Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SANCHEZ-BORDONA
delivered on 3 May 2016 [1]

Case C-525/14

European Commission
v

Czech Republic

(Failure to fulfil obligations — Free movement of goods — Article 34 TFEU — Quantitative restrictions on imports — Measures having equivalent effect — Precious metals marked in a third country in accordance with Netherlands law — Importation into the Czech Republic after release for free circulation in the Kingdom of the Netherlands or another Member State — Refusal to recognise hallmark — Consumer protection — Admissibility)

1. The Czech Republic disputes the Commission's complaint that it has failed to fulfil its obligations and contends that Articles 34 and 36 TFEU do not prohibit the administrative practice of its national assay office, since the WaarborgHolland hallmarks are stamped both in the Netherlands and in establishments situated in third countries (China and Thailand).

2. To date, the Court has laid down settled case-law on the mutual recognition of national hallmarks of Member States. The new feature of this action lies in the fact that it is necessary to decide whether that case-law applies also to articles of precious metals which come from third countries and are then imported and released for free circulation in the European Union, where those articles bear the hallmark of the Netherlands assay office, WaarborgHolland, which has been stamped in those third countries.

3. Release for free circulation entails the assimilation of goods which have arrived from outside the European Union to intra-Community goods. However, such assimilation may not be sufficient to achieve mutual recognition: the prior marketing of a product in a Member State, in accordance with its national rules, is a condition for the acceptance of equivalence by another Member State (the State of destination) and for that State's not requiring the application of its own provisions. Identification of the extent to which, and under what circumstances, that condition may be required calls for further clarification in the instant case.

I – **Conduct of the procedure for failure to fulfil obligations**

4. On 30 September 2011, the Commission sent the Czech Republic a letter of formal notice seeking an explanation of the latter's refusal to recognise Netherlands hallmarks, in particular those of the WaarborgHolland assay office.

1 — Original language: Spanish.

5. In its reply of 30 November 2011, the Czech Republic admitted that it did not recognise those Netherlands hallmarks which, in its view, raised a problem regarding the freedom to provide services and not the free movement of goods. The Czech Government gave as the reason for refusal the fact that it was impossible to distinguish between goods marked with WaarborgHolland hallmarks in the Netherlands and those marked in third countries and then imported into the European Union.

6. The Commission was not persuaded by the explanations of the Czech authorities and, on 30 May 2013, it sent the Czech Republic a reasoned opinion in which it stated that the provisions of the TFEU governing the free movement of goods apply to goods put into free circulation in the customs territory of the Union and, therefore, to goods from third countries imported into a Member State in accordance with Article 29 TFEU. The Commission invited the Czech Republic to bring its conduct into line with Article 34 TFEU within two months.

7. In its reply of 23 July 2013, the Czech Republic maintained its position and insisted that the refusal to allow articles of precious metals bearing the WaarborgHolland hallmarks to be placed on the market was justified by the need to protect Czech consumers.

8. On 20 November 2014, in the light of the Czech Republic's attitude, the Commission brought the present action for failure to fulfil obligations, based on the same arguments as those put forward in the pre-litigation procedure. In its defence, the Czech Republic maintained the position it had adopted in response to the Commission.

9. By letter of 26 February 2015, France applied to the President of the Court for leave to intervene in the proceedings in support of the stance of the Czech Republic. On 9 April 2015, the Court Registry informed France that its application to intervene had been granted, in accordance with Article 130 of the Rules of Procedure, and France lodged its statement in intervention on 26 May 2015.

10. The Commission and the Czech Republic maintained their opposing positions in the reply and the rejoinder and also at the hearing before the Court, which was held on 17 February 2016.

II – **Admissibility of the action**

11. The Czech Republic submits that the action is partially inadmissible because the Commission has framed the complaint of infringement against it in imprecise and ambiguous terms, referring to the refusal to recognise 'certain Netherlands hallmarks' and, 'in particular, the WaarborgHolland hallmarks', whereas, in the pre-litigation procedure and in the application, the Commission referred only to the WaarborgHolland hallmarks without mentioning any others. The action should therefore be limited to the latter conduct of the Czech authorities.

12. The Commission contests the plea of partial inadmissibility, contending that it has not broadened the subject matter of the action because, during the pre-litigation procedure (in particular, in the reasoned opinion), it alleged that, by failing to recognise 'certain Netherlands hallmarks', the Czech Republic was in breach of Article 34 TFEU.

