Opinion of Advocate General Tesauro (4 March 1993)

Caption: Example of an opinion of an Advocate General, delivered in connection with Case C-271/92, 'Laboratoire de prothèses oculaires', on the subject of the free movement of goods. Advocate General Tesauro considers whether the requirement of a professional qualification for the sale of optical products constitutes 'a measure having equivalent effect to a quantitative restriction' within the meaning of Article 30 (new Article 28) and, if so, whether this restriction is justified by the imperative requirements of the protection of health under the terms of Article 36 (new Article 30). The Advocate General, carrying out his examination in the light of the case law of the Court, places the case in its context and deduces the main issues. The task of the Advocate General to provide clarification is clear: as he classifies the judgments of the Court into three groups, corresponding to three different kinds of solutions, he systematises the Court's approach in respect of the free movement of goods, thus rendering it easier to comprehend.

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Opinion of Advocate General Tesauro delivered on 4 March 1993*

Mr President,
Members of the Court,

1. The present proceedings concern two questions referred by the French Cour de Cassation for a preliminary ruling and designed essentially to ascertain whether Articles 30 and 36 of the Treaty preclude the application of national legislation prohibiting the sale of optical appliances and corrective lenses by persons who do not hold an optician's certificate or an equivalent qualification.

The relevant French legislation provides that no one may practise as an optician unless he holds the requisite qualification (Article L 505 of the Code de la Santé Publique (Public Health Code, hereinafter 'the Code') and that commercial establishments whose main business is optical supplies and the supply of spectacles, their branches, and shop departments supplying optical appliances and spectacles may be run or managed only by a person fulfilling the conditions laid down for practising as an optician (Article L 508 of the Code). In addition, as an exception to the pharmacists' monopoly on such sales, products for the care of contact lenses may also be sold to the public by opticians.

2. The dispute in the main proceedings is between Laboratoire de Prothèses Oculaires (Laboratory for Eye Prostheses, hereinafter 'LPO'), which markets contact lenses, intraocular implants and related products through its agents or distributors associated with it under licence, and four professional associations of opticians, namely Syndicat des Opticiens Français Indépendants (Union of French Independent Opticians, hereinafter 'SOFI'), Groupement d'Opticiens Lunetiers Détaillants (Association of Retail Opticians supplying Spectacles, hereinafter 'GOLD'), Union Nationale des Syndicats d'Opticiens de France (National Federation of Opticians' Trade Unions in France, hereinafter 'UNSOF') and Syndicat National des Opticiens d'Optique de Contact (National Union of Contact Lens Opticians, hereinafter 'SNADOC').

Considering the actions brought by the abovementioned professional associations seeking to have it banned from selling the products in question to be restrictive practices, LPO instituted proceedings before the Tribunal de Grande Instance de Paris (Paris Regional Court). That court not only dismissed LPO's claim, but upheld the professional organizations' counterclaim and enjoined LPO from selling contact lenses to individuals at sales outlets which it controlled and which were run by persons who did not hold an optician's certificate (Diplôme de lunetier-opticien).

LPO applied for a review of that decision, which had been upheld by the Cour d'Appel de Paris (Paris Court of Appeal), claiming that the measure in question was a measure having equivalent effect, prohibited under Article 30 of the Treaty. In order to ascertain whether the sales monopoly claimed by the opticians is a measure having an effect equivalent to a quantitative restriction and, if so, whether the said monopoly is justified by mandatory requirements relating to the protection of consumers or public health within the meaning of Article 36, the Cour de Cassation (Court of Cassation) sought a preliminary ruling from the Court of Justice.

3. It should be noted first of all that Community law, as it now stands, contains no specific rules on the distribution of optical products. [1] Consequently, the task of determining the relevant rules continues to be a matter for the Member States, subject - of course - to compliance with the provisions of the Treaty, in particular those on the free movement of goods.

Moreover, referring to the Court's decisions that Article 30 does not apply to situations that have no 'extraneous' element and are consequently governed by a Member State's national law, [2] SOFI and GOLD contend that the current rules on the movement of goods do not apply to the present case because LPO neither produces nor imports contact lenses.

It must be said at once that that argument cannot be accepted. For the purposes of Article 30, it is sufficient for LPO to sell imported products *as well*, as is clear from the documents in the case and is not disputed by any of the parties.

4. As to the substance, all the opticians' professional associations agree that the rules at issue do not obstruct intra-Community trade inasmuch as they are indistinctly applicable and have neither the aim nor the effect of restricting trade but merely reserve the sale of contact lenses to qualified traders. The only condition for selling the products in question is that the commercial establishments in which they are sold must be managed by a person who holds an optician's certificate. However, the professional associations point out that LPO could perfectly well market the products in question without necessarily changing its sales strategy or making any particularly costly arrangements. It would only have to ensure that its various sales outlets were managed by opticians.

