limits laid down by Community law. It is for the Court, which interprets Community law in the final instance, and for the national courts, which reach their decisions on the basis of that interpretation, to ensure that those limits are observed.

2. It would not be compatible with Article 30 of the Treaty and the objectives of a common market for national legislation to be allowed to restrict a generic term to one national variety of a product alone to the detriment of other varieties produced, particularly in other Member States, by compelling the producers of the other varieties to use appellations which are unfamiliar to or less esteemed by the consumer.

3. In a system of a common market interests such as fair trading must be guaranteed with regard on all sides for the fair and traditional practices observed in the various Member States.

   A stipulation that national rules fixing the minimum alcohol content of a traditional beverage are to be complied with by products of the same kind imported from another Member State is not an essential requirement of fair trading, and accordingly falls within the prohibition in Article 30 of the Treaty of measures having an effect equivalent to quantitative restriction on imports, if those products are lawfully and traditionally manufactured and marketed under the same appellation in the Member State of origin and the purchaser is provided with proper information. If in such circumstances the free movement of imported goods were to be subject to the condition that there should first exist Community rules, the fundamental principle of a unified market and its corollary, the free movement of goods, would be rendered meaningless.

   The fact that imported products may have a price advantage as a result of the application of national taxes and excise duties which are proportional to the alcohol content is irrelevant in this regard.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN delivered on 11 July 1985

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling under Article 177 of the EEC Treaty dated 18 June 1984 by the Gerechtshof (Regional Court of Appeal), Arnhem, in criminal proceedings pending before that court against the company Miro BV.

The Netherlands regulation on the Appellation of Gin ('Verordening Benaming

van Jenever') provides, at Article 1 (4), that 'gin' shall mean a colourless to light yellow alcoholic beverage made from certain specified ingredients, 'which has an alcohol content of at least 35%'. Article 2 (1) of that regulation provides: 'It shall be forbidden to use in respect of a distilled beverage which does not meet the definition laid down in Article 1 (4) the appellation "jenever" or "genever", "Schiedamse jenever" (genever), "Schiedam", "Schiedammer", "Holland gin", "Friesche jenever" (genever), "graanjenever" (genever), "Hollandse jenever" (genever), "Oude Klare" or any other similar appellation which may reasonably induce purchasers to believe that a distilled beverage is gin'. Article 3 of the regulation provides that infringements of Article 2 (1) shall be punishable offences. The regulation was adopted on 22 August 1979 and came into force on 12 February 1980.

In May 1983 Miro BV (hereinafter, 'Miro'), a company which runs a number of supermarkets and off-licences in the Netherlands, started to import into the Netherlands gin made in Belgium with an alcohol content of 30%. The gin imported by Miro was made by a Belgian company called 'Gist en Spiritusfabrieken Bruggeman NV' in Ghent. It bears the trademark 'Nolens' which comes from a Belgian distillery of that name in Hasselt whose trademarks and manufacturing processes now belong to Bruggemans. The bottles of this gin are clearly labelled 'Nolens Supra Hasselt Jonge Jenever/ Genievre'. In smaller characters the labels also bear the following information: '30% Vol.', ' Inh./Cont. 1l', 'NV G. S. F. Bruggeman SA B-9000 Gent Grauwpooort 1', 'Verre Gratuit/Geen Statiegeld'. The label shows in letters and figures which are clear that the gin is made in Belgium and that it has an alcohol content of 30%. At the hearing, counsel for Miro produced to the Court a copy of a poster which, he said, was used by Miro in advertising the product. The poster, which is red and white, bears a facsimile of the label of the gin bottle and the words 'Import uit België! (imported from Belgium!) Nolens Jonge Jenever. 30% alcohol, 1 litre' along with the price at which Miro was selling it. Once again the lettering is perfectly clear.

On 17 October 1983 Miro BV was charged 'with having used on or about 16 May 1983 in the commune of Nijmegen the appellation "Nolens Jonge Jenever" (30% vol.) for a distilled drink within the meaning of Article 1 (1) of the regulation on the Appellation of Gin which did not comply with the definition of gin as laid down in Article 1 (4) of that regulation, it being a similar appellation, within the meaning of Article 2 (1) of the regulation, which could reasonably induce purchasers to believe that the distilled drink was gin, the accused having that drink, the alcohol content of which was less than 35%, in stock for the purposes of sale or at any rate present at its off-licence at 61 St Jacobslaan, Nijmegen'.

