exception to that prohibition, the existence of a relationship between the consumption or use of the free gift and the product constituting the basis for the offering of the gift.

Mertens de Wilmars Pescatore O'Keeffe Everling

Mackenzie Stuart Bosco Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 15 December 1982.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 22 SEPTEMBER 1982 [1] AND CONFIRMED AT THE SITTING ON 9 DECEMBER 1982

Mr President,
Members of the Court,

1. Introduction

1.1. Summary of the problems involved

This case shows once again that the point of contact between cartel agreements, divergent legislation of the various Member States on marketing and Community law is an area in which pitfalls, obstacles, snares and traps abound. In view of certain of those complications, it is not easy to answer the question referred to the Court by the Gerechtshof [Regional Court of Appeal], Amsterdam, in such a way as to avoid any consequences which conflict with the purport of the extensive case-law of the Court which is relevant to this case. I shall begin by giving a brief summary of those complications.

(a) It appears from the written observations (p. 10) submitted in this case by Oosthoek's Uitgeversmaatschappij BV [hereinafter referred to as "Oosthoek"] that it has fallen into a trap presented by the Vereniging ter Bevordering van de Belangen des Boekhandels [Association for the Promotion of the Interests of

1 — Translated from the Dutch.

Booksellers, hereinafter referred to as "the Booksellers' Association"]. Thus the presentation by a firm of books from its own range to purchasers of its encyclopaedias, as in this case, is, pursuant to Article 3 of the contested Wet Beperking Cadeaustelsel 1977 [Law on the Restriction of Free Gift Schemes], quite lawful subject to certain conditions. The exception in question underlines the highly specific objectives of that Law which I shall refer to again later. However, it is apparent from the written observations submitted by Oosthoek in these proceedings that the marketing rules of the Booksellers' Association prevent Oosthoek from complying with the condition laid down by Article 3 (1) (c) of the Law. That condition is essentially to the effect that the undertaking concerned must leave to the purchaser the choice between the free gift and a sum of money amounting to at least one-half of the price at which the gift is normally offered for sale (Article 3 (1) (c) in conjunction with Article 3 (2) (a)). Oosthoek states in its written observations that under Article 12 of the rules of the Booksellers' Association, however, compliance with that condition is regarded as a price rebate prohibited by the cartel agreement.

Oosthoek now seeks to avoid that pitfall by arguing that Article 4 (3) of the Law contains *another* exception to the rule prohibiting in principle the presentation of articles as free gifts which conflicts in practice with the case-law of the Court concerning Articles 30 to 36 of the EEC Treaty. Article 4 (3) provides essentially for an exception in relation to the gift of a product, *in the first place* which is related as regards its consumption or use to the product offered for sale, *secondly*, which bears an advertising mark which is indelible and clearly visible when the product is used in the normal way and, *thirdly*, whose value does not exceed 4% of the selling price of all the goods the sale of which is the reason for the free gift. In the light of the Law itself and of the case-law thereon, it is in particular the requirement of related consumption or use which the free gifts at issue do not fulfil. Since that requirement is not prescribed by an otherwise comparable provision of Belgian law which was referred to by the Belgian Government in its written observations, Oosthoek is entitled to operate the contested gift scheme in Belgium. That hinders Oosthoek in its efforts, which are in themselves praiseworthy from the point of view of the Community, to pursue a uniform sales strategy throughout the entire Dutch-speaking area.

In the light of those considerations, the national court has referred the following question to the Court of Justice for a preliminary ruling:

"Is it compatible with Community law (especially with the principle of the free movement of goods) for a publisher who, by offering free gifts in the form of books, seeks to promote sales of various reference works, which are intended for the entire Dutch-speaking area and originate partly in the Netherlands and partly in Belgium, to have to discontinue in the Netherlands that method of promoting sales, which is allowed in Belgium, owing to the Netherlands Wet Beperking Cadeaustelsel solely because that Law requires a relationship to exist between the consumption or use of the

free gift and the product which constitutes the basis for the offering of the free gift?"

