

OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 19 February 2004¹

1. Traditionally, the purity of gold has been measured in carats, pure gold being 24 carats; now, it is often measured in parts per thousand. The issue in the present case is whether a rule in a Member State, under which only articles of a fineness of 750 parts per thousand (18 carats) or more may be described as 'gold', while those of a fineness of 375 or 585 parts per thousand (9 or 14 carats respectively) are to be termed 'gold alloy', is a measure equivalent in effect to a quantitative restriction on imports and thus prohibited by Article 28 EC.

3. In September 2001, it sent the French authorities a reasoned opinion, within the meaning of the first paragraph of Article 226 EC, concerning two of those alleged obstacles to trade.

4. Following the French reply dated 4 February 2002, only the allegation in issue in the present proceedings remained outstanding.

5. On 10 April 2003, the Commission applied to the Court for a declaration that, by reserving the term 'gold' to articles stamped as being of a fineness of 750 parts per thousand while articles stamped with a fineness of 375 or 585 parts per thousand are to be termed 'gold alloy', the French Republic had failed to fulfil its obligations under Article 28 EC.

Procedure

2. In November 2000, following receipt of a complaint, the Commission sent the French Government a formal letter setting out four ways in which it believed that certain French rules might hinder imports of gold articles into France.

6. The rule in issue is embodied in Article 522 *bis* of the Code général des impôts (General Tax Code) and applies at the stage of retail sales to individuals. The number of parts per thousand must be specified for articles of 'gold alloy' though it is not clear whether the same applies for those of 'gold'.

¹ — Original language: English.

Argument

precedence over the free movement of goods.²

7. The Commission states that the great majority of articles thus required to be described as 'gold alloy' are imported. Items legally sold as 'gold' in their Member State of origin must be sold in France under a different, less well-known and less highly-regarded name, making them more difficult to market there and thus hindering their importation (although the French Government denies there is any evidence for that hypothesis).

8. It is settled law that, in the absence of harmonisation of legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures having equivalent effect which are prohibited by Article 28 EC, even if those rules apply without distinction to all products, unless their application can be justified by a public-interest objective taking

9. The Commission considers that there is no such overriding interest in the present case. Any need to inform consumers — who are deemed to be reasonably well-informed, observant and circumspect³ — can be met by adequate labelling,⁴ which could provide more detailed and helpful information than a mere difference in designation and in which traders would be free to stress the advantages of a particular standard of fineness.

10. The French Government asserts that there is such an interest. A naming rule necessary to satisfy fair-trading and consumer-protection requirements may be justified if it is proportionate to an objective which cannot be achieved by measures less restrictive of intra-Community trade.⁵ The rule in issue is necessary to protect consumers by informing them, simply and directly, of a substantial difference between

2 — See, for example, Case 120/78 *Rewe-Zentral ('Cassis de Dijon')* [1979] ECR 649, paragraph 14 of the judgment; Case C-84/00 *Commission v France* [2001] ECR I-4553, paragraph 24.

3 — See, for example, Case C-30/99 *Commission v Ireland* [2001] ECR I-4619, paragraph 32 of the judgment.

4 — See Case 193/80 *Commission v Italy* [1981] ECR 3019, particularly at paragraph 27 of the judgment.

5 — See Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 27 of the judgment and the case-law cited there.

two qualities of product, avoiding any confusion that might be caused by more technical information. It is proportionate to that aim, is not designed to protect any advantage held by domestic industry and is thus not contrary to Article 28 EC.

Assessment

11. In their reply and rejoinder, the parties concentrate on the existence or otherwise of an obstacle to trade. Whilst maintaining that the rule is in fact likely to hinder imports, the Commission stresses that any measure even potentially capable of creating even a slight obstacle is caught by Article 28. In any event, it is implausible to suggest that the designation of a luxury product has little effect on consumers, and the Court has consistently held that a labelling rule is less restrictive of trade than a designation rule.⁶ Labelling of fineness in parts per thousand is clear and simple for the average consumer. The French Government however insists that the Commission must establish the existence of an effect on trade, but has not done so.

12. This case does not call for consideration either of what the minimum standard of fineness should be in order for an article to be described as 'gold' or of what means are acceptable for guaranteeing the accuracy of an indication of fineness of a gold article. Neither of those criteria has yet been the subject of Community harmonisation. The question is whether, in the absence of such harmonisation, the French rule is caught in principle by Article 28 EC and whether, if so, it may be justified.

13. It may also be borne in mind that, at least in Europe, most gold used in the production of jewellery or other gold articles is in the form of an alloy. A gold content of between three eighths (375 parts per thousand) and three quarters (750 parts per thousand) is common. Higher standards are also used, but pure or almost pure gold is often too soft to be worked, although apparently preferred in some parts of the world. Alloys are in general used for purposes of workability, strength and durability. Different alloys have different colours, different physical properties and different prices, and correspond to different consumer preferences.

⁶ — See *Commission v Italy*, cited in note 4, and Case C-12/00 *Commission v Spain* [2003] ECR I-459.

Does the French rule constitute a measure having an effect equivalent to a quantitative restriction?

14. The French Government's position is essentially that the Commission has not put forward any evidence at all of the existence of any barrier to trade, however uncertain or however slight.

