difficulties than would result from another possible system cannot in itself constitute a failure by that State to fulfil its obligations under Article 30 of the Treaty.

3. A Member State which applies a system for checking the authenticity of products bearing a designation of origin has a duty to ensure, seeking if necessary in this respect the assistance of the Commission, that traders wishing to import into that State such products bearing a designation of origin duly adopted by that State and in free circulation in a regular manner in a Member State other than that of origin, are able to effect such imports and are not placed at a disadvantage as compared with direct importers, save in so far as appears reasonable and strictly necessary to ensure the authenticity of those products.

In Case 2/78

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, René-Christian Béraud, acting as Agent, assisted by Robert Collin, of the Paris Bar, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

applicant

v

KINGDOM OF BELGIUM, represented by Robert Hoebaer, Director at the Ministry for Foreign Affairs, External Trade and Co-operation with the Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy,

defendant

supported by

THE FRENCH GOVERNMENT, with an address for service in Luxembourg at the French Embassy, 2 Rue Bertholet,

intervener

and

THE GOVERNMENT OF THE UNITED KINGDOM, represented by R. D. Munrow, acting as Agent, Treasury Solicitor's Department, Matthew Parker Street,

London SW1H, with an address for service in Luxembourg at the United Kingdom Embassy, 28 Boulevard Royal,

intervener

APPLICATION for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the EEC Treaty,

THE COURT

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

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments of the parties in the written procedure may be summarized as follows:

I — Facts and procedure

Article 1 of the Belgian Royal Decree No 57 of 20 December 1934 provides that it is prohibited, on pain of penal sanctions, *inter alia* to import and sell spirits bearing a designation of origin duly adopted by the Belgian Government when such spirits are not accompanied by an official document certifying their right to such designation.

On a reference for a preliminary ruling under Article 177 of the EEC Treaty submitted by the Tribunal de Premier Instance, Brussels, the Court of Justice of the European Communities in its judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] 1 ECR 837 ruled as follows:

"The requirement by a Member State of a certificate of authenticity which is less

easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty."

By letter dated 20 March 1974 the Commission had already informed the Belgian Government and the various complainants that the above-mentioned rules were likely to make the import of the products in question impossible from Member States other than the producer Member State and that the legitimate objective pursued by the Belgian authorities, namely the protection of the designation of origin of the products under Article 36, could be attained as effectively by other means which would not prevent such import.

In a letter dated 7 November 1974 the Belgian Government stated that it would amend its law to take account of the aforementioned judgment. Since, however, it took the view that the achievement of this objective would cause certain difficulties because of the necessity of maintaining protection of the designation of origin "Scotch whisky" (the product in question in the *Dassonville* case), it wanted this question to be the subject-matter for discussions between representatives of the Commission and the Belgian authorities concerned.

After numerous meetings between the relevant Belgian authorities and the Commission the latter sent a letter dated 16 October 1975 to the Belgian authorities giving them a period of 15 days to submit their answer to certain possible solutions suggested by the Commission at a meeting with representatives of the Belgian authorities concerned on 10 November 1974.

Nevertheless it was only by letter dated 5 March 1976 from the Permanent Representative of Belgium to the President of the Commission that the latter was informed that the Belgian Government had the firm intention of making the requisite amendments to the system of control of designations of origin as soon as possible. According to the letter, the solution contemplated, said to be consistent with the judgment in *Dassonville*, was as follows:

"If the product is imported directly from the producer country it should be accompanied by a certificate endorsing the right to the designation of origin. Branded products from the country of origin will nevertheless not have to comply with this requirement on condition that the containers carry sealed closures which cannot be tampered with and the labels bear certain relevant information.

If the product is imported from another Member State of the EEC it must in any event be accompanied by an official document certifying its right to the designation of origin. This document may be issued either by the authorities in the Member country of origin or by those of the Member State of last export (for example a copy or photocopy of the certificate of origin issued by the producer country and certified as a true copy)."

Since the Commission was of the opinion that the amendments contemplated would make no substantial change to the existing wrongful situation, by letter dated 14 October 1976 it formally invited the Belgian Government under the first paragraph of Article 169 of the Treaty to submit its observations. Since there was no reaction from the Belgian Government to that letter giving formal

notice, the Commission on 8 December 1976 delivered a reasoned opinion pursuant to Article 169 requiring Belgium to comply therewith.

By letter dated 8 December 1976 the Belgian Government, referring to the formal letter requesting observations, asked the Commission to reconsider its position having regard to the impending publication (in fact on 11 February 1977) in the Moniteur Belge of an Arrêté Ministériel dated 2 December 1976. It added that the repeal of the provisions of the Royal Decree No 57 of 20 December 1934 on spirits referred to in the judgment in *Dassonville* was provided for in a draft law the discussion of which in Parliament was almost completed. However, such repeal did not take place.

Under the above-mentioned Arrêté Ministériel two schemes were established, according to whether or not the products in question were imported directly from the country of origin. This appears from Article 1 which provides as follows:

"The following shall be treated as accompanied at the time of customs clearance by the document provided for in Article 1 of the Royal Decree No 57 of 20 December 1934 on spirits:

1. Spirits bearing a designation of origin and imported directly from the country of origin in containers intended for sale to consumers, provided that:

   (a) the closure of the container is automatically rendered unusable on opening and bears the name or registered trade-mark of the manufacturer;

   (b) the label on the container carries the following particulars in clearly legible print:

      — 'bottled in the country of origin';

      — the name or registered trade-mark and address of the manufacturer.

2. Spirits bearing a designation or origin, other than those referred to in paragraph (1) above, imported from a Member State of the EEC, provided that they are accompanied by one of the following official documents:

   (a) the document relating to the product, issued by the authorities of the country of origin, certifying the right to the designation of origin;

   (b) the copy or photocopy of the document referred to in sub-paragraph (a) above certified as a true copy of the original by the authorities of the exporting country, provided that those authorities state on the copy or the photocopy of the document of origin the quantity of spirits exported to Belgium if this differs from the quantity stated in the original document;

   (c) a document relating to the product issued by the authorities of the exporting country certifying the right to the designation of origin."

