OPINION OF ADVOCATE GENERAL LENZ

delivered on 18 March 1992 *

Mr President,
Members of the Court,

A — Facts

1. The reference for a preliminary ruling by the Cour d'Appel, Montpellier, is concerned with the lawfulness under Community law of protection of geographical names by Member States.

2. The *respondents* in the main proceedings, the *French* undertakings LOR SA and Confiseries du Tech, manufacture and distribute in France a range of confectionery products which include 'tourons', a type of nougat, under a *Spanish name*. LOR SA's products include the 'tourons Alicante' and 'tourons Jijona' and the products of Confiseries du Tech include 'tourons type Alicante' and 'tourons type Jijona'.

3. The *appellant*, a *Spanish* association of firms exporting tourons from Jijona, brought an action against the two respondent firms for an injunction restraining them from manufacturing and *marketing* tourons *in France* under the names 'Alicante' and 'Jijona'.

4. It relies on the Franco-Spanish Convention of 1973. [1] Pursuant to Article 3 of the Convention, in conjunction with Annex B thereto, the names, *inter alia*, 'Turrón Alicante' and 'Turrón de Jijona' are reserved exclusively for Spanish products or Spanish goods and may be used only in accordance with the conditions laid down in the legislation of the Spanish State. Article 5(1) of the Convention requires the use of names in contravention of the Convention to be suppressed; according to Article 5(2), the same requirement applies even where the name is translated or indicates the true provenance or is accompanied by terms such as 'style', 'kind', 'type', 'imitation' or 'similar'. [2]

5. The *respondents* on the other hand took the view that after Spain's accession the Convention infringed Community law and the appellant could therefore not rely on it.

6. The *Cour d'Appel*, before which the matter came, shared the respondents' doubts and therefore referred the following questions to the Court for a preliminary ruling:

'1. Are Articles 30 and 34 of the EEC Treaty to be understood as prohibiting the measures for the protection of designations or indications of origin or provenance laid down in the Franco-Spanish Convention of 27 June 1973, [3] in particular the designations or

* Original language: German.

1 — 'Convention pour la protection les appellations d'origine, des indications de provenance et des dénominations de certains produits', signed in Madrid on 27 June 1973, *Journal Officiel de la République Française* of 18 April 1975, p. 4011.

2 — Paragraph 3 of the Report for the Hearing.

3 — In the original French, 'appellations d'origine ou de provenance'.

indications "Alicante" or "Jijona" for "tourons"?

2. If so, is Article 36 of the Treaty to be understood as authorizing protection of those designations or indications?'

B — Analysis

7. Although the present case is concerned with the marketing of French products in France, the dispute concerns trade within the Community for it relates to the application to French products of Spanish geographical names. The appellant represents Spanish export interests. A further issue is the compatibility with Community law of a convention between two Member States.

First question

8. By its first question the national court seeks to ascertain whether the 1973 Franco-Spanish Convention amounts to a measure having an effect equivalent to quantitative restrictions.

9. According to the well-known wide interpretation given to Article 30 of the EEC Treaty in the case-law, [4] the reservation of the aforesaid names in French territory to Spanish products under the Convention constitutes an obstacle as defined in that case-law. Neither French nor foreign undertakings can sell products under the name in question in France; they thereby lose a marketing opportunity in that they are compelled to give their products other and possibly less well-known names.

10. A measure restricting trade, such as the measure at present at issue, which applies without distinction to domestic and foreign sellers, may be lawful if it can satisfy imperative requirements pertaining to the public interest. [5] The first ground of justification which falls for consideration is the Franco-Spanish Convention of 1973 which is designed to protect fair trading and the consumer.

11. It is not necessary to inquire as to what effect the Convention had before Spain's accession to the European Economic Community. After the accession both States were in any event members of the Community. It is provisions of the EEC Treaty which apply to trade between the States and no longer provisions adopted unilaterally or bilaterally by individual Member States. This follows from the primacy of Community law. It is therefore necessary to determine whether such protection of the names at issue is justified under *Community law*.

12. The first ground on which this might be the case is that of consumer protection.

4 — Case 8/74 *Procureur Du Roi* v *Dassonville* [1974] ECR 837.

5 — Case 120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

Consumer protection has been recognized by the Court as constituting an imperative reason in the sense indicated above. It may be asked, however, whether the prohibition of the names in question in respect of products other than Spanish products does not go beyond what is strictly required. It has been argued that due weight could be given to that point — and, as far as we know, this may have been done — by bearing in mind that the products in question can be marked with an indication of the country of provenance. The consumer could thereby be saved from erroneously assuming that he was buying a Spanish product when in fact he was acquiring a French product.

