4. In so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 of the Treaty, the provisions of Article 234 do not preclude that State from fulfilling the obligations arising from the Geneva Convention, 1923, for the suppression of traffic in obscene publications and from the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976).

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Bosco

Delivered in open court in Luxembourg on 14 December 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 25 OCTOBER 1979

My Lords,

This case has the distinction of being the first to come to this Court by way of a reference for a preliminary ruling by the House of Lords. It also has the distinction of being the first in which the Court has been called upon to consider the scope of the exception in Article 36 of the EEC Treaty for prohibitions or restrictions on the free movement of goods between Member States "justified on grounds of public morality".

The appellants in the House of Lords are Maurice Donald Henn and John Frederick Ernest Darby. They, it seems, used to conduct in England a mail order business in which the goods sold were pornographic films and literature. On 14 July 1977 they were convicted at Ipswich Crown Court of a number of offences against English law. Mr Henn was sentenced to a total of 18 months' imprisonment and ordered to pay £ 20

towards the cost of legal aid. Mr Darby was sentenced to a total of 30 month's imprisonment and to other penalties.

Of the offences of which Mr Henn and Mr Darby were convicted only one is relevant in the context of this reference: that of "being knowingly concerned in the fraudulent evasion of the prohibition of the importation of indecent or obscene articles contrary to section 42 of the Customs Consolidation Act, 1876 and section 304 of the Customs and Excise Act, 1952".

Section 42 of the Customs Consolidation Act 1876 prohibits the importation into the customs territory of the United Kingdom of "indecent or obscene" articles, and provides that articles imported contrary to the prohibition shall be forfeited and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct. Section 304 of the Customs and Excise Act 1952 makes it a criminal offence for any person to be in any way knowingly concerned in the fraudulent evasion or attempted evasion of the prohibition on importation.

The goods to which the relevant charge against the appellants related were part of a consignment of films and magazines brought into England in a lorry that arrived at Felixstowe on the ferry from Rotterdam on 14 October 1975. There were six films and seven magazines named in the charge, all of them of Danish origin. In an Agreed Statement of Facts accompanying the Order for Reference, they are described as follows:

"The films were all 8mm, a size ordinarily used in domestic projectors rather than for commercial exhibition. Each film when shown would last for about ten minutes. They depict detailed and explicit sexual activities between men and women, between men alone, between women and a dog and a man and a pig. They include a number of scenes of violence and aberrant sexual behaviour including urination and defecation.

The magazines were largely composed of photographs. They too depict detailed and explicit sexual activities between men and women, men alone, women alone and between women and a dog and a pony. Two of the magazines contain only photographs of naked girls between about five and fourteen years. There is prominent display of the private parts, in one a suggested recent rupture of the hymen and in the other girls engaged in stimulating and masturbating a man."

The Agreed Statement of Facts goes on to say that, among the criminal offences depicted, are rape, abduction of a woman, buggery (involving humans and animals), indecent assault and acts of gross indecency with or towards children under 14 years of age.

The appellants appealed against their convictions to the Court of Appeal of England and Wales. Among the contentions put forward on their behalf in that Court was the contention that section 42 of the Customs Consolidation Act 1876 could not be applied in their case because it was overriden by Articles 9 and 30 of the EEC Treaty.

On 13 July 1978 the Court of Appeal delivered judgment dismissing the appeals. (The judgment is reported at [1978] 1 WLR 1031).

As regards the appellants' contention based on the EEC Treaty, the Court of Appeal said two things. First it expressed the opinion that the phrase "quantitative restrictions" in Article 30 connoted restrictions "concerned with quantity" and did not apply to a total prohibition on importation such as was in question in the present case. Secondly the Court of Appeal held that, even if the prohibition were caught by Article 30, it was saved by Article 36. It seems, from the Court of Appeal's judgment, that what was particularly argued before it on behalf of the appellants, on this part of the case, was that, according to authorities in this Court, the word "justified" in Article 36 was the equivalent of "necessary" and that, on such a matter, the Court of Appeal should not rely on its own views but should order a reference to this Court. The Court of Appeal rejected the view that it could read Article 36 of the Treaty as if it contained the word "necessary" instead of the word "justified", whilst at the same time expresing a doubt whether "it would have made any difference if we had put in 'necessary' ". The Court of Appeal added that it would have referred the problem to this Court if it had had any doubt at all about the solution, but that it had none. "We cannot see", it said, "how a prohibition on the introduction of obscene literature can be other than a prohibition justified on the grounds of public morality and public policy".

Two comments on that judgment are, I think, called for.

