2. **National rules making the importation of products coming from and in free circulation in a Member State and originating in a third country subject to the issue of a licence for the purposes of the possible future application of Article 115 of the Treaty in any event constitute a quantitative restriction prohibited by Article 30 of the Treaty.**

During the transitional period national rules making the importation of products coming from and in free circulation in a Member State and originating in a third country subject to an application for authorization for the purposes of a possible application of Article 115 of the Treaty did not constitute a quantitative restriction prohibited by the Treaty in so far as that requirement did not render more onerous the rules applicable on the entry into force of the Treaty.

Kutscher Donner Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 15 December 1976.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 24 NOVEMBER 1976 [1]

Mr President,
Members of the Court,

1. By decision of 7 April 1976 the Cour d'Appel, IVth Chambre Correctionnelle), Douai, referred two questions to this Court concerning the interpretation of Articles 30 to 32 of the Treaty of Rome and especially of the concept of 'measures having an effect equivalent to quantitative restrictions.' The questions are couched in the following terms:

(1) Does the fact that the importing Member State requires the country of origin to be indicated on the customs declaration form for products in free

1 — Translated from the Italian.

circulation whose Community status is attested by the Community movement certificate constitute a measure equivalent to a quantitative restriction?

(2) Do the national rules subjecting the importation of textile products from a Member State, where they are in free circulation and which originated in a third country, to an application for authorization for the purposes of a possible application of Article 115 of the Treaty establishing the European Economic Community constitute a measure equivalent to a quantitative restriction:
   (a) during the transitional period;
   (b) since the end of the transitional period, more particularly between 1 January and 2 June 1970?

The series of events which led to this decision began with the importation into France, between December 1969 and October 1970, of bales of cloth and sacks for packing made of synthetic textile fibre by two companies whose registered office is in Belgium. In the customs declarations made by the importers, the Belgo-Luxembourg Economic Union was given as the country of origin of the goods, but subsequent inquiries by the French customs authorities established that, in reality, the goods originated in non-European countries and were in free circulation in Belgium. The directors of the two companies were thereupon charged with having made false declarations of origin contrary to the French customs code and of having thus evaded the procedure for import licences which are required in France for products from third States which are in free circulation in other Member States. On being found guilty by the Tribunal Correctionnel, Lille, they instituted appeal proceedings before the Douai court, which referred the aforementioned questions to the Court of Justice.

2. In the case-law of this Court, the question of measures having an effect equivalent to quantitative restrictions has been examined, from different standpoints, on a number of occasions. The first decision to which I ought to draw attention is that in the *Dassonville* case (Judgment of 11 July in Case 8/74 [1974] ECR 837 *et seq.)* in which the Court made the general declaration that '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'. The same view was taken in the *Van Haaster* case (Judgment of 30 October 1974 in Case 190/73, [1974] ECR 1123 *et seq.)* with specific reference to Regulation (EEC) No 234/68 of the Council on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, Article 10 of which contains, *inter alia,* a provision prohibiting any quantitative restriction or measure having equivalent effect.

Among the Community's secondary legislation a contribution of particular importance to the clarification of the concept of measures having equivalent effect is provided by Commission Directive No 70/50/EEC of 22 December 1969 (OJ, English Special Edition, 1970 (I) p. 17). This was concerned with the application of Article 33 (7) of the Treaty, which is the provision entrusting the Commission with the task of establishing 'the procedure and timetable in accordance with which Member States shall abolish, as between themselves, any measures ... which have an effect equivalent to quotas.' Article 2 (1) of the directive states that it covers 'measures, other than those applicable equally to domestic or imported products, which hinder imports which could otherwise take place, including measures which make importation more difficult or costly than the disposal of domestic production.'

It is, of course, impossible to draw up an exhaustive and definitive list of measures

having equivalent effect from either Community case-law or legislation. This is explained both by the variety of measures which, under the law of the various States, had been adopted prior to the Treaty of Rome and by the fact that, in the Treaty, the concept with which we are concerned plays a complementary and residual role in respect of the concepts of customs duties and charges having equivalent effect (Articles 9 (1), 12 etc.), and quantitative restrictions or quota measures (Articles 30, 32 etc.).