13. The concern for consumer protection can therefore be sufficiently served by appropriate labelling.

14. But what sense is there, in such a case, in using a foreign geographical name? We have now come to the second ground, that of fair trading. Fair trading, however, concerns not only the protection of consumers against deception but also protection of producers against unfair competition. In the present case French manufacturers are promoting their goods by means of Spanish designations of origin. In other words, the French manufacturers are profiting from the actual or assumed advertising appeal of Spanish designations of origin in order to promote the sale of their products, although they are not of Spanish origin at all but French. It is a case of explicit invocation of an 'alien' indication of geographical provenance. [6]

15. In principle, no one will promote his goods by means of an alien geographical name unless he expects to achieve a certain improvement in sales in this way. For that to be the case, it is necessary that the alien indication of geographical provenance be known and that it convey to the consumer a certain image of quality which the promoter maintains the consumer will rediscover in precisely the same form or at least in a similar manner in the product in question. That is precisely what the respondents assert when they contend that their products are of the same kind and quality as the goods manufactured in Spain under the same names. They can thus exploit the reputation of products of other producers in order to promote the sale of their own goods. The question is whether that is compatible with fair trading.

16. That question must basically be answered in the negative. Everyone is as a rule entitled to promote his products by reference to their actual place of origin. In contrast, a person is not entitled to promote his products by means of an alien indication of geographical provenance because he is thereby trying to exploit to his own advantage the reputation of that other indication of provenance. On the other hand, measures which reserve exclusively to domestic goods

6 — See Winfried Tilmann, *Die Geographische Herkunftsangabe* (The Indication of Geographical Provenance), Munich 1976, p. 59 et seq.

names which are neither designations of origin nor indications of provenance are prohibited. That idea was taken up in Directive 70/50/EEC, [7] which is based on Article 33(7) of the Treaty, but is to be regarded, over and above this, as the expression of a general legal principle in the context of Article 30. Irrespective of the factors which may distinguish them, the designations of origin and indications of provenance in point at the least always denote a product coming from a specific geographical area. [8] It is common ground between the participants in the proceedings before the Court that generic names are names which are neither designations of origin nor indications of provenance, as for example the name mentioned at the hearing, 'cake anglais made in France'. Here an indication of geographical provenance has become a generic name for products whose composition and manufacture correspond to the English cake although the ingredients do not come from England nor were the products manufactured there.

17. The participants in the proceedings before the Court agree that generic names do not (or no longer) constitute indications of geographical provenance. They do not, however, agree on how an indication of geographical provenance can become a generic name. It is sufficient for the United Kingdom that 'marking a product clearly with words that indicate that that product does not claim to be product A, but rather a totally different product, a product in the style of product A, is the very clearest way of not misleading the consumer and of not trespassing on industrial and commercial property rights. Such wording affords the consumer a genuine choice'.

18. 'Marking a product' does not satisfy the other participants in the proceedings. For them the correct concept is normally that of an indication of geographical provenance. Only exceptionally can it become a generic concept, specifically where a given product's composition and manufacture characterize it in the minds of those concerned, neither the place of manufacture of the product itself nor the place from which the ingredients come constituting an additional important factor. As those participants view the matter, there is a clear relationship between rule and exception which may be paraphrased in the words: No one may deck himself in alien feathers unless the feathers have ceased to belong to anyone.

19. How a geographical indication of provenance can become *res nullius* has been described by Advocate General Jean-Pierre Warner in his Opinion in Case 12/74 in relation to sherry. [9] In that case, producers of real sherry had, for decades, stood by and, without objecting, allowed the plaintiffs to use that name. Those producers were thus precluded, on the equitable doctrine of laches, from asserting the right that they otherwise would have had to restrain the misuse of the name.

7 — OJ, English Special Edition 1970 (I), p. 17.

8 — Case 12/74 *Commission* v *Germany* [1975] ECR 181, paragraph 7.

9 — [1975] ECR 207 and 208.

20. I should like to make clear at this point my adherence to the view that mere 'marking', that is to say, affixing to a product a note making it clear that an alien indication of geographical provenance has been used, is not sufficient to justify the use of the indication because that would expose every indication of geographical provenance to use by third parties who have no right to it; there is in any event nothing in the English cases cited by Advocate General Warner to suggest that such a practice is not unlawful. [10]

21. To accept such a practice would mean that the relationship between rule and exception which I have described by means of the maxim 'No one may deck himself in alien feathers unless the feathers have ceased to belong to anyone' would now be reversed and it would have to be said instead: 'Anyone may deck himself in alien feathers provided only he describes them as alien'. The indication of geographical provenance, which can be an important distinguishing criterion for the consumers and thus an important means of promotion for the producer, would as a result be largely devalued. It would lose, particularly in a large common market, its important function in the forming of decisions and thus complicate the problems of orientation in the common market. As is quite clear from the provisions of Article 36, which guarantees *inter alia* the protection of industrial and commercial property, that is alien to the spirit of the free movement of goods.