Since it took the view that all that the Arrêté Ministériel did was to incorporate the amendments originally contemplated by the Belgian Government and referred to in its letter of 5 March 1976, the Commission brought an action dated 28 December 1977 against the Kingdom of Belgium claiming a declaration that the Kingdom of Belgium had failed to

fulfil its obligations under Article 30 of the EEC Treaty.

The action was registered at the Court Registry on 3 January 1978.

The Belgian Arrêté Ministériel of 2 December 1976 was repealed by Arrêté Ministériel of 27 February 1978 (Moniteur Belge of 15 April 1978).

By orders dated respectively 10 May 1978 and 17 August 1978 the Court allowed the French Government and the Government of the United Kingdom to intervene in support of the Kingdom of Belgium.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

In its application *the Commission* claims that the Court should:

(a) declare that, by making the importation of potable spirits bearing a designation of origin and lawfully in free circulation in Member States other than the country of origin subject to more onerous conditions than those referred to in Article 1 (1) of the Arrêté Ministériel of 2 December 1976 with regard to the same products imported directly from the country of origin, the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the EEC Treaty;

(b) order the Kingdom of Belgium to pay the costs.

In its defence the *Kingdom of Belgium* contends that the Court should:

— declare the application of the Commission unfounded;

— order the Commission to pay the costs.

In its reply and in its written observations on the submissions of the French Government and Government of the United Kingdom the *Commission* maintains unchanged the conclusions in its application.

In its rejoinder the *Kingdom of Belgium* claims that the Court should:

— declare the application of the Commission inadmissible and in any event unfounded;

— order the Commission to bear the costs.

The interveners, the *French Government* and the *Government of the United Kingdom*, are at one in their written observations on the substance of the case in support of the position adopted by the Kingdom of Belgium.

III — Submissions and arguments of the parties

The *Commission* observes that under Article 1 of the Royal Decree No 57 of 20 December 1934 imports into Belgium of spirits are conditional upon the production of a certificate of authenticity issued by the country of origin where the designations of origin of those products are recognized by the Belgian State.

Whereas for imports of the said products direct from the country of origin it is possible for traders in Belgium to obtain the certificate of authenticity without

difficulty, that certificate is available — if at all — with much greater difficulty to traders wishing to import into that Member State the same products in free circulation in other Member States. Such a difficulty is apparent when the products are in free circulation in a Member State which does not recognize their designation of origin since in such a case the certificate of authenticity is not required on importation direct from the producer country. But the difficulty exists even where, as in the case of Belgium, the Member State requires the certificate of authenticity on importation. Such a certificate does not usually accompany each container but only consignments, and the latter cannot therefore be split up for the purpose of possible re-exportation.

This is why the Court of Justice confirmed the position adopted by the Commission and ruled in the case of *Dassonville* that the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by Article 30 of the Treaty.

The Arrêté Ministériel of 2 December 1976 was limited to introducing into the original rules the amendments which had already been contemplated by the Belgian authorities in their letter of 5 March 1976 and which the Commission in its letter of 14 October 1976 inviting observations had already regarded as not being sufficient to bring the rules in question into conformity with the provisions of Article 30. While the products in question when directly imported from the country of origin need henceforth no longer be accompanied by a certificate of authenticity when they satisfy the requirements elsewhere suggested by the Commission (containers with so-called "tamper-proof" closures and bearing particulars on the closure and on a label), on the other hand products in free circulation in Member States other than the country of origin must still be accompanied by an official document certifying their right to the designation of origin which, it is true, need no longer be issued only by that country but is also obtainable in the Member State of last export. Nevertheless, such a document remains, according to the aforementioned case-law, "less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin." The difference in treatment between those two classes of traders is thus maintained to the detriment of "indirect" importers whose position, contrary to that of traders importing directly from the country of origin, has not been appreciably improved.

In answer to the argument raised by the Belgian Government in its letter of 5 March 1976 to the effect that this difference in treatment is justified by the

fact that there is no other way of combating possible fraud, the Commission points out that this argument raises another problem, namely that of any possible justification of this difference for one of the reasons referred to in Article 36 of the Treaty.

Following the Court's reasoning in the judgment in *Dassonville* and in particular the seventh paragraph of the decision the Commission points out that the rules under the Arrêté Ministériel of 2 December 1976 and the original rules constitute "a means of arbitrary discrimination or a disguised restriction on trade between Member States" within the meaning of the second sentence of Article 36 so that it may be concluded that it is not necessary to examine whether or not those rules are covered by the article.

The Commission nevertheless does consider whether the rules may be allowed under Article 36 and concludes that this will be so only where the provisions in question are justified by the objective pursued, in the present case the protection of designations of origin, the specific objective of which is the guarantee given to the purchaser that the product he intends to buy is entitled to the designation of origin. That guarantee is already largely secured in all Member States by national rules relating to unfair competition, passing off or, more generally, fraud in relation to products.

The system imposed on the products in question in free circulation in a regular manner in Member States other than the country of origin, which is more restrictive than that imposed on the same products imported directly from the country of origin has even less justification since it is the same products, all of which are entitled to the designation of origin, which are exported by the producer country into the various Member States whether or not the latter recognize the designation of origin of these products. Therefore the conditions required by Article 1 of the aforementioned Arrêté Ministériel should also suffice to guarantee that designation of origin in the event of the re-exportation of the said products to Belgium.

Having regard to the above observations the Commission takes the view that Article 1 of the Arrêté Ministériel should be amended so that a uniform system is established for the importation into Belgium of the products in question from other Member States, whether or not the products are imported directly from the country of origin. The system should contain the condition referred to in Article 1 (1) of the Arrêté Ministériel, to be satisfied as an alternative to those referred to in Article 1 (2) (a), (b) and (c).