On the other hand, to treat as contrary to Article 30 of the Treaty any measure whatsoever which has a restrictive effect on intra-Community trade or which makes it more difficult or cumbersome would be to underestimate the importance of the *purpose* of the individual measures and the relationship between the restrictive effects and the purpose. On the first point reference should be made to the judgment of the Court in the *Kramer* case (Judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 [1976] ECR 1279) in that it held that national measures involving a limitation of fishing activities with a view to conserving the resources of the sea do not constitute measures having an effect equivalent to a quantitative restriction prohibited under Article 30, even if the immediate effect of such measures is to reduce the volume of trade. On the second point I must quote the judgment in the *Sacchi* case of 30 April 1974 in Case 155/73 [1974] ECR 409 in which, consistently with Article 3 of the Commission Directive of 22 December 1969, referred to above, it was held that 'measures governing the marketing of products where the restrictive effect exceeds the effects intrinsic to trade rules are capable of constituting measures having an effect equivalent to quantitative restrictions', these being further defined by the words immediately following: 'Such is the case, in particular, where the restrictive effects are out of proportion to their purpose.'

The conclusion which may be drawn in the light of the foregoing considerations is, therefore, that national measures which are liable to render intra-Community trade impossible or more difficult are, as a general rule, measures having an effect equivalent to quantitative restrictions contrary to the Treaty unless they were adopted for a purpose worthy of protection and which accords with the common interests of the Member States, in which case, however, the restrictive effect must be in proportion to the lawful object being pursued.

This is a conclusion which, it is worth noting, is consistent with the clause derogating from Articles 30 to 34 of the Treaty, namely Article 36. As the Court will be aware, under Article 36, prohibitions or restrictions on imports (not to mention on exports or goods in transit), may, very exceptionally, be maintained or introduced by the States if they are justified on one of the grounds which the provision specifies in detail (public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property). But, as the Court is also aware, Article 36 adds: 'Such prohibitions or restrictions shall not... constitute a means of arbitrary discrimination or a desguised restriction on trade between Member States'. This makes it clear that the general prohibition of measures having a restrictive effect on trade gives way to specific interests which are regarded as worthy of protection but only so long as the measures exceptionally allowed do not have a discriminatory or restrictive aim which goes beyond the purposes for which they are deemed to be lawful.

3. I come now to the first question referred for a ruling by the French court. As I have stated, it is expressed in terms relating to a specific set of circumstances,

in which goods imported into a Member State are in free circulation, accompanied by the Community movement certificate, and in which the importing Member State requires the country of origin to be indicated in the customs declaration. Is this requirement compatible with the prohibition in Article 30 of the Treaty?

It must first of all be borne in mind that, under Article 9 (2) of the Treaty, the provisions of Article 30 to 37 apply not only to products originating in Member States but also 'to products coming from third countries which are in free circulation in Member States.' Article 10, which follows, defines what is to be understood by products in free circulation in Member States, but there is no disagreement on this point in the present case.

Another question which does not arise in the present case is that of the possibility, as provided for in the said Article 36, of justifying a national provision requiring an indication of the country of origin of the goods. It would, for example, be theoretically possible for a measure of this kind to be introduced or maintained, for particular categories of goods, on grounds of hygiene which could be regarded as falling under the protection of health and life of human beings or animals. But nothing of this kind has been disclosed in the present case, and the case stated by the Douai court refers to a rule of general application in national law which is not restricted to particular categories of goods or justified on any specific ground.

It is also conceivable that, under the safeguards clause in Article 115 of the Treaty, a Member States might be authorized by the Commission to derogate from the principle of the free movement of goods by excluding from that system certain products coming from particular countries. In those circumstances, the need to make importers declare the origin of the imported products and the seriousness of any breach of this obligation would be understandable; it would, therefore, be reasonable even to impose heavy penalties in order to ensure that it was observed. But that situation is, in fact, different from the present case since the French provision regarding certificates of origin was not adopted in the context of an actual example of the application of Article 115. Nevertheless, in its second question, the Douai court, referring to the obligation imposed on importers to obtain an authorization, assumed that this obligation was laid down 'for the purposes of a possible application of Article 115'. This is probably explained by the standpoint adopted by the French customs authorities as it was expressed in a series of notices published in the Journal Officiel on and after 14 June 1959 justifying the obligation on importers to apply for a licence for goods in free circulation and to indicate the country of origin in case the French authorities adopted measures to protect trade in those goods.

