OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 5 MAY 1981 [1]

Mr President,
Members of the Court,

1. By an application submitted on 28 April 1980 the Commission instituted proceedings against Ireland under the second paragraph of Article 169 of the EEC Treaty on the ground that it had infringed Article 30 of the Treaty. As a result the Court is being called upon to consider certain provisions of Irish law, which affect the importation and sale of articles of jewellery produced abroad, in order to decide whether or not they are compatible with the Community prohibition against measures having an effect equivalent to quantitative restrictions on imports.

It should be observed that by Statutory Instruments Nos 306 and 307 of 1971, which came into force in 1972, Ireland made it compulsory for merchandise marks to be stamped on imported articles of jewellery made of precious metal or base metal and depicting scenes, emblems or other motifs which suggest that the articles are souvenirs of Ireland. The importation and exposure for sale of articles of this kind manufactured abroad is permitted only if they are clearly marked with an indication of their country of origin or the word "foreign" or any other words designed to indicate that they were produced outside Ireland.

By a letter dated 9 December 1975, the Commission requested the Irish Government to provide it with any information which might help it to establish whether the aforesaid provisions constituted a measure having an effect equivalent to a quantitative restriction. That request failed to evoke any response from the Irish Government. Accordingly, by a second letter dated 9 March 1977, the Commission informed the Irish Government that to maintain those provisions in force was, in its opinion, contrary to Article 30 of the EEC Treaty and could not be justified under Article 36. The Irish Government was therefore asked to give assurances that it had taken appropriate steps "to ensure that marking requirements in Ireland, particularly with respect to articles of jewellery with Irish motifs or characteristics, are in conformity with the relevant provisions of Community law." Once again the Irish Government failed to reply with the result that the Commission considered it necessary to reiterate, in a third letter dated 8 May 1978 and signed by Mr Davignon, a Member of the Commission, the views expressed in its previous letter of 9 March 1977.

This time the Irish Government defined its position (in a letter dated 7 July 1978) by contending that the disputed orders were in conformity with Article 30 of the Treaty in that their purpose was to protect the consumer. However, this argument failed to sway the Commission which decided on 19 March 1979 to deliver a reasoned opinion under Article 169 declaring that, by maintaining the two orders in force, Ireland had failed to

1 — Translated from the Italian.

fulfil its obligations under Article 30 of the Treaty and requesting it to take within two months the necessary measures to bring its legislation into line with the requirements of Community law.

In view of Ireland's failure to comply with that request, the Commission submitted the application opening these proceedings.

2. In the first place, it is necessary to establish whether the Irish legislation described above hinders intra-Community trade and clashes in particular with Article 30 of the EEC Treaty. If the answer to that question is in the affirmative, it will then be necessary to determine whether the legislation comes within the scope of Article 36 or can at any rate be justified by one of the general requirements (including consumer protection) which the Court has considered capable of cancelling out the prohibition contained in Article 30.

I have already stated that the two Irish orders require foreign manufacturers to stamp every article with an indication of its country of origin or at least to indicate that it comes from abroad.

For the purposes of exposure for sale Statutory Instrument No 306 stipulates that the prescribed indication must also be marked on any label attached to the article or on the container in which it is packed. Statutory Instrument No 307 stipulates that the mark borne by the imported product must be indelible (as well as conspicuous and legible). These provisions undoubtedly impose on foreign manufacturers and on importers discriminatory requirements which result in particular in additional costs. The lower the unit cost per product the greater will be the effect on the total cost of individual products. Bearing in mind the wide commercial distribution of base metal souvenirs, in most cases the cost of marking the articles will be proportionally higher and thus lead to an appreciable increase in the total cost. Furthermore, the value (or at any rate the appeal) of an article bearing a mark which must be conspicuous is undoubtedly inferior to that of a similar article without such a mark, namely in the present case, home-produced souvenirs. The effect of these measures is to restrict the flow of the articles in question to Ireland and thus to place Irish manufacturers in a privileged position. Moreover, the Irish Government itself appears to be well aware of the fact that the disputed legislation leads to discrimination on the Irish market between domestic and foreign producers, contending merely that this difference in treatment is justified by the requirement that consumers and producers alike must be protected against unfair trading practices. In conclusion, therefore, there seems to be no doubt that the provisions of Statutory Instruments Nos 306 and 307 of 1971 have an effect equivalent to quantitative restrictions on imports and thus constitute measures which Ireland was obliged to abolish by 1 January 1975 at the latest under the second paragraph of Article 42 of the Act of Accession.

3. In my Opinion of 29 May 1980 in Case 788/79 *Gilli and Andres* [1980] ECR 2071, I had occasion to point out that the Member States have not, despite

the prohibitions contained in Articles 30 and 34 of the EEC Treaty, been entirely deprived of the right to adopt, subject to certain conditions, provisions which hinder, directly or indirectly, intra-Community trade. In this connexion, I referred both to Article 36 of the Treaty and to earlier decisions of this Court, which has accepted that restrictive national measures are in conformity with Community law where they are "necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer" (this sentence is to be found in the judgment of 20 February 1979 in Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, which was followed by the Court in its decision of 26 June 1980 in *Gilli and Andres*). Even beyond the circumstances specified in Article 36 of the EEC Treaty, the Court has recognized that national rules are lawful, notwithstanding the prohibitions contained in Article 30 and 34, on condition that they serve "a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community" (paragraph 14 of the decision in the above-mentioned judgment of 20 February 1979 in *Rewe*).

