Judgment of the Court of Justice, Dassonville, Case 8/74 (11 July 1974)

Caption: Preliminary ruling of the Court as regards the free movement of goods and competition (interpretation of Articles 30 to 33, 36 and 85 of the EEC Treaty, now Articles 28, 30 and 81 of the EC Treaty). The Court examines, in particular, the notion of a 'measure having an effect equivalent' to a quantitative restriction on imports.

Source: Reports of Cases before the Court. 1974. [s.l.].

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Judgment of the Court of 11 July 1974 1

Procureur du Roi v Benoît and Gustave Dassonville

(preliminary ruling requested by the Tribunal de Première Instance de Bruxelles)

Case 8/74

Summary

1. Quantitative restrictions — Abolition — Measures having equivalent effect — Concept
(EEC Treaty, Article 30)

2. Quantitative restrictions — Abolition — Measures having equivalent effect — Designation of origin of a product — Protective measures — Admissibility — Conditions
(EEC Treaty, Article 30, 36)

3. Competition — Agreements — Exclusive dealing agreement — Prohibition — Application — Criteria
(EEC Treaty, Article 85)

4. Competition — Agreements — Exclusive dealing agreements — Prohibition — Application — Economic and legal context
(EEC Treaty, Article 85)

1. All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

2. In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation or origin, Member States may take measures to prevent unfair practices in this connexion, on condition that such measures are reasonable and do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

3. An exclusive dealing agreement falls within the prohibition of Article 85 when it impedes, in law or in fact, the importation of the products in question from other Member States into the protected territory by persons other than the exclusive importer.

4. An exclusive dealing agreement may adversely affect trade between Member States and can have the effect of hindering competition if the concessionaire is able to prevent parallel imports from other Member States into the territory covered by the concession by means of the combined effects of the agreement and a national law requiring the exclusive use of a certain means of proof of authenticity.

For the purpose of judging whether this is the case, account must be taken not only of the rights and obligations flowing from the provisions of the agreement, but also of the legal and economic context in which it is situated and, in particular, the possible existence of similar agreements concluded between the same producer and concessionaires established in other Member States. Price differences found to exist between Member States are an indication to be taken into account.

In Case 8/74

Reference to the Court under Article 177 of the EEC Treaty by the Tribunal de Première Instance of Brussels for a preliminary ruling in the criminal proceedings pending before that court between

PROCUREUR DU ROI (Public Prosecutor)

and

BENOÎT AND GUSTAVE DASSONVILLE
and in the civil action between

SA ÉTS. FOURCROY

SA BREUVAL ET CIE

and

BENOÎT AND GUSTAVE DASSONVILLE

on the interpretation of Articles 30 to 33, 36 and 85 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, A. M. Donner, M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh, A. J. Mackenzie Stuart (Rapporteur), Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The Judgment making the reference and the written observations submitted in pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

1. According to the Belgian Law of 18 April 1927, recognition of designations of origin is subject to a declaration to the Belgian Government by the Government concerned that such designations of origin are officially and definitively adopted.

Article 1 of the Royal Decree No 57 of 2 December 1934 provides that it is prohibited, on pain of penal sanctions, to import, sell, display for sale, have possession of or transport for the purposes of sale or delivery, spirits bearing a designation of origin duly adopted by the Belgian Government when such spirits are not accompanied by any official document certifying their right to such designation.

The designation of origin ‘Scotch whisky’ has been duly adopted by the Belgian Government.

2. In 1970, Gustave Dassonville, a wholesaler in business in France, and his son Benoît Dassonville, who manages a branch of his father’s business in Belgium, imported into Belgium ‘Scotch whisky’ under the brand names ‘Johnnie Walker’ and ‘Vat 69’, which Gustave Dassonville had purchased from the French importers and distributors of these two brands of whisky.

On the bottles, the Dassonvilles affixed, with a view to their sale in Belgium, labels bearing in particular the printed words ‘British Customs Certificate of Origin’, followed by a hand-written note of the number and date of the French excise bond on the permit register. This excise bond constituted the official document which, according to French rules, had to accompany a product bearing a designation of origin. France does not require a certificate of origin for ‘Scotch whisky’.

Although the goods were duly imported into Belgium on the basis of the French documents required and cleared for customs purposes as ‘Community goods’, the Belgian authorities considered that these documents did not properly satisfy the objective envisaged by the Royal Decree No 57 of 1934.

3. Following this importation, the Public Prosecutor instituted proceedings against the Dassonvilles before a court of summary jurisdiction. It is alleged that, between the dates of 1 and 31 December 1970, they:

— committed forgeries or assisted therein in affixing to the bottles the aforementioned labels, with fraudulent intent to induce belief that they were in possession, *quod non*, of an official document certifying the origin of the whisky, and made use of forged documents;

— contravened Articles 1 and 4 of the Royal Decree No 57 of 20 December 1934 by knowingly importing, selling, displaying for sale, holding in their possession or transporting for the purposes of sale and delivery, whisky bearing a designation duly adopted by the Belgian Government without causing the whisky to be accompanied by an official document certifying its right to such designation.

