the quality of the product are not created. In this connexion matters such as the packaging, the usual quality of the goods and the level of prices in the shop where the product is put on sale may be relevant together with other matters of fact which the national court must establish and appraise in the particular case.

With regard, finally, to the circumstance that Dansk Supermarked may have been able to benefit from the advertising undertaken by Imerco for the product in question, that does not appear to be contrary to the prohibition of unfair competition. It is a factor which the Court has had occasion to consider in relation to exclusive dealing contracts (as for example in the *Grundig & Consten* case [1966] ECR 349) and which generally proves to favour the parallel importer. However it cannot, in my view, justify the exclusion of a parallel importer from a given national market within the common market.

4. A question of the interpretation of Article 85 of the EEC Treaty arises if the validity of the stipulation against exportation to other Member States contained in the agreement between Imerco and Broadhurst is called in question. The point is relevant in this case only on the assumption that the Danish court took that stipulation into accout when it prohibited the sale in Denmark by Dansk Supermarked of the substandard china services manufactured by Broadhurst. Furthermore in this connexion it cannot be said that Article 85 presents any great difficulties of interpretation: the nature and conditions of the prohibition of agreements in restriction of competition are well known, as is the fact that contracts restricting outlets and partitioning markets are included amongst such agreements.

The judgment of the Court of 25 November 1971 in Case 22/71 *Beguelin* [1971] ECR 949, which required to

decide whether an exclusive distribution agreement was in accordance with Article 85, held that the two basic conditions to which the prohibition of agreements in restriction of competition is subject (that the agreement may affect trade between Member States and that it should have as its object or effect the impeding of competition within the common market) are fulfilled "when, *de jure* or *de facto*, it (the agreement) prevents the distributor from re-exporting the products in question to other Member States..." (paragraphs 10/12 of the decision). That judgment goes on to state that "in order to come within the prohibition imposed by Article 85, the agreement must affect trade between Member States and the free play of competition *to an appreciable extent*" and it emphasizes the importance of a series of criteria, such as the nature and the quantity, restricted or otherwise of the products, the standing of the grantor and of the grantee of the concession on the market and the opportunities open to other traders to deal in the products concerned in the form of re-exports or parallel imports.

Naturally the decision whether the agreement in question in this case may be classified as a contract restricting competition is a matter for the Danish court. For my part, it seems clear that it is impossible to describe as an exclusive distribution agreement a contract between a person commissioning a product and the manufacturer whereby the former authorizes the latter to market on his own account some of the products commissioned whilst at the same time prescribing a territorial limitation on such sales. At the most a parallel might perhaps be drawn with exclusive dealing arrangements which exclude reselling on specified markets. I must however repeat that this problem does not concern this Court.

It remains to consider whether in a case such as that under discussion problems may arise as to the interpretation of Regulation No 67/67 of the Commission of 22 March 1967 (which, as I have said, was relied upon in the course of the main action). Since that regulation concerns exclusive distribution agreements and I have felt bound to exclude the contract between Imerco and Broadhurst from that category it also appears to me that I must exclude any need to interpret the regulation in question for the purposes of the reply to be given to the Danish court. In any case I must point out that the collective exemption provided by the said regulation does not apply to agreements prohibiting the distributor from re-exporting the goods to other Member States: that was laid down by the Court of Justice in the said *Beguelin* case, confirming by implication that agreements which fall into that category cannot escape the general rule laid down in Article 85 (1).

5. In conclusion, I suggest that the Court of Justice should reply to the question submitted to it by the Højesteret, Denmark by an order of 14 February 1980 by ruling as follows:

1. Pursuant to Articles 30 and 36 of the EEC Treaty, the sale in one Member State of a given product which has already been duly placed on the market in another Member State with the consent of the owner of the

trade mark or copyright pertaining to that product may not be prohibited by the national courts in order to protect such rights.

2. Where a parallel importer, or a person acquiring title from him, places on the market in a Member State products whose quality is inferior to that of products which another undertaking has commissioned for marketing in the same State but which are otherwise identical, sale by the former may not be prohibited under rules against unfair competition unless the products are marketed in such a way as to mislead customers as to their quality.

3. An agreement between the manufacturer of certain products and the undertaking which has commissioned their manufacture whereby the former is authorized to sell some of these products on his own account but is prohibited from exporting them to other Member States is incompatible with Article 85 (1) of the EEC Treaty if it affects trade between Member States and the free play of competition within the common market to an appreciable extent.