22. Since, accordingly, the protection of indications of geographical provenance is protected under Community law, it is necessary that the contested name should have become a generic name before Spain's accession to the European Economic Community, that is to say, it must have been used for many years, without objection, to indicate products which, although manufactured in France, were in their composition and manufacture an imitation of the Spanish products. Whether that condition is satisfied is a matter for the national court. If, on the other hand, at the time of Spain's accession to the Common Market the expressions 'Turrón de Alicante' and 'Turrón de Jijona' still had not become generic names, then they would be designations of origin or indications of provenance, which are not covered by the prohibition laid down in Article 30.

23. An observation is again called for here on the question whether designations of origin and indications of provenance fulfil their specific function only if the product to which they refer does in fact possess qualities and characteristics which are due to the geographical area from which it comes. As regards indications of provenance in particular, the geographical area from which a product comes must confer on it a specific quality and specific characteristics of such a nature as to distinguish it from all other products. [11] If 'turrones de Jijona' and 'turrones de Alicante' acquire an individual character in that way, that is to say, if they consist of products which come from that area and have special qualities and are processed there, then products which do not have those characteristics can scarcely be regarded as of the same kind. Neither is evolution towards a generic name possible in this case.

10 — [1975] ECR 206 et seq.

11 — Case 12/74 [1975] ECR 181, paragraph 7.

24. If, however, the same products have been used elsewhere than in Jijona or Alicante in the manufacture of 'turrones' or if products from other regions have been used in Jijona or Alicante for the manufacture of 'turrones', then it might seem that what is concerned is a mere indication of provenance which may quite well evolve towards becoming a generic name. All those circumstances must be determined by the national court.

25. The same holds true, in my opinion, irrespective of whether a word such as 'façon', 'genre', 'type', 'style', 'imitation' or 'similaire' is added to the name 'Touron de Alicante' because these additions in no way alter the fact that the promoter may not use the incorrect geographical name in the absence of any special ground of justification.

Article 34 of the EEC Treaty

26. As regards the scope of Article 34 of the EEC Treaty, the Court has consistently held that that article is infringed only if a national measure has as its specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its *export trade* in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or trade of other Member States. [12]

12 — Case 15/79 *Groenveld* v *Produktschap voor Vee en Vlees* [1979] ECR 3409.

27. The 1973 Convention has neither the object nor the effect of restricting exports of French or Spanish products, but rather the contrary.

28. The answer to the first question put by the national court must therefore be that Articles 30 and 34 of the EEC Treaty must be construed as prohibiting the measures laid down in the Franco-Spanish Convention of 27 June 1973 for the protection of designations of origin, in particular the names 'Alicante' or 'Jijona', only if the names in question are no longer designations of origin but generic names.

Second question

29. In its second question the national court wishes to know, in the alternative, whether protection of the indications of geographical provenance in question, should it not already be justified from the point of view of Article 30, may nevertheless be justified under Article 36. As has been seen, protection of indications of geographical provenance is already justified from the point of view of Article 30 so that there is no need to have recourse to Article 36. That protection is necessary in the interests of producers and consumers in the common market. However, it is also sufficiently assured in the context of Article 30 because it is accessible to every producer operating in the place concerned without the user having to satisfy further conditions. On the other hand, it seems to me that stricter requirements should apply to industrial and commercial property, as, for example, in the

case of patents, trade marks or copyright. The difference seems to me to be that in those cases the holder has a power of disposal, whereas no such power exists in the case of indications of geographical provenance. These are available to everyone who satisfies the conditions, and there is no need for authorization. Nor can they be assigned to anyone who does not fulfil the conditions.

30. If, on the other hand, an indication of geographical provenance has become a generic name, then any protection comes too late. The reservation of a generic name to a particular user seems to me by definition to be excluded. Use of a generic name is open to everyone who manufactures or distributes goods of that kind. If an outsider has acquired the right to use such a name, as is the case where a generic name is concerned, then his right cannot subsequently be contested.

31. The same holds true, in my opinion, equally in the case of designations of origin or indications of provenance (appellations d'origine ou de provenance) which the national court placed on the same footing in its questions. The matters which fall for consideration are the same in both cases. Essentially, the right to use such a name is reserved to those whom it indicates unless in the meantime the name has become generic.

32. The answer to the second question must therefore be that Article 36 does not authorize the protection of generic names.

33. In so far as the Community legislature has not established criteria for generic names, on the one hand, and indications of geographical provenance or origin, on the other, it is for this Court to do so. It is for the national court to decide the question whether the criteria are satisfied in a particular case.

C — Conclusion

34. In conclusion I propose that the Court give the following answers to the questions put to it:

(1) Articles 30 and 34 of the EEC Treaty must be construed as prohibiting the measures laid down in the Franco-Spanish Convention of 27 June 1973 for the protection of indications of geographical provenance or designations of origin, in particular the indications "Alicante" or "Jijona", only if the indications or designations in question are no longer indicative of geographical provenance but are generic names.

(2) Article 36 of the Treaty must be construed as not authorizing protection of generic names.