4. The limited liability companies Fourcroy and Breuval of Brussels have brought a civil claim in these proceedings and have claimed compensation for the damage which they have allegedly suffered by reason of the illegal importation with which the accused are charged. The latter ought either to have imported the whisky directly from the United Kingdom or to have asked their French suppliers or the British authorities themselves for the official documents before importing this whisky into Belgium.

The two companies are the exclusive importers and distributors of whisky in Belgium, one for 'Vat 69', the other for 'Johnnie Walker'. The Commission was notified within the proper time of the exclusive dealing agreement and it did not institute the procedure laid down by Article 9 of Regulation No 17.

The companies Fourcroy and Breuval consider that, even if the exclusive dealing contracts are not effective against third parties according to Belgian law they have in any case the right, as parties bringing a civil claim, to prevent third parties from importing into Belgium, in an irregular manner the brands of whisky which they have the sole right to distribute.

5. The Dassonvilles claim that the provisions of the Royal Decree No 57, in the way they are interpreted by the Belgian authorities, are incompatible with the prohibition on quantitative restrictions and measures having equivalent effect laid down by Article 30 *et seq.* of the EEC Treaty.

The Royal Decree No 57 renders impossible imports into Belgium from any country other than that in which the goods originate, in the case where the country concerned has no rules similar to those operating in Belgium with regard to certificates of origin. These rules involve a strict walling-off of markets or, at the very least, discrimination or a disguised restriction on trade between Member States, which is not justified by Article 36 of the EEC Treaty.

Secondly, the Dassonvilles consider that the companies Fourcroy and Breuval have brought a civil claim merely to protect their position as exclusive distributors against parallel imports of genuine branded whiskies obtained in a regular manner from foreign concessionaires so as to establish for themselves an absolute territorial protection. In support of their argument, the Dassonvilles cite the case-law of the Court, in particular the Judgment in *Béguelin* (Case 22/71, Rec. 1971, p. 949), according to which an exclusive agreement may be considered to be contrary to the provisions of Article 85 of the Treaty where the concessionaire can prevent parallel imports from other Member States into the territory covered by the concession by means of the combined effect of the agreement and a national law on unfair competition.

6: By Judgment of 11 January 1974, the Belgian court referred to the Court of Justice the following questions:

'1. Must Articles 30, 31, 32, 33 and 36 be interpreted as meaning that a national provision prohibiting, in particular, the import of goods such as spirits bearing a designation of origin duly adopted by a national government where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation, must be considered as a quantitative restriction or as a measure having equivalent effect?

2. Is an agreement to be considered void if its effect is to restrict competition and adversely to affect trade between Member States only when taken in conjunction with national rules with regard to certificates of origin when that agreement merely authorizes or does not prohibit the exclusive importer from exploiting that rule for the purpose of preventing parallel imports?'

I — Procedure

The Judgment making the reference was lodged at the Registry of the Court on 8 February 1974.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on behalf of the Dassonvilles by Roger Strowel, advocate at the Cour d'Appel of Brussels, on behalf of SA Fourcroy and SA Breuval et Cie by Jean Dassesse, advocate at the Cour de Cassation of Belgium, on behalf of the Government of the United Kingdom by the Treasury Solicitor, acting as agent, and on behalf of the Commission of the European Communities by its Legal Advisers René-Christian Béraud and Dieter Oldekop, acting as agents.

Upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court decided that there was no need for any preparatory inquiry.

II — Summary of written observations

Observations of the Dassonvilles

With regard to the facts, the Dassonvilles emphasize that the products in question were acquired in a regular manner from the two exclusive French importers of the brands in question and that no allegation of fraud has been made either as to the nature of the products or as to any fraudulent imitation of the brand names under which these products were marketed.

The products in question were examined by the customs. Neither the fact of their British origin nor the brand names affixed to the bottles nor the non-replaceable capsules were challenged, nor was any analysis of the products ever requested or carried out.

As to the first question

The Dassonvilles consider that the obligation to produce and to cause the products in question to be accompanied, at any stage of the marketing process, by an official document satisfying strict and precise rules constitutes a measure having an effect equivalent to a quantitative restriction.

In support of this argument, the Dassonvilles cite the definition of measures having equivalent effect given by the Commission in its Answer to the second Written Question of Mr Deringer (OJ No 169/67 of 26.7.1967): they are 'provisions laid down by law, regulation or administrative action, administrative practices and any practice of a public authority or which can be imputed thereto, precluding imports which might otherwise take place'. They also invoke a series of Commission directives on the abolition of quantitative restrictions, especially Directive 70/50 (OJ L 13,1970, p. 29) and the Judgment of the Court in *International Fruit Company* v *Produktschap voor Groenten en Fruit* (Cases 51 and 54/71, Rec. 1971, p. 1107).