On 7 November 1983 the Economische Politierechter (magistrate dealing with commercial offences) at the Arrondissementsrechtbank (District Court), Arnhem, upheld this charge and gave judgment against Miro. On 16 November 1983 Miro appealed to the Gerechtshof (Regional Court of Appeal), Arnhem, on the grounds that the application of Article 2 of the Dutch regulation to the drink in

question constituted a measure having an effect equivalent to a quantitative restriction on imports prohibited by Article 30 of the EEC Treaty. The Procureur-Generaal to the Gerechtshof accepted that the application of the regulation to the product in question had an effect equivalent to a quantitative restriction on imports but contended that its application was justified by mandatory requirements of consumer protection and fair trading. In its order for reference the Gerechtshof assumed that the label provided sufficient indication that the product originated in Belgium with an alcohol content of 30%. It found that it had not been established that consumers had been confused or misled to any appreciable extent. In view of the label in question and of the price of the product the Gerechtshof considered it unlikely that there was any risk of consumers confusing to a significant extent 'Nolens Jonge Jenever' from Belgium having an alcohol content of 30% with 'Dutch' gin having an alcohol content of 35% or more and a higher price, and that in those circumstances there appeared for the time being to be no mandatory requirement to protect consumers which would have to be ranked higher than the requirements of the free movement of goods which was one of the foundations of the EEC. When considering the alternative justification relied on, the requirements of fair trading, the national court accepted that distillers in the Netherlands, who may not sell gin on the Netherlands market with an alcohol content of less than 35%, would be in a worse competitive position than distillers established in Belgium if the latter could market gin in the Netherlands with a lower alcohol content and thus pay correspondingly less excise duty and VAT. The decisions of this Court were said not to give immediate support for the argument that such a situation violated the principle of fair trading to such an extent as to justify the prohibition in question. Since, however, this Court had not yet delivered a ruling on the point, the Gerechtshof requested the Court to give a ruling on the following question regarding the interpretation of Article 30 of the EEC Treaty:

'Assuming that:

(1) legislation exists in Member State A requiring a certain kind of alcoholic beverage, referred to below as gin, to have a minimum alcohol content of 35% and making it a punishable offence for the appellation "gin" to be used for "gin" having a lower alcohol content;

(2) in 1982 sales of gin in Member State A amounted to approximately 45% of the total market in distilled beverages;

(3) in Member State A the difference in excise duty and VAT on one litre of distilled alcohol of 30% strength and one litre of 35% strength totalled on the sale to the consumer HFL 1.62 (and since 1 February 1984 amounts to HFL 1.89);

(4) in Member State B there is no legislation in force prescribing a minimum alcohol content for gin;

(5) there are still no common rules in the EEC governing the production and sale of gin;

must the extension of Member State A's prohibition to gin having an alcohol content of 30% lawfully produced and marketed in Member State B as a result of which sales of the drink in Member State A are hindered or barred then be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 of the EEC Treaty?'

As to assumption No 4 in this question, it should perhaps be mentioned that, after the relevant events, Belgium introduced legislation prescribing 30% as the minimum alcohol content for gin: Royal Decree of 6 June 1984, 'Moniteur Belge' 15 August 1984, p. 11519. It appears that this Decree merely gives force of law to established custom. Nothing turns on it in this case since it is accepted that it was lawful to produce and market gin with an alcohol content of 30% under the name 'jenever' in Belgium prior to the Royal Decree.

Miro, Belgium and the Commission submit that the question should be answered in the affirmative. The Federal Republic of Germany, Italy and the Netherlands submit that it should be answered in the negative.

The submissions in favour of answering the question in an affirmative sense stress that gin having an alcohol content of 30% is lawfully produced and marketed in Belgium as 'jenever' and has been for many years. Jenever has indeed been produced in Belgium for centuries. Accordingly the Court's decision in Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*') [1979] ECR 649 is relevant. Moreover, no Member State can have a monopoly over the descriptive name of a product (Case 193/80 *Commission* v *Italy* [1981] ECR 3019). The interests of consumers are sufficiently protected for the purposes of Community law by the statements on the label of the product concerned. As regards the question of fair trading, it is argued that the fact that the Netherlands excise duty and VAT affect the price of products does not amount to unfair competition but is merely part of the objective market conditions in which the goods are sold. Unfair competition can only result from the conduct of importers or distributors.