In order to answer this question, it will be necessary to overcome the obstacles and avoid the traps and pitfalls which I shall describe.

(b) To begin with, it is necessary to ascertain whether the Wet Beperking Cadeaustelsel 1977, in so far as it is relevant in this case, conflicts with the basic rule laid down by the Court in paragraph 5 of its decision in Case 8/74 *Dassonville* [1974] ECR 837, which has become a fixed point of departure in the Court's later decisions. Both Oosthoek and the Commission answer that question in the affirmative, whilst the Netherlands, German and Danish Governments answer it in the negative. I shall consider the matter in paragraph 2 of this Opinion.

(c) If the question to which I have just referred is to be answered in the affirmative, it will be necessary to ascertain whether the rule which I described *inter alia* in my Opinion in Case 6/81 *Beele* as the "reasonableness rule", otherwise known as the "rule of reason" laid down by the Court in paragraph 6 of its decision in the *Dassonville* case and explained in its later judgments,[1] is applicable in the present case. In that connection it is of course necessary to avoid the misconception that it is a question of the application or extension

1 — Now that in particular the second expression seems to have gained currency in academic discussions as well as in these proceedings, the following clarification of both expressions may be of some use. The first expression (the "reasonableness rule") is connected with the decisive criterion established in paragraph 6 of the decision in the *Dassonville* case, to the effect that in order to prevent unfair competition which was there under consideration a State must ensure that the measures which it adopts "should be *reasonable*". The second expression is connected with the case-law of the United States on the Sherman Act, according to which the strict prohibition of cartel agreements is mitigated by a "rule of reason" established by legal precedent.

According to, *inter alia*, L. H. Tribe in his American Constitutional Law, 1978 pp. 340-342, the same kind of approach, involving the application of fairly far-reaching criteria, comparable to the Court's case-law on Article 30 of the EEC Treaty, has also been adopted by the Supreme Court in relation to the "inter-State commerce clause", which is itself comparable to Article 30. Thus the principle laid down by the Court in its judgment in Case 7/61 to the effect that "Economically based State regulations have almost invariably been struck down" (op. cit. p. 340) is also valid for American case-law. By adopting an approach which is in my opinion wholly analogous — albeit naturally involving the use of criteria adapted to different circumstances — the Court has, in its decisions concerning in particular Articles 30 and 59 et seq., also mitigated the strict prohibitions contained in those articles by applying a "rule of reason", as formulated for the first time in the *Dassonville* judgment. It is clear from *inter alia*, the judgments of the Court in the *Dassonville* case and in *Rewe* (the "Cassis de Dijon" case), [1974] ECR 649, that the more detailed explanations concerning the rule of reason given by the Court in its case-law are to a large extent derived from Article 36 of the EEC Treaty by analogy, with the extremely important difference that, in the event of mitigation of the basic rule contained in the *Dassonville* judgment where Article 36 is not applicable, the measures involved must apply to domestic and imported products without distinction. Moreover, on the basis of the Court's case-law relating to Article 59 et seq. — where Article 36 does not apply but strictly comparable criteria are none the less used — there can of course be no question of the direct application of the rules of interpretation developed by the Court in relation to Article 36. Rather, it seems to me that a general principle of interpretation is involved in relation to strict prohibitions laid down by provisions of the EEC Treaty. Thus, *inter alia*, grounds of overriding public interest justifying a prohibition, other than grounds dictated by economic objectives, may be reconciled with the requirements of the free movement of goods and services prescribed by the EEC Treaty. The use of the expression "rule of reason" to describe that principle of interpretation strikes me as preferable to the use of expressions "exception" or "constitute an exception" — which were adopted in this connection in my Opinion in Case 6/81 and in paragraph 10 of the Court's decision in the *Commission* v *Ireland* case, respectively, — inasmuch as, in practice, that principle forms a single entity with the prohibition which it mitigates and which is laid down by the Court in paragraph 5 of the decision in the *Dassonville* case. The principle *must* form a single entity with that prohibition also because, according to the Court's case-law concerning Article 36, the EEC Treaty leaves no room for any real exceptions to prohibitions other than those expressly provided for therein, although there is scope for a "reasonable" interpretation of those prohibitions.