In this connexion it is, therefore, necessary to make it clear that the mere possibility of protective measures in the future does not constitute a legitimate basis either for a permanent general obligation on importers to apply for a licence, or for an obligation, similarly general and permanent, to indicate the country of origin of imported products. In principle, protective measures must be authorized by the Commission in each individual case where the exceptional circumstances provided for under Article 115 occur. Even the power, granted to the Member States under the second paragraph of Article 115, themselves to take protective measures *in case of urgency during the transitional period* was not only subject to the duty to notify them to the other Member States and to the Commission and to the reservation that it must be approved by the latter but was in any case dependent on the existence of exceptional circumstances, so that there could be no question of a State's maintaining or adopting, as

normal, measures which, taken in expectation of a purely theoretical and exceptional possibility, constitute an obstruction to imports.

It does not, therefore, seem possible for either Article 36 or Article 115 of the Treaty to be relied upon for justification of the provision with which we are concerned. As indicated by the Douai court in its first question, the imported goods were accompanied by a Community movement certificate. The facts so far examined have not disclosed any reason valid in Community law for which a Member State may, with regard to goods in free circulation, demand a declaration of origin in addition to that certificate.

4. Consideration must, however, be given to another aspect of the question, bearing in mind what was stated by the French customs authorities before the Court concerned with the substance of the case; I refer to the fact that, under Article 95 of the French customs code, referred to by the order of the Director-General of Customs of 1 December 1961, the declarations of origin of imported goods must contain all the information necessary for the purposes of customs statistics as well. Does this use of declarations of origin for statistical purposes avail to justify the provision obliging importers to make the declarations in question?

Statistical surveys are, of course, an indispensable means of detecting the trend of movements of trade. That this knowledge is one of importance to the Community is demonstrated by the fact that, in Regulation No 1736/75 of 24 June 1975, the Council, acting on the basis of Article 235 of the EEC Treaty, felt it to be necessary to introduce standard definitions and methods for the external trade statistics of the Community and for statistics of trade between Member States.

The third recital in the preamble to the regulation indicates that trade statistics, including those of trade between Member States, are collected by the Member States and that standard definitions and methods have proved necessary for the purpose of producing homogeneous and detailed data. In the eleventh recital it is stated that 'statistics relating to trade between the Member States are required for the harmonious functioning of the common market.' The fact that, further, individual Member States may also have an interest, which the Treaty recognizes as a legitimate one, may be demonstrated by reference to the right which each one of them has to apply to the Commission for authorization to take protective measures within the meaning of Article 115, referred to above, on the ground that there is a 'deflection of trade'. Since such a right has been conferred each Member State must also be allowed to obtain the necessary information in order to determine for itself the expediency of measures of the kind indicated or to give the Commission the opportunity to obtain a picture of the pattern of trade in relation to the market in the applicant State to enable it to decide whether or not, and on what conditions, to grant the requested authority to derogate. In my opinion, therefore, there were, at the material time, sufficient grounds, from a Community standpoint, for regarding as legitimate national measures which, for information and statistical purposes, required importers to declare to the customs authorities the origin of goods coming from other Member States.

Nor can this conclusion be regarded as contradicted by what this Court had occasion to declare in *Craeynest* (Judgment of 22 October 1970 in Case 12/70, [1970] ECR 905) which was to the effect that the requirement of the identical use, in all the Member States, of a Community movement certificate for goods (in the case in question this was Certificate DD4) 'would be invalidated if national administrations were able to employ other means of proof, apart from the proof of origin which is established

in the form of the said certificate'. In fact that judgment does no more than declare that, for the purposes of ascertaining whether goods fulfil the requirements of Articles 9 and 10 of the Treaty, the States may not demand further proof that the Community certificate which involves the free circulation of the goods throughout the Community. Having said this, I must add at once that this interpretation cannot rule out definitions and reservations, especially those which accord with the principle, explained above, that an obstruction to the freedom of trade recognized, in view of its object, as legitimate, must be in proportion to that object.