Those who support a negative reply to the question rely on the need to protect the consumer. The labelling of bottles cannot guarantee the protection of consumers in restaurants and bars. To allow gin with an alcohol content of 30% onto the Netherlands' market would destroy the basis of the Netherlands' quality policy and undermine the reputation of Dutch gin which has for centuries had an alcohol content of 35%. As regards the mandatory requirements of fair trading, it is said that Belgian and Dutch gin can be substituted for each other. The lower alcoholic strength at which Belgian gin can be made gives it a competitive advantage in that, apart from being cheaper to manufacture, it also attracts lower excise duty and lower VAT. The only way to ensure fair trading is to prohibit the use of the names as provided in the regulation.

It is to be noted that the Community has not yet adopted any common rules relating to the production and marketing of gin. A Commission proposal for a Council regulation laying down general rules on the definition, description and presentation of spirituous beverages and of vermouths and other wines of fresh grapes flavoured with plants or other aromatic substances was submitted to the Council on 22 June 1982 (Official Journal 1982, C 189, p. 7) but has not so far been adopted by the Council. In the absence of such common rules, it is for the Member States to regulate all matters

relating to the production and marketing of gin in their own territory (paragraph 8 of the *Cassis de Dijon* decision). They may, however, only do so consistent with the provisions of the Treaty.

The regulation in this case does not, as did the German law in the *Cassis de Dijon* case, amount to a total prohibition on importation. It only prohibits the use of certain names for gin of less than the prescribed alcoholic strength. That still, in my view, constitutes an actual or potential, direct or indirect, restriction on imports which, if it cannot be justified, constitutes a measure of equivalent effect to a quantitative restriction within the meaning of Article 30.

No reliance is placed, or in my view on the material available to the Court, can be placed, on Article 36 of the Treaty.

The question is, therefore, whether this obstacle to the free movement of goods 'resulting from disparities between the national laws relating to the marketing of the products in question' must be accepted in that it is necessary 'in order to satisfy mandatory requirements relating in particular to . . . the fairness of commercial transactions and the defence of the consumer' (*Cassis de Dijon* paragraph 8). For this purpose it does not seem to me to matter whether the percentage of sales of gin in the Netherlands in relation to the total market in distilled beverages is that stated in assumption No 2 in the question, which is apparently in issue between the parties.

What is necessary to protect the consumer in any given case where proceedings are before a national court is in my view for the national court to decide in the light of all the facts, subject to the judgment of this Court as to what as a matter of law is capable of falling within such a justification.

In Case 27/80 *(Criminal proceedings against Anton Adriaan Fietje* [1980] ECR 3839) the Court held that

'The extension by a Member State of a provision which prohibits the sale of certain alcoholic beverages under a description other than that prescribed by national law to beverages imported from other Member States, thereby making it necessary to alter the label under which the imported beverage is lawfully marketed in the exporting Member State, is to be considered a measure having an effect equivalent to a quantitative restriction, which is prohibited by Article 30 of the Treaty, in so far as the details given on the original label supply the consumer with information on the nature of the product in question which is equivalent to that in the description prescribed by law'.

In the present case it is plain that gin of 30% strength can be lawfully marketed in and exported from Belgium under the name jenever, and indeed can be made in the Netherlands for export. I read the reference as meaning that the Gerechtshof was satisfied that the label gave a clear indication of the origin and alcoholic strength of the product. The label and the lower price made it unlikely that a customer would be confused. Taking the statements in the reference as a whole I understand the Gerechtshof to have rejected the contention that consumer protection justified the restriction on imports of Belgian gin as jenever with an alcoholic strength of 30%.

In my opinion the Gerechtshof was entitled to reach that conclusion. On the facts stated by the national court, I would, if the question were for this Court, reach the same conclusion. In the ordinary way adequate labelling is to be regarded as a sufficient protection of the consumer where goods lawfully marketed and exported from one Member State are imported into another. There may be exceptional cases where special local factors make even clear labelling an inadequate protection for the consumer. I do not see that any such factors exist in the present case.