Applying that Judgment to the facts in this case, the Dassonvilles are of the opinion that the certificate of origin constitutes a document to which the importation of the products in question is subject, the issue of which is however neither automatic nor purely a matter of form. They point out that, in the absence of the certificate, it is impossible both to import the products in question from countries other than the country of origin and to market them, and that the prohibition is absolute since any infringement is subject to penal sanctions.

In their opinion, the rules of the Common Market are aimed not only at the liberalization of direct trade between the producer country and the consumer country, but also at all subsequent trade within the framework of a single market.

According to Belgian rules, even if Gustave Dassonville, being a dealer in France, had succeeded in importing Scotch whisky into France directly from Scotland by obtaining a British customs certificate, he would not have been able to take from his own stock products for the supply of his Belgian branch by producing at the Belgian customs a British 'certificate of origin'.

Such trading rules often have the effect of reinforcing the monopoly position held by national exclusive distributors.

If the objective pursued at the international level is the protection of products, bearing a designation of origin, such an objective falls amongst those admissible under Article 36 of the Treaty, but subject to the strict condition that the means employed are not, on the one hand, excessive by comparison with their purpose and, on the other hand, do not constitute discrimination against certain Member States. If that is the case where imports are simply made more difficult or costly, without this being necessary for the attainment of the objective justified on the basis of Article 36 (aforementioned Directive 70/50) the same applies *a fortiori* where the means employed have the effect of making imports from a given Member State completely impossible.

The Dassonvilles proceed to enumerate examples of other more reasonable means whereby the commercial protection of products bearing a designation of origin could be guaranteed.

The Dassonvilles also point to the inequality deriving from the fact that the contested rules relating to imported products are a great deal stricter than the system set up by the Belgian Law of 14 July 1971 applying to products bearing a national designation of origin.

As to the second question

An exclusive dealing agreement should not be viewed strictly in isolation when considering whether there is absolute territorial protection; it must be judged, on the contrary, in the light of the economic and legal context within which it is situated: *Béguelin* (Case 22/71, Rec. 1971, p. 963).

By bringing a civil claim the companies Fourcroy and Breuval clearly show their desire to obtain, through the means of coercion afforded them by the legislature, an absolute territorial protection as prohibited by the Treaty. The criticisms of the parties bringing a civil claim relate neither to the nature and origin of the products in question, nor to the fraudulent imitation of brand names, but solely to the right of others but themselves to procure these products for the purpose of importing and marketing them in Belgium.

The Dassonvilles refer to the Judgment in *Sirena* v *Eda* (Case 40/70, Rec. 1971, p. 69) in support of the argument that the exercise of an industrial or commercial property right may be covered by the prohibitions under Article 85 (1). This must be the case where assignments and licences granted simultaneously to national undertakings in respect of trademark rights in the same product have the effect of restoring rigid frontiers between Member States.

Observations of Fourcroy and Breuval

As to the first question

The first question must be examined in the light of the legislative context of the rules in question. The latter are the result of certain international agreements concluded between the Belgo-Luxembourg Union on the one hand and France and Portugal, on 4 April 1925 and 6 January 1927 respectively, on the other.

Account must also be taken of the Law of 23 May 1929 ratifying the Hague Act of 6 November 1925 revising the Paris Convention for the Protection of Industrial Property of 20 March 1883. ‘Appellations of origin’ were included, under this Act, as indications as to source in relation to the protection of industrial property.

Even though the rules on the protection of designations relating to spirits may, at the time of their promulgation, have applied in a different manner to national and imported products, they have lost this character since the adoption of a coordinated system under the Law of 14 July 1971.

The number of designations of origin protected by the national rules shows that the latter have not assumed a discriminatory economic character.

In consideration of the criteria provided by the Commission in its Directive 70/50 of 22 December 1969 (OJ L 13/29 of January 1970) Fourcroy and Breuval submit that the Court should reply in the negative to the first question.

Where the requirement of a certificate applies equally to domestic and imported products, its effect on the free movement of goods must be considered as inherent in the disparities between trading rules without however exceeding that which is intrinsic to such rules.

Rules which are capable of having an effect on trade do not, for that reason alone, have an effect on that area of trade, the liberalization of which the Treaty alone is intended to ensure. The obstacle to imports which such rules are capable of creating must be judged with reference to the number and quantity of products to be imported: Advocate-General Roemer in *International Fruit Company* v *Produktschap voor Groenten en Fruit* (p. 1124).

Any exporter of original Scotch whisky can cause his product to be accompanied by a document certifying this origin, whatever may be its destination, so that this product could be imported into Belgium free of any restriction. The concept of a quantitative restriction constituting a legal obstacle to imports should therefore be disregarded.

