OPINION OF ADVOCATE GENERAL GULMANN
delivered on 9 June 1994 *

Mr President,
Members of the Court,

1. The Netherlands Law on the guarantee as to the fineness of articles of precious metal prohibits dealing by way of trade in articles of platinum, gold or silver which are not struck by an independent body with a hallmark giving information on the content of precious metal in the individual article (hereinafter the 'standard of fineness' of the article). [1] Mrs Houtwipper is charged before the Arrondissementsrechtbank (District Court), Zutphen, with infringing that prohibition. She is pleading not guilty, claiming that the prohibition is contrary to the EEC Treaty. The Arrondissementsrechtbank, Zutphen, has referred to the Court for a preliminary ruling a question on the interpretation of Articles 30 and 36 of the Treaty so that it may decide whether the provision at issue conflicts with those provisions. [2]

2. The precious metals gold, silver and platinum in the pure state are too soft to be suitable for working. That means that all articles of precious metal consist of a mixture of precious and base metals (an alloy). As a result of the high value of precious metals there is a requirement in all Member States that articles of precious metal shall be struck with various hallmarks, including a hallmark giving information as to the individual article's standard of fineness, normally expressed in thousandths (hereinafter 'fineness hallmark').

3. The laws of the Member States, however, differ considerably both as to the hallmarks to be applied (particularly as concerns the information which they provide with regard to the nominal standard of fineness, namely that with which the article is struck) and as to the manner in which the standard of fineness is verified and the hallmarking is effected.

4. In several Member States (the United Kingdom, France, the Netherlands, Ireland, Portugal and Spain) the fineness hallmark is applied by an independent body on the basis of a prior assaying of the individual article, whereas in other Member States it is applied by the manufacturer or the importer himself (Germany, Greece, Italy and Luxembourg). In yet other countries there is freedom

* Original language: Danish.

1 — In the Commission Proposal of 18 October 1993 for a Council Directive on articles of precious metal (OJ 1993 C 318, p. 5) the expression 'standard of fineness' (for which in the Danish version the expression 'ldighed' is used instead of 'holdighed') is described as 'the fine precious-metal content expressed in parts per thousand in relation to the total mass of the alloy concerned' (Article 1(2)(f)).

2 — The question is as follows: '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)?', and it is added that the effect of the provision in question in the Netherlands Law is that it is prohibited to deal in gold and silver articles after their importation into the Netherlands unless they are struck with a Netherlands, Belgian or Luxembourg fineness mark even if they bear a fineness mark of another Member State.

of choice whether it is the manufacturer/importer or an independent body which is to provide the article of precious metal with the fineness hallmark (Belgium, Denmark).

5. The national requirements for hallmarking cause serious obstacles to trade in articles of precious metal, as a number of States require imported goods also to comply with the national requirements. That has meant that, as stressed by the Portuguese Government in its observations, in this field, which is also important in an economic respect, there is still no real common market.

6. Efforts so far at Member State level to promote international trade in articles of precious metal have not been particularly successful. Only a few Member States [3] have ratified the Vienna Convention on the control and marking of articles of precious metals of 15 November 1972, [4] according to which the Contracting States undertake not to require further assaying or hallmarking of articles of precious metals which are controlled and hallmarked in accordance with the provisions of the Convention and procedures of authorized independent public bodies.

3 — According to my information, Denmark, Portugal, the United Kingdom and Ireland.

4 — The Convention was signed in Vienna on 15 November 1972 between Finland, Norway, Portugal, Switzerland, the United Kingdom, Sweden and Austria.

7. For this reason the Commission — moreover after pressure from several Member States — has drafted a proposal for a directive on articles of precious metal, [5] which was submitted to the Council in October 1993.

The proposal aims at removing the existing obstacles to trade by harmonization of the legislation of the Member States on the hallmarking of articles of precious metal. Common rules are laid down for a number of requirements to ensure a correct indication of the standard of fineness and it is provided that as far as concerns the indication of the standard of fineness the Member States may not restrict the marketing of articles of precious metal which are hallmarked either by the manufacturer or his authorized representative in accordance with the procedures described in the directive (conformity attestation) or after prior assaying (verification) by an independent body specially authorized for the purpose.