In the Commission's view such rules would in the first place be compatible with the second sentence of Article 36. Further, they would certainly be less of an obstacle to trade than the rules objected to in respect of the products in question in free circulation in Member States other than the country of origin while being effective but not excessive in attaining the desired objective; they would thus be justified within the meaning of the first sentence of that article.

In its defence the *Kingdom of Belgium* states first that the Arrêté Ministériel of 2 December 1976 was repealed by the Arrêté Ministériel of 27 February 1978. By repealing the Arrêté Ministériel of 2

December 1976 the Belgian Government ended the discrimination between country of last export and country of origin which the Commission regarded in its application as being incompatible with Article 30 of the Treaty. Following that repeal the basic Belgian rules now in force are contained in the Royal Decree No 57 of 20 December 1934.

The administrative procedure has been made more flexible since 1974. The circular to the customs of 8 February 1974 amending that of 9 April 1971 as supplemented by the circular of 18 August 1972, expressly provided that customs officials no longer have to concern themselves with the name of the consignee of the goods referred to in the certificate of origin. Moreover, customs officials have been instructed not to object to importation on the ground that at the time the goods were presented the certificate was not produced; in such a case the importer is required to put the matter in order within 20 days.

In repealing the Arrêté Ministériel of 2 December 1976 Belgium brought its rules into line with those of the Member States of the Community which protect designations of origin of spirits within their territory. As regards Scotch whisky the Belgian system of control is identical to that applied by France.

The Kingdom of Belgium asserts that in the present case there is no measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty. The product in question may be imported into Belgium without any official document: the product may be imported merely as "whisky". The requirement of a certificate of authenticity therefore does not determine the importation of the product as such but only its description, and that in a non-discriminatory manner since the certificate is required for all products wherever they come from.

Assuming that the certificate of authenticity were to be treated as a measure having an effect equivalent to a restriction, which it is not, the requirement of such a certificate would fall within the exception provided for in Article 36 of the Treaty, in the present case the protection of industrial and commercial property.

If designations of origin are important in Belgium, it is because they are based on analyses of the characteristics of the product which can be assessed only at the production stage. Rules to forestall frauds are clearly less effective at later stages, in the present case those of distribution and sale, than at the production stage. The designation of origin is inspired not only by a desire to protect industrial and commercial property but, from the point of view of protecting public health, has a much wider aim: it is in fact a moral guarantee by the authorities of the quality of the product. The certificate of authenticity guarantees the designation of origin.

In expressly mentioning as a consumer guarantee the system of capsules which cannot be tampered with the Commission seems to ignore the difficult problem of instances of bottling in non-producer Member countries of the EEC,

which do not protect the designation in question. All kinds of fraud are possible in this respect at the time of bottling, and the affixing of a tamper-proof seal would give no guarantee of the authenticity of the bottled product, any more than would special provisions on labelling.

The difficulties which certain importers may perhaps face (for example the case of certificates of authenticity not accompanying consignments which are split up) are the result of a situation which is neither arbitrary nor discriminatory; it is for the importer to avoid placing himself in such a position. Moreover, the lack of harmony between national laws in relation to certificates of authenticity could also create problems: the Belgian Government is prepared to collaborate wihin the EEC to seek a satisfactory solution.

In its reply the *Commission* states that the source of the breach of Article 30 of the Treaty is in no way the provision of the repealed Arrêté Ministériel which was adopted only during the procedure prior to the institution of legal proceedings and did not alter the illicit nature of the original rules contained in the Royal Decree No 57 of 20 December 1934 which is still in force. Those are the rules which applied when the Court gave its judgment in the case of *Dassonville* and with which the present proceedings for failure to fulfil an obligation are concerned.

The Belgian Government is completely silent on the aforementioned judgment of the Court, although in its letter to the Commission of 5 March 1976 it stated that it was ready to comply with it. The attitude it adopts in its defence amounts to challenging not only the legal classification by the Court of the said rules as a measure having an effect equivalent to a quantitative restriction on imports but also the Court's finding that Article 36 of the EEC Treaty did not apply.

As regards the arguments put forward by the Belgian Government in respect of Article 30, the Commission maintains that it has for a long time been established that there is a measure having equivalent effect not only when the measure is likely to make imports impossible but also when it is such as to make them more difficult or onerous. This is obviously the case here since the Scottish origin of the product gives it a higher market value than that of whisky whose origin is not specified and which may be imported without an official document.

Further, the concept of discrimination is in no way the decisive criterion for assessing a measure within the meaning of Article 30. A non-discriminatory measure in relation to the national production because, for example, there is no national production, would not for that reason escape the prohibition referred to in Article 30. In the present case the Court held that it was a measure having equivalent effect because of the requirement of a certificate of authenticity which is more difficult for certain importers to obtain and this the Belgian Government does not challenge.

In dismissing any justification for the rules in question under the first sentence of Article 36 the Commission emphasizes that the system of tamper-proof seals is less of an obstacle to trade than the

requirement of a certificate of authenticity and would give a guarantee to the consumer at least equal to that given by the certificate. It is no more difficult to draw up a false certificate of authenticity than to make up and place in position new tamper-proof seals. The argument to the effect that such a seal would give no guarantee where the bottling is done in non-producer Member States of the EEC is irrelevant since the Commission has always assumed that the sealing would be undertaken in the country of origin.

Further, the Belgian Government persists in confusing the guarantee to be given to consumers as to the origin of the product with protection of public health. In the present case the latter is in no way concerned, unless it can be shown that whisky produced in Scotland is less harmful to health than that produced elsewhere.

In the Commission's view the Court found in the judgment in *Dassonville* that it was not even necessary to consider the measures in question under the first sentence of Article 36, since the second sentence of that article precluded recourse to the article (paragraph 7).