In the light of this, the Irish Government cannot be reproached for having sought grounds which fall outside the scope of Article 36 in order to justify the aforesaid legislation when it contends that the purpose thereof is to protect the consumer and ensure fair trading. The Court is however empowered and obliged to establish whether this justification is founded on objective grounds and, more particularly, whether the measures adopted and maintained in force by the Irish Government are really necessary to protect the consumer and guarantee a standard of fairness in trade in the products under consideration.

In support of its argument, the Irish Government has asserted that articles of jewellery which are in the nature of souvenirs of a particular country are perceived by the consumer as having been manufactured in that country. If, on the other hand, they are produced abroad and subsequently imported, prospective purchasers should be informed of their origin, failing which they would be misled, in the sense that they would be exposed to the risk of buying foreign goods in the firm belief that they had been manufactured on the spot; hence the need, in order to protect consumers on the one hand and domestic producers on the other, for a mark to be affixed to all articles of jewellery manufactured abroad which hold themselves out as being "souvenirs of Ireland".

I cannot share this point of view for various reasons. To begin with, it is not correct to state that the essential characteristic, or at any rate the principal attraction of souvenirs consists in their having been produced on the spot. A souvenir, according to the dictionary, is an article which recalls an object, a place or an event either by virtue of what the

article itself represents (for example, a reproduction of a monument or of a sight of outstanding natural beauty) or by virtue of the place where the article was purchased or for both these reasons. In the present case, the disputed provisions concern a particular type of souvenir, namely articles which are generally sold to tourists and are tokens of remembrance of a particular place visited by them. In my opinion, a tourist is not induced to purchase an article of this kind by the belief that it has been manufactured on the spot for it is a well-known fact that souvenirs are frequently manufactured elsewhere (for example, the vast number of reproductions of the Eiffel Tower or the Statue of Liberty or even the countless miniatures of Venetian gondolas!). The essential characteristic of souvenirs which invests them with the power to evoke and recall places which have been visited lies particularly in the pictorial representations which they incorporate and in the fact that they are purchased on the spot. To require imported products to bear a mark indicating their origin is therefore not necessary in order to protect the consumer or ensure fair trading and the sole effect of such a measure is to restrict, without justification, the free movement of goods.

The position with regard to typical products of local craftsmen is different. In the case of such articles, the purchaser is indeed motivated by the belief that they have been manufactured on the spot and it is clear that any purchaser who was unaware that the articles came from abroad would be a victim of an unfair commercial practice. It follows that in such cases it is doubtless necessary, and therefore legitimate under Community law, to afford the consumer an appropriate degree of protection. However, the disputed Irish provisions concern, as has been seen, articles of jewellery made of precious or base metal which are souvenirs of Ireland and not typical products of local craftsmen. Accordingly, there can be no justification for the requirement to mark the place of origin or an indication of foreign origin on imported products displaying the above-mentioned characteristics.

In any event, even as far as typical products of local craftsmen are concerned, I doubt whether the only way to protect the consumer and ensure fair trading is by means of an indication that an article is of foreign origin. The same objectives could and should be pursued by requiring domestic manufacturers to affix a mark of origin to their products. Any increase in the cost would be offset by the dominant position on the market which is evidently enjoyed by domestic producers and which means that higher profits may be expected.

This point may be enlarged upon: even in the case of the souvenirs covered by the provisions under discussion, it would have been possible, and an easy task, to acquaint the consumer with their place of manufacture by introducing a requirement to affix an indication of origin to domestic products. The Irish Goverment's failure to take such action confirms that it has chosen the system which is most advantageous to domestic products, even as regards the costs involved; for this very reason therefore, it is undeniable that discrimination has

occurred between the treatment accorded to domestic products and that accorded to imported products, giving rise to restrictive effects on intra-Community trade. In fact, even on the assumption that it is necessary to protect consumers from the risk of purchasing souvenirs manufactured abroad, the imposition of a requirement which is out of proportion to the objective pursued — Ireland having preferred to lay down requirements in respect of foreign products rather than stipulate that an indication of origin must be affixed to domestic products — is sufficient to constitute an infringement of the last sentence of Article 36 of the EEC Treaty.

4. On the basis of the considerations discussed above, I propose that the Court grant the applications submitted by the Commission on 28 April 1980 against Ireland and declare that the defendant State has infringed the obligations imposed on Member States under Article 30 of the EEC Treaty by maintaining in force a prohibition of the importation, sale or exposure for sale of articles of jewellery manufactured abroad which bear no indication of their foreign origin.