The Commission has thus proposed a multifaceted system as regards hallmarking with the standard of fineness by equating hallmarking by an independent body with hallmarking by the manufacturer himself but in such a way that there are detailed requirements concerning a manufacturer's own hallmarking.

5 — See note 1.

The proposal for a directive contains in addition common rules for the nominal standards of fineness to be used for hallmarking (for example for silver: 800, 835, 925 and 999) and for the appearance of the hallmarks applied (for example for gold an oval within which the standard of fineness is indicated).

8. This case, as I mentioned, concerns an infringement of the Netherlands Law on the guarantee as to the fineness of articles of precious metal (hereinafter 'the Waarborgwet'). Under that law all articles of precious metal, before being marketed, are submitted to Waarborg Platina, Goud en Zilver NV (hereinafter 'Waarborg'), for assaying and hallmarking with the standard of fineness. [6]

9. Waarborg works under the authority of the Netherlands Minister for Economic Affairs and must meet certain requirements, prescribed in the Waarborgwet, with regard to independence. [7]

10. Waarborg strikes the finished articles of precious metal — if the relevant assaying justifies it — with one of the following fineness hallmarks: for platinum 950, for gold 916, 833, 750 and 585, and for silver 925, 835 and 800. [8] Articles of precious metal not having one of those values are hallmarked with the nearest nominal standard of fineness below the actual standard of fineness, so that for example an article with an actual gold content of 840 is hallmarked with the nominal standard of fineness of 833.

Where it is impossible to indicate the standard of fineness of an individual article with certainty the guarantee hallmark applies within a limit of 20 thousandths. [9]

11. It is prohibited to apply the description precious metal, platinum, gold or silver to articles with a lesser standard of fineness than the lowest of those mentioned above.

12. The requirement of assaying and hallmarking applies irrespective of whether the article of precious metal is imported from another Member State and has there been subjected to control and hallmarking in

6 — Waarborgwet, Article 30.
7 — Waarborgwet, Article 7.
8 — Waarborgwet, Article 1.
9 — Waarborgwet, Article 3.

accordance with the legislation of that Member State. [10]

13. Mrs Houtwipper has claimed first of all that the provisions of the Waarborgwet distort competition between traders in the Netherlands and their European colleagues by imposing considerable and unjustified costs on the Netherlands traders.

It is worth mentioning that such a distortion of competition is not in itself decisive for the application of the prohibition laid down in Article 30 of the Treaty of measures having an effect equivalent to quantitative restrictions. The Netherlands Government has also mentioned in this respect that it is not explained in the judgment of reference whether the articles which have given rise to Mrs Houtwipper's prosecution are of domestic or foreign origin. The court of reference, however, clearly showed that it was aware that Article 30 of the Treaty relates only to obstacles to imports from other Member States (see note 1).

14. There is substantial agreement between those who have submitted observations in the case — in addition to Mrs Houtwipper, the Netherlands, United Kingdom, German, French, Portuguese and Greek Governments and the Commission — that:

— rules such as those at issue are measures having an effect equivalent to quantitative restrictions within the meaning of Article 30 of the Treaty since they lead to obstacles to trade by laying down requirements as to quality and hallmarking even with regard to goods which are lawfully produced in another Member State; [11]

— the contested rules are not based on one of the considerations exhaustively set out in Article 36 of the Treaty, which may justify trade restrictions referred to in Article 30; and

— such obstacles to trade as are based on differences in national laws may nevertheless be regarded as lawful if the rules concerned are applied both to domestic and imported goods, if they are indis-

10 — However, in Article 48 of the Waarborgwet there is an exception to that requirement for articles officially marked in Belgium and Luxembourg after harmonization of the rules of the countries concerned under The Hague Treaty of 18 February 1950 between the Netherlands, Belgium and Luxembourg (Trb. 1951, p. 159). However, in the Netherlands Government's observations it is pointed out that that exception has lost all real practical significance since official hallmarking no longer takes place in Luxembourg and does so only seldom in Belgium.