In my opinion, the unity of the basic rule and the mitigating rule laid down by the *Dassonville* judgment also emerges clearly in some of the Court's recent judgments, including those in Case 6/81 *Beele* and in Case 220/81 *Robertson*.

of the exceptions contained in Article 36 of the EEC Treaty (as the German Government submits in its written observations), since the interests at issue in the case of legal restrictions imposed on the free gift scheme (in particular, fair trading and consumer protection) can by no means be included amongst the interests exhaustively listed in Article 36. In that respect, I would refer to paragraph 10 of the Court's decision in Case 113/80 *Commission* v *Ireland* [1981] ECR 1625.

In paragraph 3 of this Opinion, I shall examine the restrictions on trade resulting from legislation of the type in question in the light of the case-law of the Court concerning the rule of reason. In my view, the most serious obstacles to be overcome in that regard are the following:

In the *first* place, it is apparent from the legal background, the text of the Law and legal writings, that the Wet Beperking Cadeaustelsel seeks *inter alia* to protect consumers but expressly refrains from promoting fair trading since that branch of the law is governed entirely by the case-law on unlawful acts and omissions (Article 1401 of the Burgerlijk Wetboek [Civil Code]) and by a single specific provision in the Wetboek van Strafrecht [Criminal Code]. [1] The Wet Beperking Cadeaustelsel belongs to the group of laws which seek to guarantee "orderly economic activity". That group covers *inter alia*, according to the written observations of the Netherlands Government, the Uitverkopenwet [Law on Clearance Sales], the Colportagewet [Law on Hawking], and the Wet op het Afbetalingsstelsel [Law on Schemes for Payment by Instalment] and, according to other sources mentioned in the footnote, the Winkelsluitingswet [Law on Shop-Closing Times] and certain provisions of the Vestigingswet Bedrijven [Law on the Establishment of Undertakings]. According to the Explanatory Memorandum to those laws, the Wet Beperking Cadeaustelsel is, from a historical point of view, especially closely related to the development of the legislation on establishment. The successive versions of that Law (1955, 1972 and 1977) were, in particular, closely bound up with the amendments to the legislation on the establishment of retail traders. According to the Explanatory Memorandum to the Law, those amendments led, amongst other things, to the replacement of the original objective, which was the prohibition of the presentation of "unrelated" products as free gifts, by the protection of undertakings "which normally offer as part of their usual range of products the articles offered as free gifts" as the primary objective of the present legislation. The Court will recall that, at the end of the oral procedure, the representative of the Federal Government of Germany expressly dissociated himself from the adoption of an economic justification of that kind for the prohibition of free gift schemes. Nor can the other laws forming part of the legislation which I have mentioned for the promotion of orderly economic activity, any more than the Wet Beperking Cadeaustelsel, be regarded as strengthening the protection afforded to fair competition. All those laws, such as, for instance, the legislation on prices, on

1 — See, in particular, in this connection the "Rapport van de Commissie Ordelijk Economisch Verkeer", The Hague 1967, p. 19 et seq. which throws some light on this matter; the Schuurmans and Jordens Edition of the Law in question (1979), p. 9; and Mulder-Duk, Schets van het Sociaal-Economisch Recht in Nederland, Second Edition, Zwolle 1980, pp. 145, 146 and 150.

agriculture and on the regulation of transport, form part of the legislation on the organization of the market, albeit of a special type of that legislation. The common feature of that type of legislation is that the socio-economic objectives of market organization which it pursues lead in principle to enduring provisions, although that principle does not rule out the adoption of specific implementing decrees which are to a greater or lesser extent discretionary.