Therefore the Court clearly considered that "the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin" constituted arbitrary discrimination or a disguised restriction on trade between Member States within the meaning of the second sentence of Article 36.

The Commission further observes that the certificate of authenticity is not required where the products in question are imported from the Netherlands or Luxembourg where they are in free circulation, although neither of those two countries has recognized the designation of origin "Scotch whisky", and this also constitutes "arbitrary discrimination" sufficient in itself to prevent recourse to Article 36.

Finally, the Commission stresses that the consumer protection which the Belgian Government rightly intends to ensure involves not only the guarantee that the product in question is entitled to a designation of origin but also other aspects, and in particular (as mentioned by the Court in the aforementioned judgment) that the price of the product to the consumer should be the lowest possible. The requirement of a certificate of authenticity, which is easily accessible only to importers of products direct from the country of origin, by restricting competition finally makes the products in question more expensive for the sole benefit of exclusive importers and to the detriment of consumers.

This being so the problem, in short, is not to ascertain whether the consumer guarantee that the product in question is indeed the one entitled to the designation of origin must or must not be treated as having precedence over the commercial interest of an importer. The problem is solely to ascertain whether that legitimate guarantee cannot be given by means which are not an obstacle or are less of an obstacle to trade than the requirement of a certificate of authenticity, for it is only on that condition that pending possible harmonization at a Community level national

measures may be justified under Article 36.

The *Kingdom of Belgium* alleges in its rejoinder that having regard to the wording of the application and in particular its operative part the application has lost its purpose since the Arrêté Ministériel of 2 December 1976 was repealed on 27 February 1978. It follows that to rule on claims relating to the Royal Decree No 57 of 20 December 1934 would mean ruling *ultra petita*. Therefore in the absence of present interest the application is inadmissible or alternatively unfounded.

As regards the judgment of the Court in the case of *Dassonville* the Court was concerned not with the requirement of a certificate of authenticity but with the ease of obtaining such document.

Contrary to what the Commission states, the Belgian Government has since 1974 taken measures to remove the major obstacles to obtaining the certificate of authenticity. Such measures are as follows:

(a) Elimination of the requirement of a statement of the name of a Belgian consignee in the certificate of origin.

(b) Acceptance of certificates issued by the United Kingdom authorities for countries other than Belgium.

(c) Abolition of the rejection at the frontier of consignments of spirits bearing a designation but submitted without the necessary document and provision of opportunity for importers of one or more periods in order to obtain the document.

The Kingdom of Belgium disputes the Commission's contention that the guarantee of quality has nothing to do with public health. Further, contrary to what the Commission appears to allege, for more than 50 years (since the Law of 18 April 1927 on the protection of designations of origin of wines and spirits) the Belgian Government has recognized the necessity of special protection for designations of origin lodged by the governments concerned. In the particular case of trade between the Benelux countries it is only the checking by the customs of products bearing a designation that has been abolished under the Benelux agreements. The checking is still carried out within the country by the Food Inspectorate.

As for Scotch whisky, there are 29 importers at present in Belgium. It is therefore difficult to deny that there is wide competition in relation to this product in the interests of the consumer. That position renders unfounded the Commission's argument as to the impact of so-called "parallel" imports in relation to the lowering of prices.

The Kingdom of Belgium challenges the effectiveness of the system of tamper-proof seals advocated by the Commission to prevent possible fraud.

In the first place, that system does not cover all marketing eventualities and in particular that of the bottling of spirits outside the producer country. To avoid any fraud in bottling in non-producer countries which do not protect the designation of origin of spirits the producer country would have to export only bottled products, which is not the case.

In the second place, the aforesaid system does not offer the same guarantee as the certificate of authenticity. The forging of an official document is both more difficult and more dangerous for the forger than the counterfeiting of a seal or a mere label.

It is to be observed that the Commission itself has not adopted the system of tamper-proof seals. In all cases where it has been necessary to prove at the level of the European Communities the authenticity of liquid products from third countries the Commission has proposed measures of identification based on official documents (cf. Regulation No 2552/69 of 17 December 1969, Official Journal, English Special Edition 1969 (II), p. 547, regarding the import of Bourbon whisky into the Community).

Although the Community rules in the wine sector provide for a system of tamper-proof seals, it should be pointed out that in that sector there is an organization of the market whereby the products are checked in the same way by all the States. At the bulk stage this checking means that documents accompany all movement and that there is a strict check on premises used for bottling based on the maintenance of registers of receipt and despatch. Belgium would like to see this system organized for spirits within the common market.

In the view of the Kingdom of Belgium it is necessary to reject the assumption that all measures having any restrictive effect on Community trade must be abolished even where, as a result of such abolition, a legitimate objective provided for by Article 36 of the Treaty may no longer be achieved.

The question is therefore whether in the present case the objective pursued may be achieved by means other than the certificate of authenticity. The Belgian Government has shown that the system approved by the Commission of tamper-proof seals in no wise offers a sufficient guarantee to achieve the objective in question. As a result the certificate of authenticity cannot amount to a measure of arbitrary discrimination. In view of differences between the rules in relation to the protection of designations of origin in force within the EEC the certificate is the only satisfactory means of achieving the objective pursued.

In the view of the *French Government, intervening,* the fundamental problem raised by the present case concerns the conditions under which both the basic principle of the EEC Treaty of the free movement of goods and the protection of designations of origin may be secured simultaneously. Article 36 of the Treaty shows that it is necessary to achieve both those objectives.

As regards the protection of designations of origin it is simply a question of protecting the consumer against abuses. What is involved is the economic activity of French regions, a large part of whose income — especially in the field of exports — is derived from the production and marketing of certain well-known designations. Those designations are subject to very strict rules in France and a situation allowing the development of counterfeiting by means of intra-Community trade would cause obvious damage to French producers and distort competition within the Community.