11 — See in this respect the judgments in Case 8/74 *Dassonville* [1974] ECR 837 at paragraph 5, Case 120/78 REWE ('Cassis de Dijon') [1979] ECR 649 and in particular Joined Cases C-267 and 268/91 *Keck* and *Mithouard* [1993] ECR I-6097.

pensable, for example for consumer protection and fair trading, and if the restrictions involved are reasonably related to the objectives pursued and these cannot be achieved by measures less restrictive of trade. [12]

15. The first two requirements for regarding the contested rules restricting trade as lawful are met in this case. The relevant national laws are not yet harmonized and the Netherlands rules on hallmarking apply without distinction to domestic and imported products.

16. We must therefore consider whether the application of the contested rules to imported goods is indispensable for consumer protection and fair trading, as the Netherlands Government claims.

17. The Court gave its views on a somewhat similar case in the judgment in Case 220/81 *Robertson*. [13]

In that case certain Belgian importers were being prosecuted for the sale of silver cutlery from other Member States which did not bear a hallmark showing the silver content in accordance with the Belgian rules then applicable. A comparison of the laws of the Member States showed that in all of them there was an obligation to hallmark articles of precious metal in one way or another, but that it was only in Belgium that there was an obligation also to hallmark silver-plated metal.

The Court ruled in its judgment that the obligation to stamp silver-plated articles, which by their very nature were capable of being confused with articles of solid silver, might be regarded as necessary for affording effective protection to consumers and promoting fair trading and that therefore 'Article 30 ... does not prevent a Member State from applying national rules prohibiting the sale of silver-plated articles not stamped with a hallmark complying with the requirements of those rules to like articles imported from another Member State where they have been lawfully marketed'.

12 — See in this respect the two last-mentioned judgments in the previous footnote and the judgment in Case C-126/91 *Yves Rocher GmbH* [1993] ECR I-2361 at paragraph 12.

13 — [1982] ECR 2349.

The Court stressed that hallmarking fulfilled two purposes since that alone enabled the consumer to acquire a sufficiently accurate knowledge of the nature and quality of the product but also to distinguish it from other products with which it might otherwise be confused.

18. It is clear that with silver-plated goods there is an obvious risk of confusion between silver plate and precious metal since it is not possible to see immediately the difference between the two materials, between which there is a considerable difference in value.

However, it is just as clear that there is a corresponding risk as far as concerns articles of precious metal, since their standard of fineness cannot be determined without technical investigation and since the standard of fineness is decisive for the article's value.

It may therefore be stated that hallmarking articles of precious metal with the standard of fineness may be regarded as indispensable for consumers and for fair trading.

19. It is next necessary to decide whether it is also necessary to require that the hallmarking of the standard of fineness is to be undertaken by a body independent of the manufacturer on the basis of prior assaying carried out by that body.

20. It may be said by way of introduction that Mrs Houtwipper and the German Government have observed that Waarborg, which is a limited liability company, is owned by the trade organization Federatie Goud en Zilver and has therefore such close links with the Netherlands trade that it cannot be regarded as being independent of it.

I have already mentioned that Netherlands legislation contains rules which aim to ensure Waarborg's independence. There has been no attempt to show in this case that Waarborg is dependent on the undertakings it supervises and suggestions of such dependency have also been most emphatically rejected by the Netherlands Government. It is worth mentioning, moreover, that during the procedure it has not even been suggested that Waarborg treats imported goods differently from nationally produced goods.

21. The Netherlands, United Kingdom, French, Portuguese and Greek Governments

stress that hallmarking of the standard of fineness undertaken by an independent body after assaying gives consumers better protection than when the manufacturer or the importer undertakes the hallmarking himself.