The express purpose of this Law therefore raises the question whether in their written observations the Netherlands Government and the Commission were right to treat the Law at issue on the same footing as laws for the protection of fair trading, which are classified in the Court's case-law under the rule of reason laid down by the *Dassonville* judgment and, if they were not, whether it is justified also to bring laws designed to regulate economic activity within that mitigating rule of the basic formula in the *Dassonville* judgment. When I examine that twofold question, I shall explore several possible answers in order to determine whether they are appropriate.

Secondly, the application of the criterion of reasonableness, laid down in paragraph 6 of the *Dassonville* judgment, combined with the principle of proportionality which, according to the case-law of the Court, is intrinsic to that criterion, creates special problems in this case. As regards the requirement of related consumption or use contained in the provision establishing the exception referred to by the national court, it is questionable in particular whether the restrictive effects on trade of that provision, which is clearly intended to limit damage to normal trade in gift articles (the Law's primary objective), may actually be justified by that aim where the articles involved form part of the undertaking's own range of products. The view that the specific requirement of related consumption or use is justified by the purpose of the Netherlands Law, which is to regulate the market, and not by considerations of fair trading or consumer protection, is in my opinion supported by the fact that no such specific requirement is to be found in any of the otherwise comparable exceptions contained in the legislation on free gift schemes adopted by other Member States.

Thirdly, in view of the restrictive effects of trade resulting from the disparities between the relevant laws of the Member States in this field, some account must be taken of the criteria specified by the Court in its case-law, namely that goods are lawfully marketed in another Member State (Case 120/78, paragraph 15 of the decision and the operative part), and the equivalence of the requirements prescribed by another Member State (see, in particular, the Court's recent judgment of 22 June 1982 in Case 220/81 *Robertson).*

Nor did Oosthoek succeed during the oral procedure in demonstrating that Article 34 of the EEC Treaty is also relevant to this case. As the representative of the Netherlands Government repeatedly explained at the hearing and as is also clear from the principle of territoriality in Netherlands criminal law which is applicable in this case, the Netherlands Law in question does not apply to exports of goods or of gifts to other Member States. In so far as it is possible to state that the Netherlands Law none the less consitutes an indirect hindrance to an optimum uniform market strategy for the entire Dutch-

speaking area, that is to say for the Netherlands and Belgium, there can be no question of its leading to a discriminatory restriction on exports of the kind referred to by the Court in the following judgments: Case 53/76 *Bouhelier* [1977] ECR 197; Case 15/79 *Groenveld* [1979] ECR 3409; and Case 155/80 *Oebel* [1981] ECR 1993.

1.2 Course of the procedure

It is clear from the facts established by the Politierechter [magistrate dealing with commercial offences] as described in the judgment making the reference that the only factor which is significant for the purpose of gaining an understanding of the actual circumstances which led to the submission of the question to the Court is the offering of a world atlas as a free gift to subscribers to the Grote Nederlandse Larousse Encyclopedie. That encyclopaedia is imported into the Netherlands from Belgium and, as is apparent from the answer to a written question put by the Court, the extent of such imports is considerable. The other gift schemes whose existence has been established involve the sale in the Netherlands of encyclopaedias produced in that country. The court making the reference does not therefore need to consider the application of the prohibitions contained in the Law in question to those free gift schemes in the light of Articles 30 and 34 of the EEC Treaty, in view of the fact that, as a result of the Court's decided cases which I have cited and of the limited territorial scope of the Law at issue, it is not possible to speak of a prohibited indirect restriction on *exports* either.

For a summary of the arguments put forward in the numerous written observations and other relevant factors, I would refer the Court to the Report for the Hearing. During the oral procedure, however, Oosthoek, the Netherlands Government, the Government of the Federal Republic of Germany and the Commission further clarified and supplemented several points in their written observations. I shall refer to those observations in the course of my Opinion, in so far as is necessary.