A difference between the facts in this case and those in the *International Fruit Company* Case lies in the fact that, in the latter, the licences were granted by the importing country and the unequivocal purpose of these licences was to control foreign trade. In this case, it is the country of origin which issues the document certifying the right to the designation of origin; the importing country merely examines whether the official document is accompanying the product.

The difficulties encountered in this case by the Dassonvilles, following their importation of whisky into Belgium, are attributable to the lack of harmonization in the scheme for protecting designations of origin and to their own negligence.

However, even if the rules are considered to be a measure having equivalent effect they fall, in any case, under Article 36. A designation of origin constitutes a commercial property right and a collective right closely linked to the concept of public interest. The nature of the right to a designation of origin incorporates it into the field of public law. It has a twofold purpose: the protection of the collective interests of producers of a particular region and the protection of the public health of consumers.

The Belgian rules satisfy these two requirements. The legitimate interests of producers are protected insofar as the conditions of production are respected in the manner certified by the document issued in the country of origin. The requirements relating to public health are, in the importing country, guaranteed by checking that the products are not imitations intended to mislead the public.

Since only the authorities of countries of origin have the power to certify the right to a designation of origin, there can be no question of a disguised restriction or of arbitrary discrimination.

As to the second question

The rules in question by reason of their object, do not lend themselves to being 'exploited' by an individual, even if he is the exclusive importer. The legal basis of the civil action for damages is the civil liability action under Article 1382 of the Civil Code; the ground for this action is the unfair competition with traders who conform to the public rules on certificates of origin, engaged in by those who distribute such products under false certificates.

According to Community law, the concessionaire has the right to invoke the law on unfair competition if the unfair nature of the behaviour of its competitors results from a factor other than the fact that the latter has made parallel imports: *Béguelin* (mentioned above).

The other factor, in this case, is that of importation without a certificate of origin involving the use of forgeries.

Observations of the United Kingdom

The United Kingdom explains first of all the conditions under which a product has, according to British law, the right to the designation 'Scotch whisky'. It considers that the provisions of Belgian law in question cannot constitute measures having an effect equivalent to quantitative restrictions. In support of this argument, the United Kingdom invokes the Commission's Answer to Written Question No 118/66-67 (OJ No 9 of 17 January 1967, p. 122/67 and OJ No 59 of 29 March 1967, p. 901/67).

The United Kingdom considers that the concept of 'measures having equivalent effect' does not cover measures which are only potentially liable to have such an effect. But, even if such measures were to be so described, it is not possible to regard the definition of a product by reference to its ingredients, method of production and place of origin as either an actual or a potential hindrance.

On the contrary, the recognition by other Member States of the certificate granted by the Government of the United Kingdom, far from being a hindrance to trade in the defined product, must facilitate such trade. The requirement of a certificate only hinders the importation of bogus products. The restriction is accordingly qualitative in nature and not quantitative.

The Government of the United Kingdom points out that the cost of the certificate is minimal and it is given in every case, even after export, provided that the original export can be identified.

It emphasizes that Community law has already adopted this certification system for bourbon whisky. Regulation No 2552/69/EEC of 17 December 1969 (OJ L 320, 1969, p. 19) has as its basis the consideration that 'identification of bourbon whisky is particularly difficult; ... it can be made considerably easier if the exporting country gives an assurance that the product exported corresponds to the description of the product in question; … a product should not be included (under subheading No 22.09-C-III-a, CCT) ... unless it is accompanied by a certificate of authenticity'.

In the submission of the United Kingdom, the identification of Scotch whisky is no easier than that of bourbon whisky and a similar method of certification is desirable.

If, contrary to the submission of the British Government, the Belgian or British rules amount to a measure having equivalent effect the United Kingdom submits that such rules are permitted under Article 36 as a protection of the industrial and commercial property which is enshrined in the good name and reputation of Scotch whisky.

In support of this argument it cites the Commission's Answer to Written Question No 189/73 (OJ C 22, 1974, p. 9).

It is in accordance with the general principles of Community law that consumers should be protected by ensuring that when they purchase a product described as Scotch whisky, they buy a standard product.

In support of the above, the United Kingdom cites the Community rules on wine which are inspired in part by such reasoning (Regulation (EEC) No 24 of 4 April 1962, OJ of 20 April 1962, Regulation (EEC) No 1769, p. 72 of the Commission, OJ L 191, 1972, p. 1).

In international law, the protection of industrial property extends to protecting appellations of origin (Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised at Stockholm on 14 July 1967, and especially Article 1 (2) and (3).

Consequently, the United Kingdom considers that the first preliminary question should be answered in the negative.

Observations of the Belgian Government

Before dealing with the issues relating to the first question referred for a preliminary ruling, the Belgian Government gives an outline of the Belgian rules on designations of origin for wines and spirits.

As to the first question

The fact that the designation of origin 'Scotch whisky' is reserved for products accompanied by an official document certifying their right to this designation does not constitute a restriction on imports since any product which is simply described as 'whisky' can be imported without an official document.