15. The Commission submitted in its application that a great majority of articles of a fineness of 375 parts per thousand or 585 parts per thousand sold in France are imported; that they may be lawfully sold as 'gold' in their Member States of origin but that French law requires them to be sold as 'gold alloy' in France; and that the designation 'gold alloy' is likely to make them less attractive to purchasers than those described as 'gold'.

16. If established, those elements taken together do in my view identify a rule which is in principle incompatible with Article 28 EC, giving rise to a need to consider whether there is none the less any justification such as to render the rule compatible with Community law.⁷

17. In its defence, the French Republic denies that products designated as 'gold alloy' will be less attractive to purchasers and argues that the Commission has not provided any proof of the alleged effect on intra-Community trade.

18. However, it is settled law that all measures which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade are to be regarded as measures having equivalent effect to quantitative restrictions and, on that basis, as prohibited by Article 28 EC.⁸ That criterion is clearly met here.

19. To deny that the disputed rule is capable of having any effect on purchasing, and thus on trade, is not only implausible but also incompatible with the French Government's own principal argument that the rule is necessary for consumer protection.

20. Any consumer-protection requirement concerning designation of goods according to their quality is designed to have an effect

⁷ — Compare, for example, *Guinont*, cited in note 5, paragraphs 25 to 27 of the judgment.

⁸ — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5 of the judgment; Case C-322/01 *Deutscher Apothekerverband*, [2003] ECR I-14887, paragraph 66.

on purchasing, if only by preventing consumers from buying an article on the basis of a mistaken belief. Designations of higher quality will in principle always be more attractive than those of lower quality. Where other criteria, such as price, are equal, a designation of quality is likely to be decisive in the consumer's choice — in favour of the more attractive quality. And it does not seem possible seriously to contend that 'gold' is not a more attractive designation for articles of jewellery than 'gold alloy'.

21. Consequently, the rule in issue is capable of hindering trade between Member States and is therefore prohibited in principle by Article 28 EC.

Can the rule be justified?

22. It is clear from the *Cassis de Dijon* line of case-law⁹ that consumer protection and fair trading are objectives in the public interest which may take precedence over the free movement of goods.

23. It may also readily be accepted that, in view of the intrinsic value of the raw material of gold jewellery, those objectives require proper information as to the gold content of that raw material. Whilst aesthetic attractiveness, quality of workmanship and overall price will no doubt be factors in a purchaser's final decision, the proportion of gold in an article will certainly be taken into account in the choice. Gold is an emotive commodity, and history demonstrates a human predilection for purity, coupled with a perhaps justified apprehension of fraud.

24. However, as the Commission rightly contends, those concerns can be met by adequate labelling.

25. A system of labelling in accordance with the currently accepted scale of parts per thousand appears wholly proportionate to the aims of consumer protection and fair trading. It is entirely transparent, with the possible minor qualification that the public at large is perhaps more used to thinking in percentages than in 'permillages'.

⁹ — See note 2.

26. The previously current, and possibly even now more familiar, system of carats is also transparent, although for a proper appreciation it requires the slightly arcane knowledge that pure gold is 24 carats, together with a certain ability to think in 24ths.

27. The system defended as necessary by the French Government, however, is rather more opaque. Without further information, it might be liable to lead consumers to believe simply that articles designated 'gold' were of pure gold whereas those designated 'gold alloy' were of adulterated gold. There are three ways in which it thus seems, on its own, unsuited to achieve its stated aim.

28. First, it gives directly no information whatever, and even indirectly no detailed information, as to the actual gold content of the article designated.

29. Second, it fails to alert the consumer to the fact that gold of a fineness of 750 parts per thousand is also an alloy, since it contains 25 % of another metal or metals.

30. Third, it fails to distinguish between gold of a fineness of 585 parts per thousand and that of a fineness of 375 parts per thousand — a distinction which may be, if anything, more significant to consumers than that between a fineness of 750 parts per thousand and a fineness of 585 parts per thousand, since it concerns the difference between alloys containing respectively more and less than 50 % of gold.

31. It is true that at least articles of the two lowest standards of fineness must apparently also bear an indication of that precise fineness. To that extent, however, the parallel system of dichotomous designation as either 'gold' or 'gold alloy' seems at best superfluous and certainly inappropriate to the provision of information with regard to what is in essence a sliding scale of proportional composition.

32. Those failings seem to me to outweigh by far the propounded simplicity and advantages of the system — which, rather than avert confusion, may thus even fuel it. Thus, the rule in issue is not merely less suitable than the labelling advocated by the Commission to achieve the avowed aim, it is actually unsuitable and cannot be considered proportionate. There can be no basis for the French Government's argument that it is a necessary complement to more 'technical' information in terms of parts per thousand.

33. Finally, it may be pointed out that the French Government's arguments in that regard are somewhat weakened by the fact that, in its letter to the Commission of 7 February 2001, during the course of the pre-litigation procedure, it announced its intention to dispense with the rule entirely.

Conclusion

34. I am consequently of the opinion that the Court should

- (1) declare that, by reserving the term 'gold' to articles stamped as being of a fineness of 750 parts per thousand while articles stamped with a fineness of 375 or 585 parts per thousand are to be termed 'gold alloy', the French Republic has failed to fulfil its obligations under Article 28 EC; and
- (2) order the French Republic to pay the costs.