1.3. Arrangement of the remainder of the Opinion

In paragraphs 2 and 3 of my Opinion I shall, as I have already stated, examine the relevant provisions of the Netherlands Law in the light of the basic rule and of the mitigating rule laid down by the Court in paragraphs 5 and 6 of the decision in the *Dassonville* case, as subsequently clarified by the Court in its later decisions, in so far as they are relevant to this case. In paragraph 4 of my Opinion I shall summarize my views, make a number of additional observations and then give a comprehensive answer to the question submitted to the Court.

2. Restrictive effects on imports of the statutory restrictions imposed on the free gift scheme

As is also apparent from the Report for the Hearing, the Governments of the Netherlands, the Federal Republic of Germany and Denmark deny that laws such as that at issue have a restrictive effect on imports. The main argument put forward by all three governments is that the measures involved affect domestic and imported products without distinction. According to the Netherlands Government, their effect, if any, on trade between Member States is the result of disparities between national laws. Furthermore, according to the Governments of Denmark and the Federal Republic of Germany, it is not the importation of, but only the manner

of trading in, the goods which is subject to restrictions.

Those arguments must be rejected in the light of, *inter alia*, the following: paragraph 5 of the Court's decision in the *Dassonville* case; the Court's numerous judgments concerning legislation on prices which is applied to domestic and imported products without distinction; paragraph 8 of the Court's decision in Case 120/78 *REWE* [1979] ECR 649 (the "Cassis de Dijon" case); the Court's judgment in Case 152/78 *Commission* v *France* [1980] ECR 2299; paragraph 10 of the Court's decision in Case 113/80 *Commission* v *Ireland* [1981] ECR 1625, summarizing its previous decisions; and the Court's recent judgments in Case 6/81 *Beele* and Case 220/81 *Robertson*. Case 152/78 is of particular significance in these proceedings only in so far as, in that instance too, a restriction on certain forms of advertising and not a restriction on trade in the goods concerned was at issue.

In the Court's recent judgment in Case 75/81 *Blesgen*, reference was again made to the judgment in Case 152/78 in order to demonstrate that legislation on the sale of certain products, even though it does not directly concern the regulation of imports may, according to the circumstances, adversely affect the possibility of importing those products from other Member States. The Court took the view, in paragraph 9 of its decision in that case, that ultimately the decisive factor precluding the application of Article 30 of the EEC Treaty was that a legislative provision was involved "concerning only the sale of strong spirits for consumption on the premises in all places open to the public and not concerning other forms of marketing the same drinks". Such a measure which, moreover, is applicable to domestic and imported products without distinction, has, according to the same paragraph of that decision, "no connection with the importation of the products and for that reason is not of such a nature as to impede trade between Member States".

In paragraph 10 of its decision in Case 113/80 *Commission* v *Ireland*, which has already been referred to several times, the Court summarized the relevant case-law in these terms: "In the absence of common rules relating to the production and marketing of the product in question it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory *subject, however, to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade*" and that *"it is only where national rules, which apply without discrimination to both domestic and imported products,* may be justified as being necessary in order to satisfy imperative requirements relating in particular to ... the fairness of commercial transactions and the defence of the consumer *that they may constitute an exception to the requirements arising under Article 30"*.

For the examination of this case in the light of the parts of that summary of the Court's case-law which I have stressed, it is necessary to consider whether, regard being had to the circumstances, it is possible to speak of an indirect restriction on intra-Community trade. I agree with both Oosthoek and the Commission that such a restriction does indeed exist. By expressly laying down the condition of related consumption or use, the Wet Beperking Cadeaustelsel restricts the possibility of conducting

uniform advertising campaigns, authorized in various Member States, by means of free gifts, as in this case, in connection with the sale of products imported from those other Member States. Since, from a commercial point of view, it is obviously in the interests of the undertakings concerned that such an advertising campaign, authorized in various other Member States and, in particular, also in Belgium, should be conducted in a uniform manner, it follows that the importation into the Netherlands of the goods offered for sale is at the same time perceptibly, albeit indirectly, restricted. A crucial difference between this case and the position in the *Blesgen* case is, in my opinion, in particular, that in this instance not *one* specific channel of retail trade but *all* such channels are affected by the rules in question. In cases other than that here under consideration, a statutory curtailment of the free gift scheme would perhaps restrict the import of products most where a gift voucher is included in the packing of the products, which is identical for every country in which they are sold, but where the vouchers do not at the same time comply with the divergent requirements of all those countries.