13. According to settled case-law of the Court, in an action for failure to fulfil obligations, the application must state clearly and precisely the subject matter of the proceedings and a summary of the pleas in law on which the application is based, so as to enable the defendant to prepare a defence and the Court to rule on the application. It follows that the essential points of law and of fact on which an action is based must be indicated coherently and intelligibly in the application itself and that the heads of claim must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint.

14. The Court has also held that, in an action for failure to fulfil obligations, the Commission must set out the complaints coherently and precisely, so that the Member State and the Court can know exactly the full extent of the alleged infringement of EU law. That condition enables the Member State to present an effective defence and the Court to determine whether there has been a breach of obligations, as alleged. [2]

15. In the light of those requirements, I believe that the Czech Republic's argument is well founded and that the action brought by the Commission should be declared partially inadmissible. The subject matter of the infringement is defined imprecisely in that the Commission refers to the refusal of the Czech Republic to recognise 'certain Netherlands hallmarks' and the Commission only specifies — and attaches information relating to — articles marked by the WaarborgHolland assay office, established in Gouda, which is the only office which has relocated its operations to third countries (specifically, to China and Thailand).

16. The Commission has not adduced any evidence that the Czech authorities refuse to recognise the hallmark stamped by the other Netherlands assay office (Edelmetaal Waarborg Nederland BV, established in Joure). Moreover, the Czech Republic has stated, without being contradicted by the Commission, that it only requires the affixing of the Czech hallmark on articles of precious metals stamped with the WaarborgHolland hallmark.

17. Although there is a degree of consistency between the Commission's conduct in the pre-litigation phase and the judicial phase, I believe that there is a lack of precision in the Commission's allegations against the Czech Republic regarding the latter's refusal to recognise Netherlands hallmarks other than those stamped by WaarborgHolland. Accordingly, the Commission's action should be declared partially inadmissible as far as those hallmarks are concerned, and ruled admissible as regards the refusal by the Czech authorities to recognise articles of precious metals stamped with the WaarborgHolland hallmarks.

III – **Analysis of the substance of the case**

18. Before analysing the breach of obligations which the Commission alleges against the Czech Republic, it is appropriate to set out a number of features of the legal provisions applicable in the European Union and at international level to the trade in articles of precious metals.

A – *Preliminary considerations regarding the trade in articles of precious metals*

19. The marketing of articles of precious metals is one of the areas in which it has not been possible to remove technical barriers (derived from the fact that different rules exist in the Member States) through the harmonisation of laws. In the light of the failure of successive proposals from the Commission, [3] the legal technique of mutual recognition has been applied by the case-law of the Court and encouraged by the Commission itself as an alternative to lack of harmonisation. [4]

2 — Judgments in *Commission* v *Estonia*, C-39/10, EU:C:2012:282, paragraphs 24 to 26; *Commission* v *Spain*, C-211/08, EU:C:2010:340, paragraph 32; *Commission* v *Portugal*, C-458/08, EU:C:2010:692, paragraph 49; *Commission* v *Poland*, C-281/11, EU:C:2013:855, paragraphs 121 to 123; *Commission* v *Czech Republic*, C-343/08, EU:C:2010:14, paragraph 25; and *Commission* v *Spain*, C-375/10, EU:C:2011:184, paragraphs 10 and 11.

3 — Proposal for a Council Directive on the approximation of the laws of the Member States relating to articles of precious metals (COM/1975/607/final) of 1 December 1975 (OJ 1976 C 11, p. 2), withdrawn in 1977. Proposal for a Council Directive on articles of precious metal (COM(93) 322 final), of 14 October 1993, as amended by the Amended proposal for a European Parliament and Council Directive on articles of precious metal (COM(94) 267 final), of 30 June 1994 (OJ 1994 C 209, p. 4), withdrawn in 2005.

4 — See the Commission guidance document, *The application of the Mutual Recognition Regulation to articles of precious metals*, of 1 February 2010.

20. The reason why there is still no genuine internal market with free movement of articles of precious metals is because many Member States have national assay offices which apply different markings and hallmarks to guarantee the origin and standard of fineness of such articles.[5] The purpose of those hallmarks is to protect consumers, prevent fraud and ensure the good faith of commercial transactions.

21. The national provisions governing articles of precious metals form a very diverse picture. Fifteen countries (including the Czech Republic and the Netherlands) have established a system of compulsory marking, carried out by their authorised assay offices, in order to indicate that an article has been satisfactorily assayed. Seven Member States have a system of voluntary marking while a further five have no system at all.