In practice the situations likely to attract the Commission's criticism relate mainly to the re-exportation to another Member State of spirits imported from France in bulk and bottled in the importing country. In a situation of this nature the use of seals and labelling to protect designations of origin would afford no effective protection if it were not accompanied by rules such as to control the content of the containers. In the absence of such rules at a Community level regarding spirits, seals and labels cannot, at a technical level, afford a satisfactory guarantee of the authenticity of those products. Such protection can be afforded properly only by means of certificates of authenticity.

In the view of the French Government the question whether the requirement of a certificate of authenticity constitutes a "means of arbitrary discrimination" or "a disguised restriction on trade between Member States" within the meaning of the second sentence of Article 36 of the Treaty must be regarded in the light of the situation in practice confronting traders.

France, which is a producer country, has legislation requiring exporters (distillers or traders) wishing to obtain movement documents to accompany a consignment of spirits and to certify its registered designation of origin to satisfy special conditions.

A distiller must be situate within the production area defined for that spirit. He must not receive onto the premises from outside any other kind of spirit. He must have claimed the registered designation of origin in his distillation declarations. Production and sales accounts are maintained by the revenue authorities, which also conduct an annual stock-taking.

A trader must have received the goods together with the movement documents certifying their designation of origin. He must maintain them in special premises separated by a public way from premises containing other spirits. Account of spirits coming in and going out is kept by the revenue authorities, which also carry out an annual stock-taking.

A trader situate in another Member State of the Community may be subject to no conditions of that kind. Therefore, in view of the differences between the situations it is only the movement documents issued by the country of production which can certify the authenticity of the goods.

France accepts the principle that the issue of such certificates must be subject to reasonable formalities and, moreover, endeavours by way of agreements to facilitate, for example, the splitting up of certificates in the interests of traders. In the opinion of the French Government solutions of this kind could be found by agreement between the producer-country and the country in which the goods are in transit. This question relates to the conditions for the issue of movement documents and does not bring into doubt legislation of the Belgian kind, the principle of which appears to be justified.

In answer to the observations lodged by the French Government the *Commission* observes *inter alia* that in France the right to a designation of origin, once recognized, has a double objective: to

protect producers, on the one hand, against unfair competition and consumers, on the other, against fraud and deception by guaranteeing the quality of the product.

The Commission outlines the means of action which the French rules give both to the person entitled to use the designation and to the administration in order to curb unlawful use of that designation and then refers to the methods of supervision which enable frauds to be forestalled and proved and which are primarily concerned with matters of taxation. Control and surveillance are only means to establish proof of infringement. Means of proof are a matter of procedure and are in no way an integral part of the specific object of the right conferred by the designation of origin. Article 36 of the Treaty cannot therefore be relied upon to maintain such means of proof in disregard of the provisions of Article 30.

The problem in question, therefore, has nothing to do with a conflict between the Treaty and respect for designations of origin properly so-called but solely with one of the means of uncovering and establishing the existence of an infringement of the rules in question in relation to the principle of the free movement of goods. In the same way it is not the French rules on designations of origin which are in question but only that part of the Belgian rules which relates to a method of supervision of respect in Belgium for a protected designation of origin.

The conditions under which the certificate of authenticity is required by the Kingdom of Belgium in the circumstances which are at the origin of the present case were condemned by the Court in its judgment in *Dassonville*. At the hearing in that case the Commission suggested several means of control which would be less of an obstacle to trade. It is clear that the responsible Belgian authorities are not lacking in means other than the certificate of authenticity to check whether the product in question is in fact authentic, whether the product is transported in its original presentation or in bulk.

As regards the effectiveness of the tamper-proof seal in conjunction with corresponding labelling showing the name of the importer, there are circumstances in which the French legislation itself advocates and substitutes seals, stamps or bands in place of movement documents (cf. "Le Droit des Appellations d'Origine", J. M. Auby, R. Plaisant, Librairie Technique, No 253, pages 102 and 104).

The explanations given by the French Government show that the movement documents issued in France give a sufficient guarantee. The Belgian authorities should therefore at least take them into account so as to allow the importation into Belgium of Scotch whisky in free circulation in France. Further, such a presumption of authenticity would be in accord with the French rules. As for countries which do not use designations of origin and in which Scotch whisky is in free circulation the system of the tamper-proof seal and labelling would allow the Belgian authorities to exercise a more

effective control, since they would know the name of the importer. Effective control is therefore quite possible and this is the desired aim.

In the view of the *Government of the United Kingdom*, intervening, since an exclusive dealing system is not *per se* contrary to the Treaty the decision in *Dassonville* must be read subject to the qualification that any difficulty arising solely from the fact that the parallel importer is not the beneficiary of an exclusive dealing agreement must be discounted. That judgment proceeded on the basis that whilst it was possible for a parallel importer to obtain a retrospective certificate of authenticity from the United Kingdom authorities, nevertheless under the arrangements then in force it might have been a matter of some difficulty. Even at that time the difficulty was more apparent than real and more flexible arrangements have now been made. These include:

(a) allowing a dealer in an intermediate Member State to obtain a retrospective certificate in respect of a part consignment destined for re-export to a third Member State, on provision of documentary evidence to the competent authorities in the United Kingdom, and

(b) making it possible for any dealer to obtain a certificate directly from HM Customs and Excise in confidence should his commercial situation so require.

But these arrangements cannot dispose of the difficulty with regard to whisky imported in bulk into a Member State, then brought to the proper strength by dilution and bottled prior to transit to another Member State.

The Government of the United Kingdom challenges the effectiveness of the suggestions made by the Commission during the course of the *Dassonville* case whereby the authenticity of Scotch whisky could be assured without the necessity of putting parallel importers to the trouble of securing retrospective certification. The system of certification at present in force is aimed at preventing not only unfair but also, and this with even greater reason, fraudulent practices (passing off as Scotch whisky a substance which is not Scotch whisky) which could harm the health of the consumer. This comes within the overriding consideration of the protection of life and health enshrined in Article 36 of the Treaty.