The first is that, with great respect to the Court of Appeal, it was plainly wrong in thinking that the reference in Article 30 of the Treaty to "quantitative restrictions" does not include a total prohibition. The point hardly needs to be laboured since no one who took part in the argument before this Court sought to uphold the Court of Appeal's view on it. As was pointed out to us, there is ample authority against that view in judgments of this Court: see for instance Case 7/68 *Commission* v *Italy* [1968] ECR 423 at p. 430, Case 2/73 *Geddo* v *ENR* [1973] 2 ECR 865 and Case 74/76 *Iannelli & Volpi* v *Meroni* [1977] 1 ECR 557 at p. 574. Moreover, as was also pointed out to us, not only is that view irreconcilable with the use in Article 36 of the phrase "prohibitions or restrictions", but it is irreconcilable also with the very purpose of Title 1 of Part Two of the Treaty which makes the free movement of goods one of the "foundations of the Community". As the United Kingdom Government said in its written observations, in dissociating itself from the view of the Court of Appeal, "It is clear that a total prohibition represents a greater invasion of the fundamental principle of free movement of goods than a partial restraint on imports".

My second comment is that, on the other hand, the Court of Appeal was, in my opinion, plainly right in holding that Article 36 should not be read with the substitution of the word "necessary" for the word "justified". This Court has never held that such a substitution should be made; indeed this Court has no power to alter the words of the Treaty. What this Court has done is to use, in a number of cases, the word "necessary" in explaining what could be justified under Article 36 in the way of prohibitions or restrictions on imports

imposed by Member States for certain purposes: the protection of indications of origin (Case 12/74 *Commision* v *Germany* [1975] 1 ECR 181, at p. 199); consumer protection generally (Case 13/78 *Eggers* v *Freie Hansestadt Bremen* [1978] ECR 1935, at p. 1956); and the protection of the health and life of humans, animals or plants (Case 29/72 *Marimex* v *Italian Finance Administration* [1972] 2 ECR 1309, at p. 1318, Case 104/75 *De Peijper's* case [1976] 1 ECR 613, Case 35/76 *Simmenthal* v *Italian Minister for Finance* [1976] 2 ECR 1871, Case 46/76 *Bauhuis* v *Netherlands* [1977] 1 ECR 5, Case 5/77 *Tedeschi* v *Denkavit* [1977] 2 ECR 1555 and Case 153/78 *Commission* v *Germany*, 12 July 1979, not yet reported).

It must, I think, be borne in mind that, although no doubt the opinions of experts may differ on what may justifiably be prescribed for the protection of indications of origin, of consumers generally, and of the health and life of humans, animals or plants, those are matters which, at the end of the day, are susceptible of objective assessment. They are, moreover, matters on which it is, by and large, possible to prescribe a solution applicable uniformly in all Member States. That indeed is why there has been and continues to be a considerable effort on the part of the Community legislative institutions to introduce Community "harmonizing" measures relating to them and thereby eliminate the need for Member States to resort to national prohibitions and restrictions permitted by Article 36 but inimical to the free movement of goods within the Community (consider what the Court said in that connexion in *Tedeschi* v *Denkavit*, already cited, at pp. 1576-1577). It is thus natural in such contexts to say that measures that are unnecessary, or that go beyond what is necessary, for the purpose in question cannot be justified under Article 36. A different approach is, however, in my opinion, inevitable, when the question under consideration is that of the circumstances in which a Member State may be justified in imposing prohibitions or restrictions on imports "on grounds of public morality". The concept of "public morality" is not one that can be made the subject of objective assessment, or of a Community-wide definition. It is a matter of individual opinion, rather than of expert opinion.

I think that, in deciding upon the right approach to the interpretation of the phrase "justified on grounds of public morality" in Article 36, assistance is to be derived from paragraphs 48 and 49 of the judgment of the European Court of Human Rights in the *Handyside* case (7 December 1976, Series A, No 24). That Court had, in that case, to consider the proper interpretation of Article 10 of the European Convention on Human Rights, which is about freedom of expression. More precisely it had to consider the proper interpretation of the exception in paragraph 2 of that Article for "such ... restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of ... morals ...". The European Court of Human Rights said this:

"In particular, it is not possible to find in the domestic law of the various

Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. The Court notes at this juncture that ... the adjective 'necessary', within the meaning of Article 10 para. 2, is not synonymous with 'indispensable' ...

Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. ...

Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. ... The domestic margin of appreciation ... goes hand in hand with a European supervision. ...

This means, amongs other things, that every ... 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

Your Lordships see that, in some of the things that are there said, there is an echo of what this Court itself said, in relation to the "public policy" exception in Article 48 of the EEC Treaty, in Case 41/74 *Van Duyn* v *Home Office* [1974] 2 ECR 1337 and in Case 30/77 *Reg.* v *Bouchereau* [1977] 2 ECR 1999.