22. Most of the technical barriers to trade in articles of precious metals stem from the existence of a procedure for controlling such articles by an authorised assay office before they enter the national market and from the requirement of a compulsory mark,[6] called a hallmark, which indicates the manufacturer, the nature of the metal and its standard of fineness. The most common hallmarks are the following:

— the assay office mark, which indicates that the article has been satisfactorily assayed and usually also specifies the nature of the metal and its standard of fineness;

— the responsibility mark (or sponsor's mark) of the manufacturer, which is usually registered in the country where the article of precious metals is controlled;

— the fineness mark (or the metal mark),[7] which indicates the nature of the precious metal and its standard of fineness, expressed in carats or parts per thousand;

— the common control mark, established by the Convention on the Control and Marking of Articles of Precious Metals, signed in Vienna on 15 November 1972.[8]

23. In view of the technical barriers created by the differences between national provisions governing the hallmarking of articles of precious metals, the Court has applied to this area its case-law relating to Articles 34 to 36 TFEU. The Court has done so, in particular, when referring to the obligation of mutual recognition of hallmarks.

5 — According to the available information, in the period from 13 May 2009, the date of entry into force of Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (OJ 2008 L 218, p. 21), and 31 December 2011, 90% of the 1 524 notifications of refusal of mutual recognition concerned articles of precious metals. See the Communication from the Commission to the European Parliament and the Council: First Report on the application of Regulation No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (COM(2012) 292 final), of 15 June 2012, p. 8.

6 — See the information on the website of the International Association of Assay Offices, http://www.theiaao.com/hallmarking/.

7 — According to the information supplied by the Commission, there are currently 18 standards of fineness for gold in the EU but only two are common to all the Member States (585 and 750). In the case of silver, there are 15 national standards of fineness throughout the EU but only 800 and 925 are accepted in all the Member States. There are five standards of fineness in the EU for platinum, which is not accepted as a precious metal in Bulgaria, Cyprus and Germany (European Commission, *The application of the Mutual Recognition Regulation to articles of precious metals*, 1 February 2010, p. 9).

8 — The text of the Convention, which has been amended on a number of occasions, and the list of States parties can be viewed at http://www.hallmarkingconvention.org/documents.php.

24. The Court's line of reasoning was clear in the judgments in *Robertson and Others*, *Houtwipper*, *Commission* v *Ireland*, and *Juvelta*,[9] which concerned intra-Community trade in such goods. National rules constitute measures having an effect equivalent to importation (and are therefore contrary to Article 34 TFEU) if they impose on products imported from other Member States, where they have been lawfully hallmarked and marketed, the obligation to obtain a fresh hallmark in the Member State of destination, since that condition makes the intra-Community importation of such articles more difficult and costly.

25. However, the Court has accepted that, in the absence of harmonisation at EU level, the requirement of stamping with a national hallmark and the failure to recognise the hallmark of the State of origin can be justified to some extent by the overriding requirements of consumer protection and the good faith of commercial transactions, developed with effect from the judgment in *Cassis de Dijon*.[10] The hallmark ensures that the consumer is not misled for it is not possible to determine, by sight, by touch or by weight, the exact degree of purity of an article of precious metal.[11] As the old proverb says, 'all that glisters is not gold'.

26. There can be no requirement to affix the hallmark of the State of destination where the article imported from another Member State has been stamped with a hallmark which includes information, in whatever form, which is equivalent to that prescribed by the Member State of importation and intelligible to consumers of that State.[12] This therefore entails specific application of the principle of the mutual recognition of equivalent national trading rules, on which the Court has frequently relied as an alternative to the absence of harmonisation of laws, in order to remove technical barriers to intra-Community trade.

27. As regards trade (in articles of precious metals) between the European Union and third countries, there are very few applicable provisions and even more technical barriers exist than in the intra-Community market because of the wide diversity of national legal systems. Logically, that trade is subject to the application of the general provisions of the World Trade Organisation, in particular, GATT and the Agreement on Technical Barriers to Trade.[13] The European Union has not concluded agreements within the framework of the common commercial policy or included in its treaties with third countries provisions on trade in articles made from precious metals.

28. An attempt to abolish the technical barriers in the international trade in such articles was made by means of the Convention on the Control and Marking of Articles of Precious Metals, signed in Vienna on 15 November 1972, which entered into force in 1975 and to which 16 EU Member States, in addition to Switzerland, Norway and Israel, are parties ('the Vienna Convention').[14] That convention has been in force in the Czech Republic since 1994 and in the Netherlands since 1999.