For the sake of completeness, I should like to add that in a case such as this, paragraphs 5 and 6 of the decision in Case 8/74 *Dassonville*, paragraph 8 of the decision in Case 120/78 *Rewe* and paragraph 10 of the decision in Case 113/80 *Commission* v *Ireland* would also appear to rule out a contrary conclusion on the basis of Commission Directive 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17). During the oral procedure, the Agent for the Commission also came to the conclusion that Directive 70/50/EEC could not lead to any other outcome in this case.

3. Grounds justifying statutory restrictions imposed on the free gift scheme

On the assumption that rules of national law are involved which are applicable to domestic and imported products without distinction, most of the national rules concerning the gift scheme may, in line with the conclusion drawn by the Court in paragraph 10 of its decision in the *Commission* v *Ireland* case, in principle be justified only by "imperative requirements relating in particular to ... the fairness of commercial transactions and the defence of the consumer".

However, as I have already stated in detail in the introduction to my Opinion, and as is also apparent from the Explanatory Memorandum to the Law in question and from the written observations submitted by the Netherlands Government and by the Commission, the difficulty in this case is that the relevant Netherlands legislation is not based on the additional objective of the protection of fair trading but, first and foremost, on that of the protection of undertakings which usually offer the gifts as part of their normal range of products. The requirement of related consumption or use referred to in the question submitted by the national court cannot be justified, at least by this first express objective of the Law, if products are involved which, as in this case, happen to form part of the undertaking's *own* normal range of products. As I argued in the introductory considerations to my Opinion, the reason for the special requirement concerning related consumption or use appears to be none the less in this first express objective of the Law and not in the second objective which is to protect consumers. If, therefore, that view is correct — which ultimately only the national court can decide — the question

referred to the Court of Justice should be answered in the negative, if the Court considers the manner in which the objectives justifying the restriction are classified under national law to be decisive.

It would be impossible to escape that conclusion even if the Court were prepared in this connection to add considerations of "orderly economic activity", as in this case, to the accepted grounds on which restrictive effects on trade may be justified. Quite apart from the fact that the latter concept would, in the event of the application of the Court's judgment in Case 7/61, provide an unacceptable ground for justification of economic policy,[1] that it exists moreover only in the Netherlands and, finally, that in view of its vagueness there is a risk that it may be extended without limitation to other measures of economic policy restricting imports, with unforeseeable consequences in the context of these proceedings, that path cannot in my opinion lead to any conclusion other than that which has been reached. Even if such an extension of the grounds justifying the restriction is accepted in principle, the fact none the less remains that the condition of related consumption or use, in respect of products belonging to an undertaking's own range, cannot be based on it, for the reasons which I have just given. Accordingly, the Court need not consider that alternative in its judgment.

Another possible solution may lie in the fact that the grounds justifying the restriction are classified primarily not under national law but under Community law. In order to prevent any abuse of the grounds of justification recognized by the Court in its case-law, that solution in my opinion is in general to be preferred. Since the legislation on free gift schemes is regarded as forming part of the law on unfair competition, *inter alia* according to the detailed study of comparative law carried out by Ulmer and others in 1968 (Het Recht inzake Oneerlijke Mededinging in de Lid-Staten der Europese Gemeenschappen, Part I, Netherlands Edition, p. 196 et seq.), such legislation should, regardless of the conflicting national descriptions of its objectives, be regarded as being governed in principle by Community law on and justified on grounds of the protection of fair trading and consumer protection, which have already been recognized by the Court in its previous decisions. However, as far as the specific question submitted to the Court is concerned, that solution in itself does not resolve the problem that, according to the requirement of reasonableness specified in paragraph 6 of the Court's decision in the *Dassonville* case, as amplified by the Court in subsequent decisions, an objective justification as in this present case is not by itself enough. The specific measure restricting trade must, in addition, be "reasonable" or, according to the wording of paragraph 8 of the Court's decision in the *Rewe* case, it must be "necessary" for the attainment of the objective of the measure, which is in principle justified. It is apparent from the Court's later decisions that, amongst other things, a requirement of proportionality is involved, in other words the requirement that the restrictive effect on trade should go no further than what is strictly required by the objective which is acceptable in principle, and the concomitant duty also to recognize compliance with the measures of the exporting country as sufficient if those measures are to be regarded as equivalent in the light of the objectives