I do not read the judgment in Case 58/80 *Dansk Supermarked* v *Imerco* [1981] ECR 181 (where the Court accepted that the marketing of goods may be prohibited if the conditions on which they are sold constitute an infringement of the marketing usages considered proper and fair in the Member State of importation, so long as those usages related to 'an offer or exposure for sale on the basis of circumstances distinct from the importation itself') as cutting down the principle that the consumer and the trader may be protected by adequate labelling of imported products.

There is, it is clear, in the Community a difference between the alcoholic strength of certain spirits such as gin, rum and whisky. So long as he is told what he is buying, it is for the consumer to decide which strength he prefers. Gin at 30% alcoholic strength seems to me clearly to be within the range of what average consumers would consider to be gin. What the position would be if a trader sought to sell as 'jenever' or as 'gin' a product of 15% strength does not arise in this case and does not need to be considered. Consumer resistance may ensure that it never needs to be considered.

In this case, as not uncommonly, what is relied on as being necessary for the defence of the consumer is to some extent also relied on as being necessary to achieve the fairness of commercial transactions. If the purchaser buys Belgian jenever thinking it is Dutch jenever, the manufacturer of the latter is prejudiced. It is said that he loses the advantages of the reputation which his traditional product has built up over the years. The only way to protect his trade is to ban the name. In my view the answer is the same. If labelling is adequate protection for the consumer, it cannot be justified to prohibit the use of the name (lawfully used in the exporting State) in the importing State in the interests of protecting the trader from rival products.

As the Court held in Case 16/83 (*Criminal proceedings against Karl Prantl* [1984] ECR 1328, paragraphs 26 to 30) a Member State cannot set up its traditional usages in relation to the manufacture of a certain product as an obstacle to imports of similar products from another Member State, where those products have also been manufactured in accordance with practices fairly and traditionally employed in the exporting Member State.

It is also said that the sale of the Belgian product violates the fairness of commercial transactions in that the product is not only cheaper because of its lower alcohol content, but it attracts lower *ad valorem* taxes or duties and thereby becomes

relatively cheaper still. This puts the Netherlands product, it is said, at a price disadvantage, and thereby justifies the prohibition of the use of the prescribed names in respect of the Belgian product.

This argument I do not accept. The Court has made it clear many times that the exceptions set out in Article 36 of the Treaty 'refer to matters of a non-economic nature' (Case 95/81 *Commission* v *Italy* [1982] ECR 2187, e.g. also Case 7/61 *Commission* v *Italy* [1961] ECR 317). The mandatory requirements justifying obstacles to intra-Community trade referred to in *Cassis de Dijon* (at paragraph 8) must equally in my view be of a 'non-economic nature'. If a Member State could impose restrictions on imports (whether by total prohibition or by requiring different names to be used) on the footing that imported products were cheaper or attracted a lower amount of *ad valorem* tax, competition and the principle of free movement of goods would be wholly undermined. Such arguments are entirely economic. The mere fact that imported goods are cheaper or attract for that reason a lower amount of *ad valorem* tax cannot constitute an unfair or improper act (within the meaning of *Dansk Supermarked*) or justify restrictions or prohibitions on imports in the name of the fairness of commercial transactions within the meaning of the *Cassis de Dijon* decision.

It seems to me that rules relating to the fairness of commercial transactions cover measures of the kind, though not necessarily limited to those, suggested by the Commission — i.e. the creation of confusion, the denigration of competitors, misleading advertising, the disclosure of secrets or the corruption of employees. None of those is present in this case.

Accordingly, I am of the opinion that the question referred by the Gerechtshof, Arnhem, should be answered along the following lines:

The extension of one Member State's prohibition on using certain appellations for a spirituous beverage having an alcohol content of less than a fixed amount to imports of that beverage having an alcohol content of less than that amount which are lawfully produced and marketed under the same appellation in another Member State, constitutes a measure having an effect equivalent to a quantitative restriction contrary to Article 30 of the EEC Treaty.

Miro's costs fall to be dealt with by the national court. The costs of Belgium, the Federal Republic of Germany, Italy, the Netherlands and the Commission are not recoverable.