On the basis of those considerations, UNSOF and SNADOC also maintain that such legislation could affect the free movement of goods only if the condition that they must be sold in a commercial establishment managed by an optician were so difficult to fulfil that only a few sales outlets would be able to supply the products in question, that is only if the number of opticians were limited.

5. The legislation at issue, like all provisions regulating the procedures for marketing products in general (where, how, when, by whom), is not intrinsically such as to make the marketing of imported products more costly than the marketing of domestic products. Clearly, therefore, for the purposes of this type of legislation, it is completely irrelevant whether or not marketing arrangements in the various Member States are similar.

It follows that such rules may indeed affect imports to some extent but only because, in imposing restrictions on the outlets for the products they cover, they may affect demand and so cause the volume of sales and, by extension, the volume of imports to fall. In the present case, however, it has not been shown whether or to what extent sales and consequently imports might benefit if the legislation at issue were to be repealed.

In fact, we are faced with the now common case of a potential reduction in imports arising neither from any difference in the treatment accorded to domestic and imported products nor from any difference in the legislation governing the requirements in respect of the composition or presentation of the product (as in *Cassis de Dijon*). Instead, it arises from a measure relating only to the marketing of a product which, in the present case, makes marketing conditional upon holding a professional qualification, though it could equally well be a sales authorization.

Such measures, by regulating and thus restricting the number of distribution channels in various ways, depending on the particular circumstances, may cause imports to fall. In these circumstances, therefore, the (causal) link between the restriction of distribution channels and the reduction in import is clearly only indirect and speculative, in the sense that it does not necessarily exist and cannot in any event be assumed to do so.

6. Nevertheless, in principle, even cases such as this should be governed by the class statement in *Dassonville* that any trading rules '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'. [3] The Court had also held that a national measure 'does not fall outside the scope of the prohibition in Article 30 merely because the hindrance to imports which it creates is slight and because it is possible for imported products to be marketed in other ways'. [4]

However, the Court's rulings on whether and to what extent Articles 30 and 36 of the Treaty are applicable to trading rules such as those at issue here, which bear no relation to those in the *Cassis de Dijon* case, have apparently varied and may be reduced for the sake of brevity to three main categories.

7. In the first group of judgments, the Court held that the measures in question had no connection whatever with imports. [5] In reaching that conclusion, the Court was influenced primarily by the fact that the measures were not intended to regulate intra-Community trade, did not concern other forms of marketing the product, [6] or in any event allowed the possibility of selling it through other channels. [7] It is scarcely necessary to mention the prohibition on the production and delivery of bread at certain hours (*Oebel*), the prohibition on

the consumption of spirituous beverages in certain commercial establishments (*Blesgen*), or the prohibition on the sale of sex articles in unlicensed establishments (*Quietlynn*).

8. In a second group of judgments, on the other hand, the Court held that legislation on sales may, although it does not directly affect imports, be such as to restrict their volume simply because it affects marketing opportunities for the imported products and it must therefore be examined to ascertain whether it is compatible with Articles 30 and 36. [8]

This is the case with measures which are such as to render access to the market more difficult and more costly simply because they prohibit the use of a certain *marketing method*. The Court has explained that that finding applies *a fortiori* when the trader concerned uses the marketing method in question to realize almost all his sales. [9] In other words, in cases such as *Oosthoek* (offering free gifts for sales promotion purposes), *Buet* (canvassing at private homes) and *Delattre* (sale by mail order), the Court has established a close link between a potential reduction in the volume of imports and the obstacles to traders in the sector concerned resulting from the rules in question.

The same considerations apply to legislation *reserving* to a single class of trader (pharmacists) the right to sell certain categories of product and precluding the marketing of such products through channels other than those prescribed by the law. [10]

In such cases, the Court considers whether the national legislation pursues an objective of general interest recognized in the Community legal order (the protection of consumers or public health, as the case may be) and whether the measures chosen are proportionate in relation to the (legitimate) objective pursued.

9. In a third group of judgments, on the prohibition of Sunday trading, [11] the Court seems at first sight finally to have acknowledged that the principle laid down in *Dassonville* applies to trading rules of the kind at issue and that their compatibility with Article 30 is therefore subject to two conditions: a) the legislation in question must pursue an objective that is justified with regard to Community law, and b) the restrictive effects of such legislation must not exceed what is necessary to achieve the aim pursued or, to quote the form of words used in those judgments, must not ‘exceed the effects intrinsic to rules of that kind’.