29. The Vienna Convention provides for minimum harmonisation of the provisions applicable to hallmarks in order to promote their mutual recognition among the countries which are parties thereto. National assay offices designated in accordance with the convention may stamp the common control mark on articles made from gold, silver and platinum after their fineness has been checked in accordance with approved assaying methods. Each contracting State permits goods marked with the

9 — Judgments in *Robertson and Others*, 220/81, EU:C:1982:239; *Houtwipper*, C-293/93, EU:C:1994:330; *Commission* v *Ireland*, C-30/99, EU:C:2001:346; and *Juvelta*, C-481/12, EU:C:2014:11.

10 — Judgment in *Rewe-Zentral*, 120/78, EU:C:1979:42 ('Cassis de Dijon').

11 — See judgments in *Robertson and Others*, 220/81, EU:C:1982:239, paragraphs 9 and 11, and *Houtwipper*, C-293/93, EU:C:1994:330, paragraphs 11 and 14.

12 — Judgments in *Robertson and Others*, 220/81, EU:C:1982:239, paragraph 12; *Houtwipper*, C-293/93, EU:C:1994:330, paragraph 15; *Commission* v *Ireland*, C-30/99, EU:C:2001:346, paragraphs 30 and 69; and *Juvelta*, C-481/12, EU:C:2014:11, paragraph 22.

13 — Nevertheless, since the general exceptions laid down in Article XX of GATT include measures 'relating to the importations or exportations of gold or silver', it is straightforward for States to justify their restrictive national rules.

14 — The list of States parties and States with observer status (Croatia, Italy, Serbia, Sri Lanka and Ukraine) appears at http://www.hallmarkingconvention.org/members-observers.php.

common control mark [15] to be imported into its territory without carrying out any testing or stamping of an additional hallmark. Stamping of the common control mark is carried out voluntarily and an exporter has the option of requesting that mark from his national assay office or sending the goods without the mark to the importing country, which will stamp the mark if the goods comply with its legislation and the convention. Articles bearing the common control mark and the other three marks provided for in the convention are accepted by the States parties without requiring any assaying or stamping of an additional hallmark.

30. The reluctance of a number of European States (particularly those with authorised assay offices of long-standing with a wealth of tradition and experience) to become parties to the Vienna Convention has led to the conclusion of bilateral treaties on the mutual recognition of hallmarks with third countries which are very active in the international trade in articles of precious metals . [16]

B – *The infringement alleged by the Commission against the Czech Republic*

1. Whether there is a restriction of the free movement of goods

31. The Commission submits that the Czech Republic's practice of requiring the stamping of the Czech hallmark on articles of precious metals bearing the WaarborgHolland hallmark constitutes a measure having an effect equivalent to importation, which is prohibited by Articles 34 to 36 TFEU.

32. The Commission contends that the case-law of the Court on the recognition of hallmarks is fully applicable to the conduct of the Czech Republic because freedom of movement applies to goods coming from Member States and to goods coming from third countries which have been released for free circulation in accordance with Article 29 TFEU. The Czech Republic cannot recognise the hallmarks of some Member States while treating articles bearing the WaarborgHolland hallmark differently because that office physically stamps its hallmark in third countries, after having relocated a number of its operations outside the Netherlands and the EU.

33. The Czech Republic responds that its conduct is compatible with Article 34 TFEU because the mutual recognition of hallmarks is permitted only for intra-Community goods and for goods from third countries which have been released for free circulation in the EU if they have already been marketed in a Member State in accordance with that State's national law. Therefore, articles marked with the WaarborgHolland hallmarks in third countries, which are released for free circulation in the EU and not lawfully marketed in a Member State, do not benefit from mutual recognition even though hallmarking by WaarborgHolland outside the EU is carried out in accordance with Netherlands law.

34. In my view, it should be made clear, first, that the administrative practice of the Czech assay office can be attributed to the Czech Republic, from which it follows that it may be classified as a measure having equivalent effect to a quantitative restriction on imports, in accordance with the case-law of the Court. [17]

15 — Point 4 of Annex II to the Vienna Convention provides that, in addition to the common control mark, articles must be marked with the hallmark of the country of origin or destination, the responsibility mark of the manufacturer or sponsor's mark, and the fineness mark.

16 — Convention entre le Conseil fédéral suisse et le Gouvernement de la République française relative à la reconnaissance réciproque des poinçons officiels apposés sur les ouvrages en métaux précieux, publiée comme annexe au Décret No 89-216 du 10 avril 1989 (JORF of 14 April 1989, page 4741), concluded on 2 June 1987 and in force since 1 May 1989. Convention entre la Confédération suisse et la République italienne relative à la reconnaissance réciproque des poinçons apposés sur les ouvrages en métaux précieux (RO 1974 753), concluded on 15 January 1970 and in force since 30 March 1974.