The House of Lords, to which Mr Henn and Mr Darby now appeal against the judgment of the Court of Appeal, has referred to this Court seven questions.

The first is in these terms:

"Is a law of a Member State which prohibits the import into that State of pornographic articles a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty establishing the European Economic Community?"

Clearly that is intended to elucidate whether the Court of Appeal was right in its view that Article 30 of the Treaty does not apply to a total prohibition. There is, I think, nothing I need add to what I have already said on that question, except this. The wording of the question suggests that a total prohibition cannot be a "quantitative restriction" but may be a measure having equivalent effect to one. In my opinion that is not so. A total prohibition is a quantitative restriction, the quantity being zero. It is like a "nil quota". "Measures having equivalent effect" constitute a much wider and looser concept, comprising prima facie, as the Court first held in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] 1 ECR 837 and has repeated in many cases since, "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".

Before I turn to the second and subsequent questions referred to the Court by the House of Lords, I must say a word about the complexities of the laws of the United Kingdom on pornography,

which to a substantial extent underlie and explain those questions. Those complexities arise in two ways:

(1) because the laws of the different parts of the United Kingdom, namely England and Wales, Scotland, Northern Ireland, and the Isle of Man, are different, and, in each case, derived from a variety of sources rather than from any coherent scheme; and

(2) because nowhere in the United Kingdom is pornography treated quite as strictly internally as on its importation.

The essential provisions applicable to the importation of pornography are those that I mentioned at the outset, namely section 42 of the Customs Consolidation Act 1876 and section 304 of the Customs and Excise Act 1952. They apply to the whole of the United Kingdom. Their effect, shortly stated, is that indecent or obscene articles are, on arrival in the United Kingdom, liable to forfeiture and destruction, and that, if anyone seeks to smuggle such articles into the United Kingdom, he is guilty of a criminal offence. Schedule 7 to the Customs and Excise Act 1952 provides a procedure under which the liability of goods to forfeiture may be tested in a court of law.

In an Agreed Statement of Law accompanying the Order for Reference it is explained that in the various laws of the United Kingdom (some derived from common law, some from statute) two different and distinct criteria are recognized and applied.

The first, referred to in that Statement as "Standard A", is expressed in the words " indecent or obscene", which appear in the customs legislation and in certain other legislation, and are also used to indicate the ambit of the English common law offence of "outraging public decency". Those words, we are told, convey a single idea, namely that of offending against recognized standards of propriety, generally but not exclusively with reference to sexual matters, "indecent" being at the lower end, "obscene" at the upper end, of the scale.

The second criterion, referred to in the Agreed Statement as "Standard B", is expressed by the word "obscene" as used alone in the Obscene Publications Acts 1959 and 1964 (which apply only to England and Wales) and in describing the ambit of certain common law offences in England, Wales, Scotland and Northern Ireland. That word connotes a narrower class of material, namely that which tends to "deprave and corrupt" those exposed to the material. The Obscene Publications Acts 1959 and 1964 except from the provisions of those Acts obscene articles of which the publication is, despite their obscenity, "justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern".

The Agreed Statement contains a summary of the laws of the different parts of the United Kingdom, distinguishing between those that apply Standard A and those that apply Standard B, and mentioning some that apply yet other standards. None of the parties sought however, in argument

before us, to distil from that summary particular respects in which they contended that the disparities between those laws were significant for present purposes. That is perhaps understandable, because the appellants relied on those disparities only in support of their contention that there was in the United Kingdom no clearly defined policy or standpoint as to the requirements of public morality (it being their further contention that, in the absence of such a clearly defined policy or standpoint, a Member State could not rely on the "public morality" exception in Article 36), whilst on behalf of the United Kingdom Government it was contended that such disparities were irrelevant. The Commission for its part annexed to its observations a careful analysis of the summary, but without, so far as I was able to discern, drawing any conclusions from it. It seems to be common ground that the laws of Scotland and of the Isle of Man are more stringent than those of England and Wales, and in particular that the laws of the Isle of Man apply only Standard A. The United Kingdom Government and the Commission also made the point that, in some respects, the laws of the different parts of the United Kingdom differ only in the weight of the penalties that they impose in particular circumstances. As to the different treatment by the laws of the United Kingdom of home-produced pornography and foreign pornography, the main points relied upon by the appellants seemed to be these:

(1) That nowhere in the United Kingdom is the mere possession by a person of articles offending against Standard A or even Standard B a criminal offence. I took the reference to "mere possession" to mean possession otherwise than with a view to sale, because a number of statutes (e.g. in England and Wales the Obscene Publications Act 1964, in Scotland certain local Acts, in Northern Ireland the Obscene Publications Act 1857, and in the Isle of Man an Act 1907 "for the Suppression of Obscene Publications and Indecent Advertisements") forbid the possession of pornographic articles with a view to their sale or provide for the seizure and destruction of such articles if kept for that purpose. Of those statutes, some apply Standard A, some Standard B.