Belgium puts forward the following arguments in support of the compatibility of the Belgian rules with Articles 30 to 33 and 36 of the Treaty establishing the EEC.

In the first instance it must be for the country of origin to determine which designations of origin in respect of its products are to be protected and the characteristics which these products must possess. Only a certificate of origin issued by the authorities of the country of origin can therefore be valid.

Further, the requirement of proof of origin does not constitute an illegal restriction on trade between Member States. The Belgian authorities are not concerned with the nationality of the trader who, when exporting Scotch whisky, asks the British authorities for the official documents which constitute confirmation by those authorities that the exported products have the right to bear the protected designation of origin.

The Belgian Government refers to the Answer which the Commission gave to the aforementioned Written Question No 189/73 of Mr Cousté. It follows from this Answer that the Belgian rules, which apply only to proof of the right to protected designations of origin, are not contrary to Articles 30 to 33 of the EEC Treaty and are covered by Article 36.

The Belgian Government emphasizes that in Belgium the protection of designations of origin plays a part in the protection of public health because it is based on examinations of the composition of foodstuffs, carried out at the production stage in the country of origin by the relevant authorities of the latter. At the distribution and marketing stage such examinations would be difficult, or even impossible, and less effective for the protection of public health.

The Belgian Government points out that restrictions on imports and exports for reasons relating to the protection of industrial and commercial property are not included in the list of measures having equivalent effect prohibited by Directive 70/50/EEC of the Commission of 22 December 1969.

In the spirits market, fraudulent misrepresentations as to quality would very soon become possible if the certificate of origin was not required. The Royal Decree No 57 does not constitute a disguised restriction on inter-State trade. There is no question here of a restriction, but of a condition which the person concerned is at liberty to satisfy or not at will.

The fact that a non-producer State may allow importation without a certificate of origin is irrelevant. If that State were to be recognized as having the right to replace the certificate of origin by some other document not offering the same guarantees this would have the effect of invalidating the laws on designations of origin. The protection of designations of origin itself would be put at risk, not the means of exercising that protection.

As to the second question

According to the Belgian Government it is necessary to distinguish between legal provisions allowing the persons concerned to assert rights and those which, as in this case, impose on everyone obligations which none can avoid. It is the application of the former which alone appears capable of being affected by the rules on competition. It is necessary to avoid all uncertainty or ambiguity; the question simply asks whether the mere fact of the co-existence of an agreement with national rules can cause that agreement to become illegal. The Belgian Government concludes that the validity or nullity of an agreement is not affected by the existence of imperative rules on the matter in question.

Observations of the Commission

As to the first question

According to the Commission, any measure, whatever its nature or content may, by reason of its effect on the free movement of goods, constitute a measure having equivalent effect, provided that it is not covered by another provision of the Treaty.

The Commission elaborated this concept during the course of the transitional period in important directives which it issued on the basis of Article 33 (7) of the EEC Treaty (Directives of the Commission of 7 November 1966, OJ of 30.11.1966, pp. 3745/66 and 3748/66, and of 17 and 22 December 1969, OJ L 13, pp. 1 and 29 of 19.1.1970).

According to the Commission measures having an effect equivalent to a quantitative restriction on imports or exports must include laws, regulations, administrative provisions and practices which hinder imports or exports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production on the national market. A measure has an effect equivalent to that of a quantitative restriction on imports, not only when it makes imports impossible, but also when it makes them more difficult or more costly, even if it does not prevent them, as is precisely the case when the public authorities make imports subject to the presentation of a document: Case 51 to 54/71 *International Fruit Company* v *Produktschap voor Groenten en Fruit* (mentioned above).

Trading rules which apply equally to national products and imported products do not in principle constitute measures having equivalent effect within the meaning of Articles 30 *et seq.* of the EEC Treaty.

However, the Commission considers that the right of Member States to regulate trade by means of provisions applying equally to imported products is not unlimited.

This right can be exercised only to attain the objectives of the rules concerned and must be suited to those objectives.

An ineffective measure or, on the other hand, an excessive measure which could be replaced by another which would be less of a hindrance to trade, constitutes, in the Commission's opinion, a measure having equivalent effect, although in theory it is applicable equally to domestic and imported products, because such a measure has a restrictive effect on the free movement of goods in excess of that which is intrinsic to trade rules. The Commission draws a parallel with the case-law of the Court on Article 95. Taxation which falls outside the general framework of a national taxation system, of which the tax in issue is an integral part, constitutes an infringement of the principle of the free movement of goods (*Stier* v *Hauptzollamt Ericus*, Case 31/67, Rec. 1968, pp. 347-357).

It follows from the very wording of Article 36 that, to be covered by this provision, measures which may be held to infringe the prohibition on quantitative restrictions and measures having equivalent effect must first of all be objectively justified on one of the grounds stipulated in the said Article.

As Article 36 is a derogatory provision it must be strictly interpreted: *Commission* v *Italy* (Case 7/68, Rec. 1968, p. 617).