In these circumstances the Government of the United Kingdom asks the Court to rule that the system of certification of Scotch whisky as now in operation fulfils the criteria required by Community law in so far as is humanly possible in the absence of a Community system of certification and to endorse the view that the best long-term solution of the problem is the introduction of a Community-wide system of certification at the earliest possible time.

The *Commission* replies that it is not possible to exclude all reference to the use made of the rules in question by the concessionnaire under an exclusive dealing agreement in order to prevent parallel imports. In this respect it refers to paragraphs 12 and 14 of the decision in *Dassonville*.

As for the steps taken to introduce more flexibility, as referred to by the Government of the United Kingdom, the

Commission states that at present to obtain either a retroactive certificate or a certificate issued in confidence by the British customs still requires the distributor to comply with complex administrative formalities which make the certificates of authenticity yet more difficult to obtain for parallel importers than for direct importers.

As regards alternative methods of control, the Commission refers to its comments on the observations of the French Government.

Finally, the criterion of public health as contemplated by Article 36 is nowhere in question in the matter of designations of origin.

IV — Information supplied at the request of the Court

In response to a request by the Court on 14 December 1978 the Government of the Kingdom of Belgium lodged at the Registry of the Court on 10 February 1979 copies of the circulars of 9 April 1971, 18 August 1972, 8 February 1974, 16 December 1974 and 4 August 1978 sent by the Administration Centrale des Douanes et Accises to customs offices in relation to the importation of *inter alia* wines and spirits.

V — Oral procedure

At the hearing on 21 February 1979 oral submissions were made by the Commission, represented by its Legal Adviser, René-Christian Béraud, assisted by Robert Collin, Advocate of the Paris Bar, by the Kingdom of Belgium, represented by Robert Hoebaer, Director at the Ministry for Foreign Affairs, External Trade and Co-operation with the Developing Countries, and by the Government of the United Kingdom, represented by R. D. Munrow of the Treasury Solicitor's Department.

In answer to a question asked at the hearing, the representative of the *Government of the United Kingdom* confirmed that a trader who buys Scotch whisky from an exclusive distributor in France for importation into and resale in Belgium may obtain from HM Customs a certificate of origin in conditions of confidentiality. For this purpose it is necessary to quote the serial numbers of the bottles in question and give sufficient particulars to enable the customs authorities to trace the original transaction. The facility is not often used.

The representative of the *Kingdom of Belgium* confirmed that in the above-mentioned circumstances such a certificate would be accepted by the responsible Belgian authorities.

The Advocate General delivered his opinion at the hearing on 20 March 1979.

Decision

1 By application dated 28 December 1977, which was received at the Court on 3 January 1978 the Commission brought an action under the second paragraph of Article 169 of the EEC Treaty against the Kingdom of Belgium for a declaration that, by making the importation of potable spirits bearing a designation of origin and lawfully in free circulation in Member States other than the country of origin subject to more onerous conditions in respect of proof of entitlement to that designation than those referred to in Article 1 (1) of the Arrêté Ministériel of 2 December 1976 (Moniteur Belge of 11 February 1977) with regard to the same products imported directly from the country of origin, the Kingdom of Belgium has failed to fulfil its obligations under Article 30 of the EEC Treaty.

2 Article 1 (1) of the above-mentioned Arrêté Ministériel provides that the conditions therein referred to shall be treated as satisfied when spirits bearing a designation of origin are imported directly from the country of origin in containers intended for sale to consumers which are equipped with a special closure, the latter as well as the label bearing certain particulars regarding the name and registered trade-mark of the manufacturer and the notice "bottled in the country of origin".

The national provisions and practices in question

3 The above-mentioned provisions must be placed within the context of the whole body of provisions laid down by law, regulation or administrative action by the Kingdom of Belgium in relation to the protection of the authenticity of designations of origin.

4 The Belgian Law of 18 April 1927 treats as designations of origin such as are notified to the Belgian Government by the governments concerned as being designations of origin officially and finally adopted.

5 Article 1 (1) of the Royal Decree No 57 of 20 December 1934 states that it is prohibited to import, sell, display for sale, have possession of or transport

for the purposes of sale or delivery, spirits bearing a designation of origin duly adopted by the Belgian Government when such spirits are not accompanied by an official document certifying their right to such designation.

6 The designation of origin "Scotch whisky" is included among those adopted by the Belgian Government and the difficulties in obtaining the above-mentioned official document experienced by certain Belgian importers of this product in particular from a Member State other than that of origin have given rise to various complaints to the Commission.

7 Article 1 of the above-mentioned Arrêté Ministériel of 2 December 1976 published in the Moniteur Belge on 11 February 1977 provides as follows:

"The following shall be treated as accompanied at the time of customs clearance by the document provided for in Article 1 of the Royal Decree No 57 of 20 December 1934 on spirits:

1. Spirits bearing a designation of origin and imported directly from the country of origin in containers intended for sale to consumers, provided that:

   (a) the closure of the container is automatically rendered unusable on opening and bears the name or registered trade-mark of the manufacturer;

   (b) the label on the container carries the following particulars in clearly legible print:

      — 'bottled in the country of origin';

      — the name or registered trade-mark and address of the manufacturer.

2. Spirits bearing a designation of origin, other than those referred to in paragraph (1) above, imported from a Member State of the EEC, provided that they are accompanied by one of the following official documents:

   (a) the document relating to the product, issued by the authorities of the country of origin, certifying the right to the designation of origin;

(b) the copy or photocopy of the document referred to in subparagraph (a) above certified as a true copy of the original by the authorities of the exporting country, provided that those authorities state on the copy or the photocopy of the document of origin the quantity of spirits exported to Belgium if this differs from the quantity stated in the original document;

(c) a document relating to the product issued by the authorities of the exporting country certifying the right to the designation of origin."