(2) That, at all events in England and Wales, which constitute by far the largest part of the United Kingdom, articles offending against standard A but not standard B may be sold, provided that they are not exhibited in a street or other public place, or sold in such a place. Such articles may moreover be sent by private carrier, though not by post.

(3) That, in England and Wales, even articles offending against Standard B may be published if their publication is "justified as being for the public good" on any of the grounds mentioned in the Obscene Publications Act 1959.

In contrast, the customs legislation imposes a complete ban on the introduction into the United Kingdom of any article offending against Standard A, let alone Standard B.

The second, third, fourth, fifth and sixth questions referred to the Court by the House of Lords, which I propose to discuss together, are these:

"2. If the answer to question 1 is in the affirmative, does the first sentence of Article 36 upon its true construction mean that a Member State may lawfully impose prohibitions on the importation of goods from another Member State which are of an indecent or obscene character as understood by the laws of that Member State?

3. In particular:

(i) is the Member State entitled to maintain such prohibitions in order to prevent, to guard against or to reduce the likelihood of breaches of the domestic law of all constituent parts of the customs territory of the State?

(ii) is the Member State entitled to maintain such prohibitions having regard to the national standards and characteristics of that State as demonstrated by the domestic laws of the constituent parts of the customs territory of that State including the law imposing the prohibition, notwithstanding variations between the laws of the constituent parts?

4. If a prohibition on the importation of goods is justifiable on grounds of public morality or public policy, and imposed with that purpose, can that prohibition nevertheless amount to a means of arbitrary discrimination or a disguised restriction on trade contrary to Article 36?

5. If the answer to question 4 is in the affirmative, does the fact that the prohibition imposed on the importation of such goods is different in scope from that imposed by the criminal law upon the possession and publication of such goods within the Member State or any part of it necessarily constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States so as to conflict with the requirements of the second sentence of Article 36?

6. If it be the fact that the prohibition imposed upon importation is, and a prohibition such as is imposed upon possession and publication is not, capable as a matter of administration of being applied by customs officials responsible for examining goods at the point of importation, would that fact have any bearing upon the answer to question 5?"

Those are all, of course, questions of interpretation of Article 36. In considering them I think it convenient to start with certain general observations.

The first is that, as the parties were at one in saying, on the basis of decisions of this Court so familiar that I need not cite them, Article 36, since it derogates from the fundamental principle of free movement of goods within the Community, is to be interpreted strictly.

The second is that, in my opinion, the "public policy" exception in Article 36 is irrelevant in relation to prohibitions or restrictions on the importation of pornography into a Member State. If such prohibitions or restrictions are to be saved by Article 36 it must be by virtue of the "public morality" exception, which is the more specific and the more apt in their case.

My third observation is that, of the two limbs of the second sentence of Article 36, the only one that can be relevant in this case is that relating to "arbitrary discrimination", for there is nothing "disguised" about the operation of the United Kingdom laws here in question.

My fourth observation concerns the relationship between the first and the second sentence of Article 36. On that the appellants submitted that the second sentence must be interpreted as having an "overriding" effect, in the sense that a prohibition or restriction was not authorized by Article 36 if, although "justified" under the first sentence, it constituted "a means of arbitrary discrimination or a disguised restriction on trade between Member States". The United Kingdom Government, on the other hand, submitted that the two sentences should be read together, the second being a gloss on the first. A measure could not, the United Kingdom Government pointed out, be at once "justified" and "arbitrary", because the two concepts were mutually inconsistent. The views of the Commission seemed to evolve during the case. In its written observations it seemed to agree with the appellants, but at the hearing it seemed to accept the view of the United Kingdom Government that Article 36 should be read as a whole. At all events I have no doubt that the United Kingdom Government is right. The second sentence of Article 36 is intended, in my opinion, to make it clear that a prohibition or restriction that constitutes "a means of arbitrary discrimination or a disguised restriction on trade between Member States" cannot be "justified" within the meaning of that word in the first sentence. "Justified" is not, of course, a synonym of "imposed": a prohibition or restriction may be imposed for a particular purpose without being justified for that purpose. My view on that point thus accords with that expressed by Mr Advocate General Trabucchi in the passage to which we were referred in his Opinion in *Procureur du Roi* v *Dassonville* [1974] 1 ECR at p. 861. The judgment of the Court in that case; on which the appellants relied, does not appear to me to have any bearing on the point. My view might appear at first sight inconsistent with the approach of the Court in Case 102/77 *Hoffmann-La Roche* v *Centrafarm* [1978] ECR 1139 and in Case 3/78 *Centrafarm* v *American Home Products Corporation* [1978] ECR 1823, but I think that what, in the correct analysis, the judgments in those cases mean is that, whilst the recognition by the law of a Member State of certain trademark rights may be justified under Article 36, the exploitation of those rights by the owner of the mark may be unjustified in so far as it constitutes a disguised restriction on trade between Member States.