Only measures which are necessary are justified on the basis of this Article, since excessive measures can always be replaced by measures of a less restrictive nature.

The Commission next examines the provisions of the Belgian rules on designations of origin and concludes that these provisions, applied to imported products alone, are capable of precluding imports of the products in question, which are in free circulation in Member States which, like France, do not require that they be accompanied by a certificate of origin. Furthermore, even if this document could be obtained, it would not, it seems, be accepted by the Belgian authorities since the name and address of the Belgian importer do not appear on it.

In pursuance of Article 9 (2) of the EEC Treaty, the provisions of Chapter 2 of Title I, which consist of Articles 30 *et seq.*, apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

The Belgian rules on designations of origin, which prevent the importation of 'Scotch whisky' in free circulation in France, therefore constitute a measure having an effect equivalent to a quantitative restriction on imports, contrary to the obligations devolving on Member States under Article 30 of the EEC Treaty.

The Commission next examines whether these measures can be justified on one of the grounds referred to in Article 36 of the Treaty, in particular the protection of industrial and commercial property. In such a case, it would still be necessary to determine whether the means used were appropriate, considering the objective to be attained.

The Commission is of the opinion that a restrictive measure similar to the one in this case can really be justified only where it is seriously suspected that the objective sought is being threatened. This might possibly be the case if instances of fraud were reported or had already been determined.

The Commission goes on to examine whether there are other measures less likely to constitute a hindrance to trade than the rules in question. It suggests a number as examples.

Finally, the Commission examines the hypothesis that the rules under consideration are in fact applicable equally to imported and domestic products. The Commission considers that in this case the restrictive effects of such a measure on the free movement of goods exceed those which are necessary for the regulation of trade, and this for reasons similar to those which lead it to reject the application of Article 36 of the Treaty.

As to the second question

Although an exclusive dealing agreement does not, in itself, contain all the elements necessary to attract the prohibition of Article 85 (1) it can have the effect of restricting trade when, considered separately or in conjunction with parallel agreements, it confers on concessionaires, in law or in fact, an absolute territorial protection against parallel imports of the products concerned.

These agreements are prohibited under Article 85 (1) and are not, as a general rule, likely to be authorized on the basis of Article 85 (3).

In the Commission’s opinion, for the prohibition of Article 85 of the EEC Treaty to be applicable, it suffices that the exclusive dealing agreement should give concessionaires the possibility of preventing parallel imports into the contract territory by invoking national laws on unfair competition, and that the concessionaire should avail himself of this possibility. It is enough that the agreement should merely authorize or should not prevent the exclusive importer from exploiting this rule for the purpose of preventing parallel imports.

However, in this case, the obstacle to parallel imports does not lie, first and foremost, in the proceedings instituted by the exclusive importers and distributors.

The rules laid down by the Royal Decree No 57 suffice, by virtue of their own legal mechanism, to render difficult, if not impossible, parallel imports of spirits in circumstances similar to those of this case, and there is no need for the concessionaires to take legal action to create this effect.

However, the Commission considers that the fact that the concessionaires have brought a civil claim in the criminal proceedings for infringement of the provisions of rules such as those laid down by the Royal Decree No 57, further reinforces the difficulties created by those rules in the way of effecting parallel imports. It points out that the concessionaires can lodge a complaint, support the public prosecution, and claim compensation for damage suffered. The Commission suggests that it is necessary to interpret the question put by the Belgian court by asking whether an exclusive dealing agreement falls within the prohibition of Article 85 of the EEC Treaty when the concessionaire makes use of the possibility offered to him to exploit the national rules on certificates of origin for imported goods in such a way as to reinforce obstacles, created by those rules, in the way of effecting parallel imports.

The Commission considers that this question should be answered in the affirmative. The prohibition in Article 85 of the EEC Treaty applies if the agreement, considered in its legal and economic context, and taking into account the national rules in question and the use made of them by the concessionaire, may affect trade between Member States and if it had the effect of hindering competition within the Common Market.

Although the civil action may not be necessary to prevent parallel imports, its effects combine with those inherent in the national rules in question, which can in particular consist of the award of damages to the exclusive importers and distributors.

Oral procedure

During the course of the oral procedure the parties put forward new facts and arguments which may be summarized as follows.

Jean Dasesse, for the Companies Fourcroy and Breuval made clear that the last circular issued by the Belgian customs authorities of 8 February 1974 on the importation of wines and spirits provides expressly that in respect of Scotch whiskies, the customs authorities may accept as an official document a certificate of origin establishing that delivery is intended for a country outside Belgium. He adds that even if this circular was not in force at the time the events in this case took place it is important to point out this liberalization on the part of the Belgian administrative authorities.