8 That Arrêté Ministériel was repealed by the Arrêté Ministériel of 27 February 1978 published in the Moniteur Belge of 15 April 1978, so that as from the latter date only the provisions of Article 1 of the Royal Decree No 57 of 20 December 1934 apply to spirits imported both directly and indirectly.

9 The Kingdom of Belgium has, however, referred to a certain flexibility introduced since 1974 into the administrative procedure in relation to the application of the above-mentioned provisions.

10 In particular, the importation into Belgium of spirits bearing a designation of origin is not subject to the requirement that the certificate of origin should state the name of the consignee of the goods (cf. in particular circular of 8 February 1974 sent to customs offices and published by the Administration des Douanes et Accises).

11 Further, as regards the importation of spirits described as "Scotch whisky", the Belgian customs are allowed to accept as an official document either the document known as the "customs and excise certificate for Scotch whisky exported to Belgium — C & E 94 A" or a certificate of origin issued for delivery to a country other than Belgium by the United Kingdom Customs and Excise administration (cf. in particular circular of 4 August 1978 sent to customs offices and published by the Administration des Douanes et Accises).

12 Further, the Belgian Customs have been instructed not to object to the importation of spirits on the ground of failure to produce the certificate of origin on presentation of the goods but to invite the importer to put the matter in order within a period of 20 days.

13 It should further be observed that according to statements of the Government of the United Kingdom, intervening in the present case, additional measures have been introduced by that Member State to make it easier to obtain certificates of origin relating to Scotch whisky.

14 On the one hand, it is possible for a purchaser of that product in an intermediate Member State to obtain a retrospective certificate in respect of a part-consignment intended for re-export to a third Member State, on provision of documentary evidence to the competent authorities in the United Kingdom.

15 On the other hand, any purchaser may obtain a certificate directly from HM Customs and Excise without going through the direct importer.

16 The Belgian Government has confirmed that in the latter case such a certificate would be accepted by the competent Belgian authorities.

17 The Government of the United Kingdom has nevertheless stated that the above-mentioned arrangements cannot dispose of the difficulty with regard to Scotch whisky imported in bulk into a Member State, then brought to the proper strength by dilution and bottled prior to transit to another Member State.

Procedure prior to commencement of legal proceedings

18 By letter dated 20 March 1974 the Commission expressed the opinion to the Belgian Government that Article 1 of the Royal Decree of 20 December 1934 was likely to make imports of spirits from Member States other than

the producer State impossible and that the lawful objective of the Belgian authorities, namely the protection of the designation of origin of its products pursuant to Article 36 of the Treaty, could be achieved as effectively by other means which would not prevent such parallel imports.

19 By letter dated 7 November 1974 the Belgian Government declared itself ready to amend its legislation.

20 After numerous unsuccessful discussions between the relevant departments of the Belgian administration and those of the Commission the latter on 16 October 1975 gave the Belgian authorities a period of 15 days within which to give their answer to various proposals for a solution which the Commission had made at a meeting with representatives of the Belgian departments concerned on 10 November 1974.

21 Only by letter dated 5 March 1976 did the Belgian Government inform the Commission of the amendments which it proposed to make to the system of supervision of designations of origin.

22 Since, however, the Commission took the view that the amendments contemplated were not likely to render the Belgian rules in question compatible with Article 30 of the Treaty, by letter dated 14 October 1976 if formally requested the Belgian Government under the first paragraph of Article 169 of the Treaty to submit its observations within a period of 15 days, which was subsequently extended to a month.

23 Since there was no answer to that formal request the Commission delivered a reasoned opinion dated 8 December 1976 under Article 169 of the Treaty, which was notified to the Belgian Government on 16 December 1976, inviting it to take the requisite measures to comply with the said opinion within a period of a month.

24 On 8 December 1976 the Belgian Government replied to the letter containing the formal request stating that the problem would soon be resolved by the forthcoming publication of an Arrêté Ministériel, the text of which it sent to the Commission, being the above-mentioned Arrêté Ministériel of 2 December 1976.

25 It also stated that the repeal of the provisions of the Royal Decree No 57 of 20 December 1934 on spirits was provided for in a draft law concerning the control of foodstuffs and other products, the discussion of which in Parliament was almost concluded.

Admissibility

26 The Kingdom of Belgium states that having regard to the wording of the conclusions in the application, the action relates to the Arrêté Ministériel of 2 December 1976 and not to the Royal Decree No 57 of 20 December 1934.

27 Since the Arrêté Ministériel was repealed after the action was brought, it is claimed that the latter has lost its purpose and is therefore inadmissible.

28 In this respect it should be remembered in the first place that the action taken by the Commission prior to institution proceedings, including the delivery of the reasoned opinion of 8 December 1976, indeed referred to the provisions of Article 1 of the Royal Decree No 57 of 20 December 1934.

29 It was not until after the said opinion had been issued that the Belgian Government sent the Commission the text, at that time not yet published in the Moniteur Belge, of the Arrêté Ministériel of 2 December 1976 which consisted not of independent rules but was confined to rendering more explicit the provisions of Article 1 of the Royal Decree No 57 in relation to proof of the entitlement to the designation of origin of spirits imported into Belgium.

30 As appears from the wording of Article 1 of the Arrêté Ministériel, it established two systems of proof, according to whether the products in question were imported directly or indirectly from the country of origin.

31 Since the Commission took the view that all that those provisions did was to render more explicit the amendments to Article 1 of the Royal Decree No 57 contemplated by the Belgian Government in its letter of 5 March 1976, it brought the present action against the Kingdom of Belgium for failure to fulfil its obligations.

32 In view of the above-mentioned circumstances it is right to consider the conclusions of the Commission as referring not only to the Arrêté Ministériel of 2 December 1976 but also to the Royal Decree No 57.