I would on the other hand reject the submission implicit in the suggestion made on behalf of the United Kingdom Government at the hearing that, in considering whether the customs legislation here in question was authorized by Article 36, one should take into account that it was enacted and applied "bona fide by the United Kingdom for the purpose of protecting the public against a serious threat and not with any intention to subject importers to a harsher regime than applied to United Kingdom dealers".

Although the expression "a means of arbitrary discrimination" in the second sentence of Article 36 may seem at first sight to call for an enquiry into the intentions of those who enacted the measure under consideration, and although there may be cases where their intentions are ascertainable (whether by inference or because those intentions have been expressed), I cannot believe that the authors of Article 36 meant its application to depend on the outcome of such an enquiry, which would manifestly be impracticable, and indeed unrealistic, in most cases.

I would also reject the submission of the United Kingdom Government that the second sentence of Article 36 precludes only discrimination in or restriction of "trade" between Member States, in the sense, if I understood the submission rightly, of transactions by or between traders, and so does not apply to prohibitions or restrictions on imports into a Member State in so far as such prohibitions or restrictions affect only private individuals. That submission, in my opinion, attached undue importance to the use of the phrase "trade between Member States" at the end of Article 36 and moreover attributed an unduly restrictive meaning to the word "trade" in that phrase. There is trade between Member States when an individual imports into a Member State for his own use goods that he has bought in another Member State. Article 36, it must be remembered, forms part of Title 1 of Part Two of the Treaty, which makes the free movement of goods within the Community, not just free trade in goods in the narrow sense, one of the Community's "foundations". The word "trade" is used in a number of Articles forming part of Title 1. It is even used in Article 9 itself. No one, however, would suggest that, because the word "trade" is occasionally used in Articles 12 to 17, relating to the elimination of customs duties between Member States, private individuals moving their possessions from one Member State to another may still be subjected to customs duties, or that, because that word is occasionally used in Articles 18 to 29, relating to the Common Customs Tariff, private individuals who bring their possessions into the Community from outside it are subject, not to the Common Customs Tariff, but to the erstwhile tariffs of Member States. By a parity of reasoning, Article 30, which is the leading Article on the elimination of quantitative restrictions between Member States, and which does not itself use the word "trade", cannot be interpreted as limited to transactions by or between traders. That being so, since Article 36 operates by way of proviso to Article 30, its second sentence, which, as the United Kingdom Government itself rightly submitted, is only a gloss on the first, cannot be interpreted as so limited.

My last general observation is that some of the submissions of the parties seemed to be expressed in a way that implied that it was for this Court to approve or condemn the United Kingdom customs legislation that is in question. The jurisdiction of this Court under Article 177 of the Treaty is however confined to ruling on the questions of Community law that are referred to it. Here it will be for the House of Lords to decide the case in the light of Your Lordships'

rulings, and in particular to say, in the light of those rulings, whether the United Kingdom legislation, at all events in so far as it applies to goods of the kind in question in this case, is compatible with Community law.

So I turn to the points directly raised by the questions referred to the Court by the House of Lords.

In Case 35/76 *Simmenthal* v *Italian Minister of Finance* [1976] 2 ECR 1871 this Court held that:

"Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article."

To the same effect are the judgments of the Court in Case 5/77 *Tedeschi* v *Denkavit* [1977] 2 ECR 1555 and in Case 153/78 *Commission* v *Germany* (12 July 1979, not yet reported). Thus, no Member State has an unfettered discretion to impose prohibitions or restrictions on the importation of goods from other Member States "on grounds of public morality".

As however the European Court of Human Rights pointed out in the passage that I cited earlier, views about the requirements of public morality vary from time to time and from country to country, so that Member States must be allowed a measure of discretion in the matter. In Case 41/74 *Van Duyn* v *Home Office* [1974] 2 ECR 1337 this Court said:

"It should be emphasized that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty."

The Court said the same thing again in Case 30/77 *Reg.* v *Bouchereau* [1977] 2 ECR 1999.

In my opinion precisely similar considerations apply where the concept of public morality is invoked as justifying a derogation from the fundamental principle of free movement of goods.