In this connexion, the first question to be determined is whether or not the importing State takes into account the difficulties which an importer may find in specifying with certainty the country of origin of his goods when it demands a declaration as to the origin of the goods and determines the consequences of any errors in the declaration.

In the present case the Commission has stated that products are, with increasing frequency, subjected to a series of processes in various States and may pass through the hands of a number of owners with the result that in many cases it is very difficult, or even impossible, to establish their origin.

Accordingly, and, of course, ignoring subsequent limitations which may now result from Regulation No 1736/75, referred to above, a national provision which makes the marketing of imported goods in all circumstances subject to an exact declaration by the importer of the origin of the goods, without leaving him any ground to stand on if he does not know it, must be held to be unjustifiably harsh and disproportionate to the objective of obtaining statistical information.

Secondly, it is necessary to ascertain what penalty the Member State concerned imposes in the event of failure to comply with the obligation to declare the origin of the goods. If, as in the present case, the penalty takes the form of confiscation of the goods (or of the payment of an amount equal to its value), to which are added a fine equal to twice the value of the goods and conviction to a term of imprisonment, I do not think that I need waste time in showing that the penalty is excessive in relation to the gravity of the offence. This is one of those cases where manifestly excessive punishment affects the exercise of one of the fundamental freedoms of the Treaty.

In this connexion allow me to recall the principle laid down by the Court of Justice in its decision of 7 July 1976 in the *Watson* case (Case 118/75 [1975] ECR 1185) on the subject of the free movement of persons, to the effect that while the States, in carrying out their task of preserving internal public order, are entitled to impose on foreign nationals and on their own nationals who accommodate them a duty to notify the police authorities of the presence of the foreign nationals on the national territory, they cannot attach conditions to that duty such as to cause excessive difficulties to those bound by it (such as fixing unreasonable time-limits) or impose penalties disproportionate to the gravity of the offence in respect of a failure to comply with the duty.

In accordance with this reasoning I feel able to conclude that the penalties inflicted for non-observance of a general duty to supply information for statistical purposes can certainly not be imposed by Member States to the same extent as they might be in circumstances in which it was sought to ensure compliance with a protective measure duly authorized in pursuance of Article 115. It is clear that the weight of the penalty must be different in the two cases. In the second case, it would be a question of ensuring the correct application of a restriction on trade necessary in order to avoid serious economic disturbances; on the other

hand the first case is concerned with ensuring the performance of a straightforward operation for the purpose of providing information, involving goods which are entitled to move freely and without hindrance within the territory of the Community. It is therefore important to ensure that the obligations connected with the collection of this information should not be such as to constitute an unjustifiable restriction on the freedom of movement of goods.

The statistical surveys in question may, as I have said, be used also as a basis on which a State can establish and demonstrate to the Commission the need for protective measures. But it must be emphasized too that precisely because of their derogative nature, such measures are exceptional and the effect of the Community rule which provides for their possible authorization cannot be extended beyond the time when the authority is actually exercised.

For all these reasons, the conclusion must be drawn that the imposition on importers by a Member State of a duty to declare the origin of imported goods — which is compatible with the Treaty in so far as its purpose is to obtain statistical information — constitutes a measure having an effect equivalent to quantitative restrictions if authority for the marketing of the goods depends on the fulfilment of the duty, and if failure to fulfil it results in administrative and punitive sanctions which are out of proportion to the objectives described above.

5. I can now turn to the second question submitted by the national court. That question is based on a case in which, in a Member State, a licence is required for the importation of goods in free circulation in another Member State for the purposes of a possible application of Article 115 of the Treaty. The Court of Justice is asked to rule whether or not such a case comes within the Community prohibition of measures equivalent to quantitative restrictions either during or after the transitional period.