33 Repeal of the Arrêté Ministériel after the action was brought has therefore not deprived the latter of its purpose.

34 It therefore follows that the action is admissible.

Substance

35 It should be recalled that the provisions of Article 1 of the said Royal Decree were at the root of the reference for a preliminary ruling by the Tribunal de Première Instance of Brussels in Case 8/74 *Procureur du Roi* v *Benoît and Gustave Dassonville,* which asked whether a national provision prohibiting the import of goods bearing a designation of origin where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

36 In its judgment of 11 July 1974 given in that case ([1974] ECR 837) the Court ruled:

"The requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty."

37 In the grounds of that judgment the Court added that in the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion it is, however, subject to the condition that those measures should be reasonable and that the means of proof required

should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

38 The essential question to be resolved is therefore whether the measures taken by the Kingdom of Belgium to ensure the authenticity of spirits bearing a designation of origin imported into Belgium are unreasonable in that they are disproportionate in relation to that objective.

39 It should be stressed, on the one hand, that it is for the Court to settle not the question as to which method of checking authenticity is the most effective, but rather the question whether the method adopted by the Belgian Government, the effectiveness of which is not questioned and which is based on the examination of certificates of origin issued in the exporting Member State, causes a trader, who wishes to import into Belgium from a Member State other than that of origin spirits bearing a designation of origin, difficulties in obtaining certificates which are unreasonable in relation to those which that State imposes on a direct importer, even where it is assumed that this method creates more difficulties for both types of import than result from the system of sealing and labelling provided for in Article 1 (1) of the Arrêté Ministériel of 2 December 1976.

40 On the other hand, the Commission is not asking the Court to settle the question whether the Arrêté Ministériel which has now been repealed gave rise to such discrimination or whether in refraining from incorporating into laws or regulations the liberalizing measures provided for *inter alia* in the above-mentioned administrative circulars the Kingdom of Belgium failed to fulfil its obligations under Article 30 of the Treaty.

41 Confining consideration to the question which the Commission has brought before the Court, it is not possible to say that to check the authenticity of a product bearing a designation of origin by the expedient of examining certificates of origin issued in the producer Member State constitutes an unreasonable measure in relation to the objective of guaranteeing the authenticity of the product.

42 In this respect it is appropriate to observe that a similar system has been adopted in various Community regulations as a means of proving the authenticity of certain products such as Bourbon whisky, port, Madeira, sherry, Setubal muscatel and Tokay and wines, juices and grape musts imported into the Community from third countries and that the Belgian system, as a method of control, has not been challenged by the Commission in so far as it applies to spirits imported directly into Belgium from the producer Member State.

43 Further, at least as regards Scotch whisky, according to information supplied to the Court by the Belgian Government and the Government of the United Kingdom, the requisite certificates are available not only to importers importing spirits directly into Belgium from the producer Member State but also to traders wishing to import such products from an intermediate Member State, as a result of the above-mentioned liberalizing administrative measures adopted both by the Belgian Government and by the Government of the United Kingdom.

44 The Commission has not satisfactorily refuted the argument of the Belgian Government that those liberalizing measures have contributed to an appreciable improvement in the position in relation to direct importers of traders wishing to import spirits bearing a protected designation of origin into Belgium from another Member State where they are in free circulation, but has confined itself to stating that in spite of the said measures the system of control adopted by the Belgian Government still involves the importer of those products into Belgium in more difficulties than would result from the system of sealing and labelling which it advocates.

45 That fact relied on by the Commission nevertheless cannot in itself constitute a failure by the Kingdom of Belgium to fulfil its obligations under Article 30 of the Treaty.

46 It is clear from those considerations that, even if the system for checking the authenticity of products bearing a designation of origin as applied by the Belgian Government involves the importer of those products into Belgium in more difficulties than would result from a system of sealing and labelling,

that fact cannot in itself constitute a failure by the Kingdom of Belgium to fulfil its obligations under Article 30 of the Treaty.

47 For those reasons the action must be dismissed.

48 It is necessary, however, to emphasize that the Kingdom of Belgium has a duty to ensure, seeking if necessary in this respect the assistance of the Commission, that traders wishing to import into Belgium spirits bearing a designation of origin duly adopted by the Belgian Government and in free circulation in a regular manner in a Member State other than that of origin are able to effect such imports and are not placed at a disadvantage in relation to direct importers, save in so far as appears reasonable and strictly necessary to ensure the authenticity of those products.

Costs

49 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the Commission has failed in its submissions it must be ordered to pay the costs, save those caused by the interventions, in respect of which the Commission and the interveners shall each pay their own costs since the interveners have not asked for costs.

On those grounds;

THE COURT

hereby:

(1) Dismisses the action;

(2) Orders the Commission to pay the costs of the main action;

(3) Orders the Commission and the interveners to pay their own costs in relation to the intervention.

Kutscher Mertens de Wilmars Mackenzie Stuart

Pescatore Sørensen O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 May 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 20 MARCH 1979 [1]

Mr President,
Members of the Court,

The case in which I am giving my opinion today is closely connected with the judgment of the Court of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] 1 ECR 837. Those proceedings for a preliminary ruling were concerned with Article 1 of the Royal Decree No 57 of 20 December 1934 on the protection of designations of origin of spirits (Moniteur Belge of 4 January 1935) and this is also the subject-matter of the present proceedings for infringement of the Treaty. The wording of the article is as follows:

"It is prohibited, on pain of penal sanctions, to import, sell, display for sale, have possession of or transport for the purposes of sale or delivery, spirits bearing a designation of origin duly adopted by the Belgian Government when such spirits are not accompanied by an official document certifying their right to such designation."

In the first proceedings the Tribunal de Premier Instance of Brussels referred to the Court for a preliminary ruling the question whether a national provision prohibiting the importation of goods bearing a designation of origin where such goods are not accompanied by an official document issued by the exporting country certifying their right to such designation is to be considered as a quantitative restriction or a measure having equivalent effect within the

1 — Translated from the German.