It follows in my opinion that, if the laws of a Member State apply the same criteria to home-produced pornography and to foreign pornography, and those criteria are reasonable, any prohibitions or restrictions on imports from other Member States that that State may consequently impose will be permitted by Article 36.

The real difficulty in the present case arises, it seems to me, from the lack of uniformity in the laws of the United Kingdom and in particular from the circumstance that those laws do not entirely apply the same criteria to home-produced goods and to foreign goods. Perhaps the most glaring disparity lies in the fact that, although an obscene book may be lawfully on sale in English bookshops, for instance because its publication is judged to be for the public

good on the ground of its scientific value or literary merit, the identical book published in another Member State may not be imported into England. That undoubtedly constitutes discrimination. In a case that was concerned with such a book, it might not be easy to decide whether the discrimination was "arbitrary" or was "justified". From the description we have been given in the Agreed Statement of Facts of the films and magazines with which this case is concerned, it seems improbable that the House of Lords will be confronted here with such a difficult question. It seems more probable that those films and magazines belong to a category of articles that the laws of the United Kingdom treat in much the same way whether they be home-produced or foreign. Perhaps the only difference lies in the fact that "mere possession" of pornography, however "hard", is not forbidden within the United Kingdom. But a person in possession of such articles only for his own delectation (if I may use the word) will, almost inevitably, have come into possession of them by means of a transaction constituting a criminal offence by the other party to it — consider sections 1 (3) and 2 (1) of the Obscene Publications Act 1959, which forbid publication of obscene matter "whether for gain or not" and treat a person as publishing an article if, among other things, he "distributes, circulates, sells, lets on hire, gives or lends it". Those thoughts, however, do not absolve Your Lordships, nor do they absolve me, from the duty to tackle the problem in all its width, as it has been referred to the Court by the House of Lords.

Essentially that problem lies in distinguishing between the kind of situation in which discrimination is "arbitrary" and the kind of situation in which it is "justified".

As to that cases already decided by this Court provide some guidance.

We were referred to Case 4/75 *Rewe-Zentralfinanz* v *Landwirtschaftskammer* [1975] 1 ECR 843, which was about German legislation requiring apples imported from other Member States to be inspected at the frontier for San Jose Scale, whereas, so it was said, German-grown apples were not required to undergo inspection before being marketed. The Court held (at p. 860) that the different treatment of imported and home-grown apples could not be regarded as arbitrary discrimination if effective measures were taken in Germany to prevent the distribution of contaminated domestic apples and if there was reason to believe, in particular on the basis of previous experience, that there was a risk of San Jose Scale spreading if no inspection were held on importation. Obviously that ruling can, *mutatis mutandis*, be applied in the context of the importation of pornography into the United Kingdom. But its application in that context means that a selection should be made at the frontier between pornography of a kind so harmful that its distribution within the United Kingdom is forbidden (the contaminated apples) and pornography of a kind that may lawfully be marketed in the United Kingdom or in a substantial part of it.

Then we were referred to Case 104/75 *De Peijper's* case [1976] 1 ECR 613 in which the Court held that "Article 36 cannot be relied on to justify rules or practices which, even though they are beneficial, contain restrictions which are explained primarily by a concern to lighten the administration's burden or reduce public expenditure, unless, in the absence of the said rules or practices, this burden or expenditure clearly would exceed the limits of what can reasonably be required".

It was not contended on behalf of the United Kingdom Government before this Court that the prohibition in section 42 of the Customs Consolidation Act 1876 could be justified on the ground that Standard A afforded a test that customs officials were better able to apply than any narrower test. Perhaps it was thought that, in view of the procedure available under Schedule 7 to the Customs and Excise Act 1952, that contention was not sustainable — though I understood the appellants to say that the Crown had advanced it in the House of Lords. At all events, the contention of the United Kingdom Government in this Court was that one could not transpose to the "frontier situation" all the ingredients, such as public display or sale, that were necessary to constitute an offence internally. The obvious adaptation would be to make confiscation at the frontier dependent on whether a breach of internal law was threatened. That, however, would be often difficult and sometimes impossible to ascertain with any reasonable degree of certainty, so that a customs official would be faced with an enquiry more difficult than that facing a policeman dealing with an internal offence, where the ingredient of, e. g., public display or sale would be a matter of fact and not one of speculation as to the future. To that it was added that a Member State could not be called upon to invest any significant amount of its financial or manpower resources merely to ensure that, in the suppression of traffic in socially harmful or immoral material, its treatment of foreign and domestic products was completely even-handed.

With much of that I agree.