The basis for a reply is to be found among the precedents established by this Court. In its decision of 15 December 1971 in the case of the *International Fruit Company* (Joined Cases 51 to 54/71, [1971] ECR 1107) it was held that, apart from the exceptions for which provision is made by Community law itself, Articles 30 and 34 (1) of the Treaty preclude the application to intra-Community trade of a national provision which requires, even as a pure formality, import or export licences or any other similar procedure. It should be noted that in that case, too, the Court stated that the national authorities always issued licences (or readily granted exemption from the obligation to apply for them) but, despite this, the Court ruled to the effect indicated above. In my opinion, the same principle must be confirmed in the present case.

It is true that, prior to the judgment cited, the Commission had, by Decision No 71/202/EEC of 12 May 1971 (OJ English Special Edition 1971 (I), p. 343) empowered the Member States to take protective measures with regard to the importation of certain products originating in third countries and put into free circulation in other Member States and, in particular, to make the importation of such products subject to the granting of an import authorization in specified circumstances (Article 1 (1)). It is also true that, under the first recital of the preamble to that decision, Member States were permitted to impose a system of licences or other import authorizations in intra-Community trade provided that 'they issue such documents promptly and for all the quantities in respect of which application is made.' But this could not remove the incompatibility, on an objective view, between Government measures of the kind with which we are concerned and the provisions of the Treaty, and once this Court had given a

ruling establishing such incompatibility, it is in my view no longer possible to rely on the above-mentioned decision of the Commission. It must in any case be emphasized that the events to which the questions of the Douai appeal court relate took place prior to the decision of 12 May 1971.

Finally, the description of the national system of import licences as a measure having equivalent effect continues to hold good despite the fact that the system is used 'in anticipation of the possible application of Article 115 of the Treaty'. As I have already said, the mere possibility of a future application of this safeguarding clause is no justification for the permanent general application of the system in question. It is only after the protective measure has, subject to the conditions in Article 115, been adopted by a specific Member State, that it becomes possible to introduce exceptional forms of import controls with the object of ensuring the correct application of the restrictions exceptionally allowed.

6. However, the effects of Articles 30 to 32 differ according to whether the conduct inconsistent with them took place during the transitional period or after its conclusion.

During the transitional period Member States were required, pursuant to Article 31 and to the first paragraph of Article 32, to observe the standstill rule in their trade with one another, that is to say they were to refrain from introducing between themselves any new quantitative restrictions and from making more restrictive those existing at the date of the entry into force of the Treaty. Within that period, therefore, the system of import licences can be regarded as compatible with the Treaty so long as it has not been introduced after the entry into force of the Treaty and does not represent a tightening up of a previous authorization system. This principle also applies to an obligation to declare the origin of imported goods, although, in its first question, the Douai court did not take into account the difference between the arrangements during the transitional period and those which followed.

At the end of the transitional period, the requirement of total abolition, for which the second paragraph of Article 32 provides expressly in the case of quotas, only, is extended to measures having equivalent effect. This is to be concluded from the general nature of the prohibition imposed by Article 30 on such measures, on the same basis as in the case of quotas, and also from the provision in Article 8 (7) that 'the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all the measures required for establishing the Common Market must be implemented'.

7. For all these reasons I am of the opinion that the Court should reply to the questions referred to it for a preliminary ruling by the Cour d'Appel of Douai by ruling as follows:

1. The prohibition contained in Article 30 of the EEC Treaty of all measures having equivalent effect to quantitative restrictions on imports does not preclude a Member State from requiring importers, for statistical purposes, to state the origin of goods coming from another Member State. Nevertheless it is a breach of such prohibition to make the authorization for the marketing of the goods subject to an exact indication of origin.

A national provision which, for failure to comply with the duty to indicate origin, imposes penalties which, in view of the lawfully pursued objective of merely obtaining statistical information, are disproportionate to the gravity of the offence is also incompatible with the said prohibition.

2. The imposition, even as a mere formality, of import licences in trade between Member States constitutes a measure having an effect equivalent to a quantitative restriction.

3. The application, during the transitional period, of measures of the kind described in paragraphs 1. and 2. above would have been contrary to Articles 31 and 32 of the Treaty if they had constituted in trade between the Member States new and more burdensome restrictions than those existing at the date of the entry into force of the Treaty.