1 — Although in its judgment in Case 7/61 *Commission* v *Italy* [1961] ECR 671 the Court merely established that, unlike Article 226, Article 36 covers (exclusively) cases of a non-economic nature, the rationale of that decision leads in my opinion to the consequence that in connection with the rule of reason in relation to Article 30 only imperative requirements of general interest and non-economic in nature can have a function. The Court's extensive case-law concerning the rule of reason in my view confirms the truth of that assumption.

concerned. In the present case, it seems to me, in particular, that compliance with the requirement of proportionality may on the grounds referred to earlier constitute an obstacle even if this solution is adopted; however, the question of the application *in concreto* of the Court's judgment must be left to the national court.

Therefore, in my opinion, the question referred to the Court cannot, without qualification, be answered in the affirmative on the basis of any of the alternative solutions which have been considered and, furthermore, some allowance must be made in every solution for consideration of the specific statutory provision in the light both of the objectives of legislation on free gift schemes which are regarded by the Court as acceptable and of the other criteria established by the Court in its case-law. Moreover, I am of the opinion that in its answer the Court will in principle have to proceed on the basis of the third solution which I have described.

4. Final observations and conclusion

In my examination, I came to the conclusion in the first place that legislation on free gift schemes, such as that at issue in this case, may indeed result in indirect restrictions on imports and that those restrictions, according to the case-law of the Court, entail in principle the application of Article 30 of the Treaty.

Secondly, I concluded that the requirement of related consumption or use, which is of crucial significance in the question referred to the Court, may not without qualification be regarded as justified either on grounds of the protection of fair trading and of consumer protection, which have been recognized by the Court in its case-law, or by the express objectives of the Wet Beperking Cadeaustelsel; hence there is no need to consider whether orderly economic activity — the other basic objective of that Law — should also be added to the list of grounds justifying such legislation which has so far been elaborated by the Court.

I would only add to this summary of my observations that, in its answer to the question raised, the Court should obviously not focus its attention in particular on the Netherlands Law, still less on the specific circumstances of the case which led to the submission of this question. The answer to the question should be worded in more abstract terms and the references in the question to certain Member States and to their legislation should be disregarded. That is an additional argument in favour of the classification of the grounds justifying the legislation in question on the basis of Community law rather than national law. Furthermore, the abstract formulation required reinforces the need to allow the national court a measure of discretion in applying the Court's answer to the case at issue.

On the basis of the foregoing considerations, I am of the opinion that the question referred to the Court should be answered as follows:

As long as there are no rules of Community law in the matter, Article 30 of the EEC Treaty does not prohibit the statutory restriction by a Member

State of free gift schemes which is applicable to domestic and imported products alike and which makes the offering of free gifts as a means of sales promotion, in the event of the inapplicability of other exceptions to the prohibition on principle laid down by such legislation, subject to the condition that a relationship must exist between the consumption or use of the gift and the product which constitutes the basis for offering it, provided that the application of that condition does not have the effect of restricting imports any more than is strictly required either by the objective of the protection of fair trading or by that of consumer protection. Any other objectives of such a condition may, without prejudice to the question whether they may be justified under Community law, in no circumstances lead to restrictions on imports, which are not essential to those objectives.