It is true that in those judgments the Court, having first admitted that the aim of ensuring that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics is justified with regard to Community law, merely stated that ‘the restrictive effects on trade which may stem from such rules do not seem disproportionate to the aim pursued’, [12] adding, in the most recent judgment on the subject, that in order to verify whether (any) restrictive effects on intra-Community trade of the rules at issue exceed what is necessary to achieve the aim in view, it must be considered whether those effects ‘are direct, indirect or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products’. [13]

On closer scrutiny, therefore, the Court appears to have confined itself to a limited investigation as to whether the measure in question is reasonable and, in particular, whether it is advisable in view of (any) restrictive effects it may have. But quite apart from the various forms of words used and the depth in which the provisions in question are investigated, I think it is undeniable that the Court always focuses its examination on the aims pursued and on the means adopted by the national legislature to achieve them.

10. Let us now return to the present case. As I have said, the legislation at issue reserves the sale of *certain* products (notably spectacles and contact lenses) to members of a *given* profession.

That legislation restricts sales to certain *channels*, that is a network of specialized agents, and consequently precludes the distribution of the product through channels other than those prescribed by the law.

In this respect, therefore, there is no difference between the present case and that of the pharmacists’ monopoly which the Court investigated in *Delattre* and *Monteil and Samanni*. It is true that, in the present case, the opticians’ associations have argued that pharmacies are subject to a *numerus clausus*, whereas

there are no special conditions for opening establishments marketing optical products, so that anyone can open a shop supplying optical appliances or a department supplying such wares in a supermarket, for example, provided that it is managed by a person who holds an optician's certificate. That argument is not decisive, however. Clearly there can only be as many sales outlets for spectacles and contact lenses as there are opticians. [14] In any event, therefore, the distribution channels for the product will be restricted to some extent.

11. According to the case-law of the Court, rules of this type have an effect on trade that may in certain circumstances fall within the scope of Article 30.

Thus, in its judgments in *Delattre* and *Monteil and Samanni*, the Court states that 'a monopoly granted to dispensing pharmacists in respect of the marketing of medicinal or other products is capable, in so far as it restricts sales to certain channels, of affecting the possibilities of marketing imported products and may accordingly constitute a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty'. [15] The Court therefore felt obliged to verify whether such a monopoly could be justified on grounds of the protection of health and life of humans or the requirement of consumer protection.

12. The same verification is necessary in the present case. I would remind you, first, that the Court has consistently ruled [16] that, in the absence of common or harmonized rules, it is for the Member States to decide on the degree of protection which they wish to afford to public health and on the way in which that protection is to be achieved, provided that they comply with the principle of proportionality.

The Court has also held on a number of occasions that Member States may in principle impose restrictive rules on the sale or marketing of products which, although not proprietary medicinal products within the meaning of Community rules, are nevertheless intended to meet requirements that fall within the scope of the protection of health. [17]

13. This certainly applies to the provisions at issue in this case, which regulate the sale of products intended to correct a defect in a bodily function. Such provisions, which reserve to opticians the sale of instruments for correcting sight, are clearly designed to protect public health.

In the first place, while it is true - as LPO, has claimed - that ophthalmologists are responsible for prescribing and fitting contact lenses, the fact remains that the sale of such lenses cannot be regarded as an ordinary commercial activity. One reason is that the optician is the only person, apart from the ophthalmologist, who is in a position to give users the necessary information on the use of the lenses and on the products for their care; another is that, in the absence of a medical prescription - which is not required for persons over 16 years of age - it is essential for the appropriate checks to be made and for advice to be provided by someone with a minimum of knowledge on the subject. The measure in question is therefore objectively necessary to ensure the protection of public health.

Furthermore, it does not appear possible to achieve such an objective unless the sale of the products in question is entrusted to qualified staff. I cannot endorse the plaintiff's view that it is sufficient for the products to be sold only on medical prescription and for those selling them to provide no technical or medical services. The very fact that a medical prescription is required for the products in question could be held to be a decisive reason for having a qualified person in attendance in shops supplying optical appliances, since it can be assumed that some knowledge of optics is needed to 'read' the prescription. I do not therefore think that there are any other less restrictive methods of securing the same result.

Nor do I consider that the *scope* of the monopoly conferred on opticians by the French legislation is disproportionate in relation to the objectives pursued. That monopoly is confined to products for which it appears necessary to employ traders holding an appropriate professional qualification. It is only the sale of contact lenses and corrective lenses that is reserved to opticians, not the sale of other products, such as sunglasses or ski-goggles, which are unrelated to the correction of sight defects and whose use in any case presents no risk to health.

In the light of those considerations, I feel justified in maintaining that the rules at issue in the present case fulfil the objective of protecting health and that their restrictive effects - which are in any case indirect and nondiscriminatory - do not exceed what is necessary to achieve the objective pursued, with the result that such rules should not fall within the scope of the prohibition laid down in Article 30.