22. On the other hand the German Government contends that it is less important whether the hallmarking is undertaken by an independent third party or on the manufacturer's own responsibility and that there is therefore some question of an unnecessary duplication of control if articles of precious metal hallmarked by a German manufacturer must also be assayed and hallmarked by Waarborg upon importation into the Netherlands.

23. In my view it is impossible to agree with the German Government in this respect.

24. It is undoubtedly correct, as pointed out by the German Government, that rules which allow the hallmarking of the standard of fineness to be carried out by the manufacturer himself, as do the German rules, obstruct trade between the Member States less than rules like those of the Netherlands. Rules like the German ones also have regard to the need for consumer protection and fair trading, inasmuch as not only the manufacturer but also the dealer in articles of precious metal is responsible, according *inter alia* to criminal law, competition legislation and trade standards, if the hallmarking of the standard of fineness is not correct.

25. In addition it is certain — as also stated by the German Government and Mrs Houtwipper — that rules such as those in the Netherlands make trade in articles of precious metal substantially more expensive by imposing on traders expenditure on such items as transport and insurance of the goods to be assayed and hallmarked, which moreover may be done in only one place in the Netherlands. These costs may undoubtedly be found by the traders concerned to be disproportionate, particularly in comparison with the amount and value of the metal used (for example when antiques and fragile articles are to be hallmarked).

26. However, this fact is not decisive. As long as no Community rules to the contrary have been adopted in this field, Member States may be justified in laying down rules based on the idea that consumer protection and fair trading are best secured by means of assaying and hallmarking undertaken by an independent body.

27. Assaying and hallmarking by an independent body undoubtedly have a greater preventive effect and protect consumers better than hallmarking carried out by the manufacturer himself. Fraud is an obvious risk in this sphere and it must be permissible for the Member States to refuse to accept that subsequent criminal liability is a sufficient safeguard against that risk.

28. It is also significant that assaying and hallmarking by an independent body has been compulsory for centuries in various Member States and that such a requirement must be satisfied if the Contracting States are to have an obligation under the aforementioned Convention of Vienna to allow the importation of articles of precious metal from the other Contracting States.

29. For those reasons the Court should rule that a requirement for assaying and hallmarking by an independent body does not reflect an unacceptable double requirement when demanded in relation to goods from Member States where the hallmarking is lawfully applied by the manufacturer himself.

30. Accordingly it is necessary to consider afresh whether and if so to what extent a requirement may be imposed for assaying and hallmarking, in importing States, articles of precious metal imported from another Member State, which have been assayed and hallmarked there by an independent body.

31. In the *Robertson* case, which is relevant to this question, the Court declared: 'However, there is no longer the need for such protection where articles of that kind are imported from another Member State in which they have been lawfully marketed, if they are already hallmarked in accordance with the legislation of that State, on condition however that the indications provided by the hallmarks provided by that State, in whatever form, contain information which includes indications equivalent to those provided by the hallmarks prescribed by the Member State of importation and intelligible to consumers of that State.'

32. The Netherlands Government contends that the Court should maintain the interpretation of Article 30 which it gave in the *Robertson* judgment. It stresses the need for the consumer to be correctly informed and points out that in some Member States articles of precious metal with a standard of fineness of gold of 333 are recognized, whereas other Member States require a higher minimum standard. It also mentions

that the nominal standards of fineness required in the different States vary considerably and that the form and content of the various hallmarks may also be very different. Finally it points out that the question of whether certain negative fluctuations in the stated standard of fineness are permissible, and if so how wide they may be, may vary from one Member State to another.

33. The Netherlands Government claims that it may be hard enough for experts in the trade to distinguish between each State's fineness hallmarks and that in any case it is impossible for an average consumer to know and understand the fineness hallmarks of all Member States. It therefore expresses the view that it is doubtful whether foreign articles may be approved without fresh hallmarking unless there is to be an obvious risk that consumers will be misled.