In my opinion the solution of the problem lies in applying the concept of reasonableness referred to by the Court in *De Peijper's* case, or, which comes, I think, to the same thing, that of proportionality referred to by the European Court of Human Rights in the *Handyside* case and by this Court in *Commission* v *Germany* (12 July 1979, paragraph 15 of the decision). That, in a context such as this, 'reasonableness' and 'proportionality' are the same concept or that, at all events, proportionality is an aspect of reasonableness, was shown by Professor L. Neville Brown in an enlightening paper "General Principles of Law and the English Legal System" published by the European University Institute of Florence in "New Perspectives for a Common Law of Europe" (1978), at pp. 177 to 185.

Thus, in my opinion, the test must in each case be whether any element of discrimination inherent in the prohibition or restriction on imports under consideration is, in all the circumstances, reasonable. This it will not be if its effect is disproportionate to any legitimate purpose pursued, be that purpose to prevent, guard against or reduce the likelihood of breaches of the internal law of the Member State concerned, or to avoid excessive administrative burdens and public expenditure, or both. Where the Member State concerned is so constituted that there are variations in the laws of different parts of it, that in my opinion is a factor — it may be an important factor — to be taken into account in applying the test.

The test, as I see it, is one to be applied, not by customs officials in examining goods at the frontier, but by the legislature in framing the rules that customs officials are to enforce, and of course by the courts in considering to what extent those rules are compatible with Community law.

I doubt if the application of that test would justify the prohibition of the importation into the United Kingdom of a book that was lawfully on sale in English bookshops. Clearly it would be unreasonable and disproportionate to forbid the importation of such a book just because of the risk that it might be displayed in an English street or put on sale in Scotland or the Isle of Man. Those very same risks flow from the publication of the book in England.

If I were to seek to express even a tentative view as to the side of the line on which other cases might fall, I should be going far beyond what is required in order to deal with the present reference.

In a case, however, of a bulk importation of articles of a kind so obscene and unmeritorious that they may not be published or distributed in any way in any part of the United Kingdom without a criminal offence being committed, it seems to me that the problem does not arise at all. No one can suppose that a man who imports such material in bulk does so only for his private delectation, so that, so its seems to me, there is no element of discrimination in the prohibition of such an importation.

Both the appellants and the United Kingdom Government based arguments on the paragraph in the judgment of this Court in the *Van Duyn* case where the Court held that, where the competent authorities of a Member State had clearly defined their standpoint as to the socially harmful character of certain activities and had taken administrative measures to counteract them, that Member State need not make those activities unlawful before it could rely on the "public policy" exception in Article 48 of the Treaty ([1974] 2 ECR at p. 1350).

In reliance on that paragraph the appellants submitted (as I mentioned earlier) that a Member State was not entitled to rely on the "public morality" exception in Article 36 unless it had adopted a clearly defined policy or standpoint as to the requirements of

public morality, which the complexities of the United Kingdom's laws on the subject showed that it had not done. In my opinion that submission was misconceived. The United Kingdom's attitude to the activities of pornographers (complex though it may be) is defined by its laws. No one suggests that there exists any executive or administrative decision defining it, such as existed in the case of the activities of scientologists, with which the *Van Duyn* case was concerned. The point made by the Court in the paragraph in question is therefore irrelevant here.

The United Kingdom Government, for its part, founded on that paragraph an argument which, if I understood it correctly, was to the effect that the invocation by a Member State of "public morality" to justify a measure under Article 36 did not require the threat of any unlawful activity, so that a Member State was entitled to maintain a prohibition such as that in question in the present case for reasons other than to prevent, guard against or reduce the likelihood of breaches of its domestic law. No doubt, as a general proposition that is correct. But the United Kingdom Government did not point to any such other reasons for section 42 of the Customs Consolidation Act 1876, beyond referring in general terms to the fact that the overall pattern of the laws of the United Kingdom was, and had for a long time been, hostile to indecent or obscene material and activities. It may be that it was because some such argument as that was submitted to the House of Lords, that the House included among its questions paragraph (ii) of question 3, referring to the "national standards and characteristics" of a Member State. That, however, seems to me altogether too vague a concept to be invoked in the present context, nor is it, as the United Kingdom Government itself acknowledged, relevant to the question whether, and if so to what extent, section 42 of the Customs Consolidation Act 1876 is a source of arbitrary discrimination.

I turn to the seventh and last question referred to the Court by the House of Lords, which is in these terms:

"Independently of the questions posed above, may a Member State lawfully impose prohibitions on the importation of such goods from another Member State by reference to obligations arising from the Geneva Convention 1923 for the suppression of the traffic in obscene publications and the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976), bearing in mind the provisions of Article 234 of the Treaty?"