14. That said, it must point out that, in the case of measures pursuing the objective of protecting health, the Court usually considers whether they are proportionate to that objective under the terms of Article 36 rather than Article 30. In practice, the result is the same either way, in that the measures in question are in any case considered to be compatible with the rules on the free movement of goods. Indeed the Court expressly stated in its judgment in *Aragonesa*[18] that, in determining whether a measure is justified on grounds of the protection of health, it is not necessary to consider whether that objective might also be in the nature of an imperative requirement to be taken into account for the purposes of the application of Article 30, since the protection of health is expressly mentioned amongst the grounds of public interest which are set out in Article 36.

Thus in the case of measures applicable without distinction, particularly those regulating commercial distribution, I consider that if such measures are justified on grounds of the protection of health and are proportionate in relation to that objective, it would be more appropriate to regard them as being within the jurisdiction of the Member States, and consequently not even as falling within the scope of the prohibition on measures having equivalent effect. This is however a purely theoretical question. I am inclined to think that there is no need to pursue it further and that we should abide by the practical decision reached by the Court in its judgment in *Aragonesa*.

15. In the light of the foregoing considerations, therefore, I suggest that the Court give the following answer to the questions referred to it by the French Cour de Cassation:

Article 30 of the Treaty must be interpreted as not applying to national rules which prohibit the sale of contact lenses and related products in commercial establishments which are not run or managed by persons who fulfil the conditions laid down for practising as an optician; even if such rules constituted measures having equivalent effect within the meaning of Article 30, they could nevertheless be justified on grounds of the protection of health under Article 36 of the Treaty.

* Original language: Italian

1 - It should however be pointed out in this connection that a proposal for a directive concerning medical devices (OJ 1991 C 237, p. 3) is at present before the Council. That directive, which harmonizes the national provisions for the safety and health protection of patients in order to guarantee the free movement of such devices within the internal market, also applies to contact lenses and optical wares in general.

2 - In its judgment in Case 286/81 *Oosthoek* [1982] ECR 4575, for example, the Court expressly stated that ‘the application of the Netherlands legislation to the sale in the Netherlands of encyclopaedias produced in that country is in no way linked to the importation or exportation of goods and does not therefore fall within the scope of Articles 30 and 34 of the EEC Treaty’ (paragraph 9 of the judgment).

3 - Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5.

4 - See the judgments in joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, paragraph 13, and Case 103/84 *Commission v Italy* [1986] ECR 1759, paragraph 18.

5 - See in this connection the judgments in Case 155/80 *Oebel* [1981] ECR 1993, Case 75/81 *Blesgen* [1982] ECR 1211, Case 145/85 *Forest* [1986] ECR 3449, Case C-69/88 *Krantz* [1990] I-583, Case C-23/89 *Quietlynn* [1990] ECR I-3059, and Case C-350/89 *Sheptonhurst* [1991] ECR I-2387.

6 - *Blesgen* , referred to above, paragraph 9.

7 - *Quietlynn* , referred to above, paragraph 11.

8 - See in this connection the judgment in *Oosthoek* , referred to above, which is the first occasion on which this approach was adopted to legislation of the type at issue in the present case. See also the judgments in Case 382/87 *Buet* [1989] ECR 1235 and Case C-369/88 *Delattre* [1991] ECR I-1487. Following the same line of reasoning, the Court held that national legislation which restricts or prohibits certain forms of advertising may be such as to reduce the volume of imports: see, for example, the judgments in Case C-362/88 *GB-INNO* [1990] ECR I-667 and Joined Cases C-1/90 and C-176/90 *Aragonesa* [1991] ECR I-4151.

9 - See the judgments, referred to above, in *Oosthoek* , paragraph 15; *Buet* , paragraphs 7 and 8; and *Delattre* , paragraph 50.

10 - Case C-60/89 *Monteil and Samanni* [1991] ECR I-1547 and *Delattre* , referred to above.

11 - Case C-145/88 *Torfaen* [1989] ECR I-3851, Case C-312/89 *Conforama* [1991] ECR I-997, Case C-332/89 *Marchandise* [1991] ECR I-1027 and Case C-169/91 *Council of the City of Stoke-on-Trent* [1992] ECR I-6635.

12 - *Conforama* and *Marchandise* , referred to above, paragraphs 12 and 13 respectively.
13 - *Council of the City of Stoke-on-Trent* , referred to above, paragraph 15.
14 - I note in this connection that LPO claims that most opticians sell spectacles only. However, the figures supplied by the parties do not agree: approximately 2 000 out of 6 000 sales outlets according to LPO, more than 4 000 according to the professional associations.
15 - *Delattre* , referred to above, paragraph 51.
16 - See, most recently, the judgment in *Aragonesa* , referred to above, paragraph 16.
17 - *Delattre* and *Monteil and Samanni* as well as in Case 227/82 *Van Bennekom* [1983] ECR 3883 and in Case 35/85 *Tissier* [1986] ECR 1207.
18 - *Aragonesa* , referred to above, paragraph13.