34. The French, Greek, Portuguese and United Kingdom Governments agree with the Netherlands Government that the Court should uphold the interpretation of Article 30 which it gave in the *Robertson* judgment, although they express somewhat different views as to the practical consequences of the obligation of their authorities to accept the importation of articles from other Member States without fresh hallmarking. The United Kingdom Government thus does not deny that there may be cases in which such acceptance is possible without the risk of misleading consumers, but emphasizes, as an addition to the Netherlands Government's statement, that the fineness hallmarks not only vary from one Member State to another but also vary in number and appearance within the individual Member State according to the age of the article in question.

35. The governments are undoubtedly right in emphasizing the importance of the fact that there is a multiplicity of fineness hallmarks in the Community and point out that the common market cannot operate fully in this sphere until rules are adopted under Community law for the harmonization of national rules in the sector.

However, that does not mean that there cannot be cases in which the Member States may be required, on the basis of the criteria laid down in the *Robertson* judgment, to approve importation without fresh hallmarking of articles of precious metal produced in other Member States.

36. As the German Government states, the standard of fineness of articles of precious

metal is given in by far the majority of Member States in thousandths. That indication must be intelligible to consumers irrespective of whether precisely that nominal standard is used in the consumer's own country. It does not seem probable that there should be, by reason of such differences alone, a sufficiently important risk of misleading as to be able to justify renewed hallmarking in the State of importation. In my view consumers will undoubtedly also be able to understand without being misled the significance of hallmarking applied in other Member States even though it may differ in certain points from the hallmarking applied in their own Member State.

37. It should be stressed, not least on the basis of observations from the Netherlands and United Kingdom Governments during the oral procedure that consumers' interest in not being misled is certainly worthy of protection but that that interest should be safeguarded in a way which does not render illusory the basic rules of the Treaty with regard to free movement of goods between Member States.

38. In this field the Member States have a positive duty to approve articles assayed and hallmarked in satisfactory conditions in the State of exportation and not to extend the exception formulated in the *Robertson* judgment further than strictly necessary.

The authorities of the Member States must strive conscientiously to comply with this duty. That presupposes that they fail to accept articles of precious metal from other Member States where they have been assayed and hallmarked by an independent body only where there are good grounds for assuming that consumers will be misled if assaying and hallmarking are not carried out afresh. In that respect the authorities must take account of the basic principles laid down in the case-law of the Court according to which measures which entail obstacles to trade are lawful only if they are indispensable and are reasonably related to the objectives pursued, which cannot be attained by measures which obstruct Community trade less.

39. The Court declared in the *Robertson* judgment that it was for national courts to decide whether the conditions for allowing the marketing of imported goods without fresh hallmarking were satisfied. However,

that finding does not mean that that task is exclusively a matter for the national courts.

40. It is important to stress that it follows from Article 5 of the Treaty that the national authorities must at all times strive to arrange and administer their rules in such a way as to comply with the requirements of the Treaty with regard to free movement of goods. The authorities cannot simply wait until the question of the legality of the State's rules or administrative practice is tested before the national courts by undertakings affected by them.

41. It will follow from my observations that I think it is possible for the Court to answer the question referred to it in the same way as it answered the question in the *Robertson* case, whilst specifying that the Member States may require assaying and hallmarking by an independent body and also emphasizing that it follows from the answer that there is a positive duty for the national authorities to consider conscientiously whether articles from other Member States are to be approved in accordance with the criteria of the *Robertson* judgment.

Opinion

42. For those reasons I shall suggest that the Court answer the question referred to it by the Arrondissementsrechtbank, Zutphen, as follows:

Article 30 of the Treaty does not prevent national rules prohibiting the sale of articles of precious metal which have not been examined and provided with hallmarks as to the standard of fineness of the article by an independent body established in that State from being applied to articles of precious metal imported from another Member State where they are lawfully marketed. Such rules cannot however be applied to articles imported from another Member State where they are lawfully marketed if they have in that State been assayed by an independent body and provided by it with the appropriate hallmarks which contain information equivalent to that provided by the hallmarks prescribed by the rules of the Member State of importation and are as intelligible to consumers of that State.