As regards the second preliminary question he emphasizes three differences between the facts of this case and those of the *Béguelin* Case (abovementioned). In the first place, the Belgian Cour de Cassation has held since 1932 that the mere fact that a third party makes parallel imports infringing exclusive dealing agreements is not forbidden on the grounds of unfair competition, since exclusive dealing agreements are *res inter alios acta*.

Secondly, in this case, the parties bringing the civil claim in the criminal proceedings are not criticizing parallel imports as such but imports which are irregular in view of the Royal Decree No 57, whereas they themselves respect this law. They have a duty to those who have granted them exclusive dealing agreements to watch for irregular imports.

Thirdly, the Belgian rules in question in the criminal proceedings are enforced at the exclusive discretion of the Public Prosecutor and, consequently, the parties bringing a civil claim in these proceedings cannot participate in the prosecution on the basis of an infringement of the exclusive dealing agreement.

Roger Strowel, for the Dassonvilles, maintains that a system in which imports are subject to the presentation of a document issued by the exporting country and which must contain the names and data identifying the Belgian importer is contrary to the very idea of a common market. The result of this is to establish a measure having a discriminatory effect by necessarily favouring imports from one of the States of the Community.

As for the second question, the Dassonvilles allege that the criminal proceedings resulted entirely from a complaint at the administrative stage to the Inspection générale économique by the parties which later brought a civil claim. They emphasize that their products sell at the retail price of 294 francs for one of the brands and 250 francs for the other, whereas the prices fixed by the exclusive importers, Fourcroy and Breuval, are 316 francs and 305 francs respectively. They conclude that Fourcroy and Breuval intervened in this case for the purpose of safeguarding their monopoly which allows them to fix and protect the level of prices. As regards procedure, the Dassonvilles state that the second preliminary question is not a subsidiary matter, since the Belgian court has the task of deciding, first of all, the admissibility of the civil claim in the criminal proceedings.

Peter Langdon Davies, for the Government of the United Kingdom states that the Member States were all party to the International Convention for the Protection of Industrial Property of 1883. Under Articles 9 and 10 of that Convention the parties agreed to seize on importation all goods bearing a false or erroneous indication of their source. It is therefore surprising, in the opinion of the United Kingdom, if it is now discovered that there is a conflict between the Treaty and the Belgian rules.

The Government of the United Kingdom further explains that if it is desired to import whisky from France into Belgium it will be possible to obtain a retrospective certificate from the United Kingdom but under present arrangements it may not be an altogether simple matter. First, the rotation number and progressive number of the cases must be supplied. Secondly, the customs authorities will require to know the name of the warehouse from which the goods have been exported. If the importer will not cooperate this can be obtained with the cooperation of the trademark owner from the numbers referred to above and the bottler's marks on the labels on the bottles. These difficulties could be overcome if importers in other Member States asked for certificates and passed them on to their buyers.

In the words of the Court in the *Deutsche Grammophon* Case, the Government of the United Kingdom is of the opinion that the question which must be determined is whether the Belgian rules find their justification in the protection of the industrial property concerned. The argument of the British Government is that this is just such a regulation as must have been contemplated by the authors of Article 36. If it incidentally makes importation in some cases rather more difficult, that is a pity but it is precisely to such incidental restrictions, even if they amount to quotas or equivalent measures, that Article 36 is intended to apply.

René Christian Béraud, for the Commission, adds a few facts on the possibilities of importing products bearing a designation of origin. He explains that the term designation of origin is used primarily in the wine sector, in that of spirits, and in the cheese sector. As regards cheeses, neither bilateral conventions nor domestic provisions in Member States provide for the requirement of a certificate on importation. The right to a particular designation is therefore a question of proof according to the normal rules of law.

In the Commission's opinion, it is not the requirement of proving that the product in question really was of the geographical origin mentioned by the designation of origin claimed which constitutes the measure having an effect equivalent to a quantitative restriction on importation, but the requirement of a single means of proof, namely the certificate of origin, when there are other means of proof, constituting less of a hindrance to trade, which secure the same guarantees.

As regards the Community rules for the designation 'bourbon whisky' the Commission explains that within the framework of the negotiations of the Kennedy Round the Community agreed to classify bourbon whisky in the Common Customs Tariff under a subheading more favourable than those for other whiskies from third countries. And, because, under GATT, the subheading 'bourbon whisky' was created within the heading 'whisky' the Community was obliged to require, in agreement with the USA, a certificate, not of origin, but of authenticity of the product, so as to be able to identify this whisky and thereby avoid the risk that whiskies other than bourbon might benefit undeservedly from the preferential tariff which the Community granted only to the latter. That was therefore a problem relating only to the tariff and which clearly does not arise in this case.

The procedure for obtaining a certificate of origin for whiskies already in free circulation in France is ill-suited to the present speed of commercial transactions, which may accordingly be discouraged. Parallel imports depend in any case on the goodwill of the manufacturer or exporter, who are alone in possessing the information needed by the authorities of the United Kingdom to identify the consignments of goods exported.