As regards the Universal Postal Convention, the Commission pointed out that, since it was renewed at Lausanne in 1974, the provisions of Article 234 of the Treaty were inapplicable to it. Those provisions only apply, in the case of the original Member States, to international agreements concluded before the entry into force of the Treaty and, in the case of the new Member States, to agreements concluded before accession, i. e. before 1 January 1973 (see Article 5 of the Act of Accession). The Commission also pointed out that Member States cannot alter their obligations under the Treaty by entering into subsequent international conventions; that can only be done under Article 236 of the Treaty. The United Kingdom Government drew attention to

the fact that the material parts of the relevant Article of the Lausanne Convention (Article 33) are identical to the provisions that they replaced in the earlier Tokyo Convention of 1969 (Article 29). That does not seem to me to meet the points made by the Commission. The United Kingdom Government added, however, that, since the importation in the present case did not involve the postal services, the matter was purely hypothetical.

The position about the Geneva Convention of 1923 is different and is not so simple. It depends on the interpretation of that Convention, to which, incidentally, all the Member States were originally parties, but which was denounced (so the Commission told us) by Denmark with effect from 16 August 1968 and by the Federal Republic of Germany with effect from 25 January 1975.

Two interpretations of it were canvassed before us.

One interpretation is that the Convention only creates, at all events as regards imports and exports, a series of bilateral obligations between the parties to it. If that interpretation is correct, the Convention is overriden, as between the Member States of the Community, by the Treaty, so that the Convention no longer applies in relation to imports and exports between Member States — consider Case 10/61 *Commission* v *Italy* [1962] ECR 1. If so, a Member State may not lawfully impose prohibitions on imports from other Member States by reference to its obligations under the Convention.

The other interpretation is that the Convention creates multilateral obligations between all the parties to it, so that States that are parties to the Convention but are not Members of the Community have a right to the observation of the provisions of the Convention even as respects imports and exports between Member States, on the footing that, as the Commission put it at the hearing, a flourishing trade in obscene material within the Community could prejudice other States' efforts to suppress the traffic in it. If that is the correct interpretation of the Convention, a Member State is entitled (independently of Articles 30 and 36) to impose prohibitions or restrictions on imports from other Member States in so far as may be necessary to enable it to comply with its obligations under the Convention. But that right is subject to the obligations of the Member State under Article 234 of the Treaty.

The jurisdiction of this Court under Article 177 is limited to the interpretation of the Treaty and of acts of the Community institutions. It does not extend to the interpretation of a Convention that was entered into before the Community existed. Where such a Convention has a bearing on a question referred to the Court under Article 177, and no one suggests that the Convention is open to different interpretations, this Court may of course answer the question on the assumption that the Convention means what it apparently says. But, in a case like the present, the Court is bound, in my opinion, to give alternative answers and to leave it to the national court or tribunal concerned to do the best it can with those answers.

In the result I am of the opinion that, in answer to the questions referred to the Court by the House of Lords, Your Lordships should rule as follows:

1. A law of a Member State which prohibits the importation of pornographic articles into that State from another Member State is a quantitative restriction on imports within the meaning of Article 30 of the Treaty establishing the European Economic Community.

2. Article 36 of the Treaty does not confer on a Member State an unfettered discretion to impose prohibitions on the importation of goods from another Member State which are of an indecent or obscene character as understood by the laws of that Member State. It confers on a Member State a discretion to impose prohibitions on such imports on grounds of public morality if those prohibitions are justified on such grounds.

3. A prohibition cannot be justified within the meaning of that expression in Article 36 if it constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States.

4. To determine whether a prohibition is justified on grounds of public morality or constitutes a means of arbitrary discrimination, the test in each case is whether the prohibition is in all the circumstances reasonable. This it will not be if its effect is disproprotionate to any legitimate purpose pursued.

5. To prevent, to guard against or to reduce the likelihood of breaches of the domestic laws of the Member State concerned is a legitimate purpose.

6. Where the Member State concerned is so constituted that there are variations in the laws of different parts of it, that is a factor to be taken into account in applying the test.

7. A Member State may not impose prohibitions on the importation of goods from another Member State by reference to obligations arising from the Universal Postal Convention renewed at Lausanne in 1974.

8. Whether a Member State may impose prohibitions on imports from another Member State by reference to its obligations under the Geneva

Convention of 1923 for the suppression of the circulation of and traffic in obscene publications depends upon what is the proper interpretation of that Convention. If that Convention, properly interpreted, imposes on the parties to it, as regards imports and exports, a series of bilateral obligations, the Convention is overridden, as respects imports and exports between Member States, by the Treaty. If, on the other hand, the Convention creates multilateral obligations between all the parties to it, a Member State is entitled, despite the Treaty, to impose prohibitions on imports from other Member States in so far as that may be necessary to enable it to comply with its obligations under the Convention, but that is subject to the obligations of the Member State under Article 234 of the Treaty.