The complaints lodged with the Commission in respect of the Belgian rules criticize the Belgian authorities for favouring the exclusive importers of the products in question. The various complainants contend in effect that the aim of the provisions adopted by these authorities in this field was to prevent them from selling the products concerned in Belgium at prices appreciably lower than those of Fourcroy and Breuval.

It quite often happens that producers themselves refuse to sell their products to importers other than the exclusive importers for fear of retaliation by the latter. The only possibility open to importers who wish to sell in a particular market, at competitive prices, is to approach distributors operating in a country other than the country of origin.

If the Belgian rules were to continue to be applied this phenomenon whereby certain importers hold exclusive rights would continue, and a walling-off of the market in these products would accordingly persist, without the possibility of an action being instituted on the basis of Article 30, whilst the application of Article 85 *et seq.* alone would probably prove inadequate to liberalize trade.

The Advocate-General delivered his opinion on 20 June 1974.

Law

1 By Judgment of 11 January 1974, received at the Registry of the Court on 8 February 1974, the Tribunal de Première Instance of Brussels referred, under Article 177 of the EEC Treaty, two questions on the interpretation of Articles 30, 31, 32, 33, 36 and 85 of the EEC Treaty, relating to the requirement of an official document issued by the government of the exporting country for products bearing a designation of origin.

2 By the first question it is asked whether a national provision prohibiting the import of goods bearing a designation of origin where such goods are not accompanied by an official document issued by the government of the exporting country certifying their right to such designation constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

3 This question was raised within the context of criminal proceedings instituted in Belgium against traders who duly acquired a consignment of Scotch whisky in free circulation in France and imported it into Belgium without being in possession of a certificate of origin from the British customs authorities, thereby

infringing Belgian rules.

4 It emerges from the file and from the oral proceedings that a trader, wishing to import into Belgium Scotch whisky which is already in free circulation in France, can obtain such a certificate: only with great difficulty, unlike the importer who imports directly from the producer country.

5 All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

6 In the absence of a Community system guaranteeing for consumers the authenticity of a product's designation of origin, if a Member State takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between Member States and should, in consequence, be accessible to all Community nationals.

7 Even without having to examine whether or not such measures are covered by Article 36, they must not, in any case, by virtue of the principle expressed in the second sentence of that Article, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

8 That may be the case with formalities, required by a Member State for the purpose of proving the origin of a product, which only direct importers are really in a position to satisfy without facing serious difficulties.

9 Consequently, the requirement by a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

10 By the second question it is asked whether an agreement the effect of which is to restrict competition and adversely to affect trade between Member States when taken in conjunction with a national rule with regard to certificates of origin is void when that agreement merely authorizes the exclusive importer to exploit that rule for the purpose of preventing parallel imports or does not prohibit him from doing so.

11 An exclusive dealing agreement falls within the prohibition of Article 85 when it impedes, in law or in fact, the importation of the products in question from other Member States into the protected territory by persons other than the exclusive importer.

12 More particularly, an exclusive dealing agreement may adversely affect trade between Member States and can have the effect of hindering competition if the concessionaire is able to prevent parallel imports from other Member States into the territory covered by the concession by means of the combined effects of the agreement and a national law requiring the exclusive use of a certain means of proof of authenticity.

13 For the purpose of judging whether this is the case, account must be taken not only of the rights and obligations flowing from the provisions of the agreement, but also of the legal and economic context in which it is situated and, in particular, the possible existence of similar agreements concluded between the same producer and concessionaires established in other Member States.

14 In this connexion, the maintenance within a Member State of prices appreciably higher than those in force in another Member State may prompt an examination as to whether the exclusive dealing agreement is being used for the purpose of preventing importers from obtaining the means of proof of authenticity of the product in question, required by national rules of the type envisaged by the question.

15 However, the fact that an agreement merely authorizes the concessionaire to exploit such a national rule or does not prohibit him from doing so, does not suffice, in itself, to render the agreement null and void.

Costs

16 The costs incurred by the Governments of Belgium and of the United Kingdom as well as by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

17 As these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the Tribunal de Première Instance of Brussels, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunal de Première Instance of Brussels by Judgment of 11 January 1974, hereby rules:

1. The requirement of a Member State of a certificate of authenticity which is less easily obtainable by importers of an authentic product which has been put into free circulation in a regular manner in another Member State than by importers of the same product coming directly from the country of origin constitutes a measure having an effect equivalent to a quantitative restriction as prohibited by the Treaty.

2. The fact that an agreement merely authorizes the concessionaire to exploit such a national rule or does not prohibit him from doing so does not suffice, in itself, to render the agreement null and void.

Lecourt
Donner
Sørensen
Monaco
Mertens de Wilmars
Pescatore
Kutscher
Ó Dálaigh
Mackenzie Stuart

Delivered in open court in Luxembourg on 11 July 1974.

A. Van Houtte
Registrar

R. Lecourt
President

[1] — Language of the Case: French.