17 — Judgments in *Commission* v *Germany*, C-387/99, EU:C:2004:235, paragraph 42, and *Commission* v *Spain*, C-88/07, EU:C:2009:123, paragraph 54.

35. Second, I do not agree with the Czech Republic's argument (put forward in the pre-litigation stage of the proceedings) that its conduct ought to be examined in the light of the provisions and case-law on freedom to provide services. As the Commission stated, the restrictions imposed by the Czech Republic directly affect the trade in articles of precious metals and not the provision of hallmarking services. The hallmark is punched onto the goods, of which it forms part, and therefore the Czech practice affects the free movement of goods and not the free movement of services. It is an administrative practice of a Member State, which applies without distinction and affects the marketing of a type of goods.

36. Third, I believe that the Czech administrative practices fits without difficulty into the definition of a measure having an effect equivalent to a quantitative restriction on imports, which was adopted by the Court in its case-law on the interpretation of Article 34 TFEU. All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be classified as such. [18]

37. The Court has held that, in the absence of harmonisation of laws, obstacles to 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 constitute measures of equivalent effect prohibited by Article 34 TFEU, even if those rules apply without distinction to all products, unless their application can be justified by a public-interest objective taking precedence over the requirements of the free movement of goods. [19]

38. The requirement that the Czech hallmark must be stamped on articles marked with the WaarborgHolland hallmarks impedes the marketing of those articles on Czech territory by requiring them to be stamped with two hallmarks; it also necessitates the payment of a fee to the authorised assay office of the State of destination and delays the placing of the article on the market, with the resulting increase in costs. [20]

39. In principle, and subject to the qualification which I shall set out below, the prohibition in Article 34 TFEU affects goods in intra-Community trade and goods coming from third countries which are in free circulation in the EU. The Court has made it clear that, as regards free movement of goods within the European Union, goods in free circulation are definitively and wholly assimilated to goods originating in Member States. [21]

40. Therefore, the Czech measure infringes Article 34 TFEU since it applies to articles of precious metals which are produced and marketed in the Netherlands under the WaarborgHolland hallmark. The Czech measure also infringes that article because it applies to such articles where they are produced in a third country, marked in that third country with the WaarborgHolland hallmark and imported and released for free circulation in any Member State before being imported to the Czech Republic.

18 — See, in particular, the judgments in *Dassonville*, 8/74, EU:C:1974:82, paragraph 5; *Ker-Optika*, C-108/09, EU:C:2010:725, paragraph 47; and *Juvelta*, C-481/12, EU:C:2014:11, paragraph 16.

19 — See the judgments in *Robertson and Others*, 220/81, EU:C:1982:239, paragraph 9; *Houtwipper*, C-293/93, EU:C:1994:330, paragraph 11; *Commission* v *Ireland*, C-30/99, EU:C:2001:346, paragraph 26; and *Juvelta*, C-481/12, EU:C:2014:11, paragraph 17.

20 — Judgments in *Houtwipper*, C-293/93, EU:C:1994:330, paragraph 13; *Commission* v *Ireland*, C-30/99, EU:C:2001:346, paragraph 27; and *Juvelta*, C-481/12, EU:C:2014:11, paragraph 18.

21 — See, to that effect, judgments in *Tezi* v *Commission*, 59/84, EU:C:1986:102, paragraph 26, and *UNIC and Uni.co.pel*, C-95/14, EU:C:2015:492, paragraph 41.

2. Justification for the restriction

41. The Czech Republic, supported by France, seeks to justify its administrative practice by relying on the overriding requirement to protect consumers. The Czech Republic further submits that it respects the principle of proportionality because there is no way of differentiating articles marked by WaarborgHolland on Netherlands territory from those which WaarborgHolland has marked with its hallmark in third countries. According to the Czech Republic's defence, attempts to establish, through conversations with WaarborgHolland, clear guidelines to distinguish one from the other have been fruitless.

42. As I have pointed out, the Court has accepted that, in the absence of harmonisation by the EU, marking with the national hallmark and non-recognition of the hallmark of the State of origin may be justified by the overriding requirements of consumer protection and the good faith of commercial transactions. In line with that criterion, the Czech Republic could rely on consumer protection to legitimise the practice of requiring Czech hallmarking and refusing to accept the WaarborgHolland hallmarks.

43. That Czech administrative practice will be covered by consumer protection only if, cumulatively: (a) the WaarborgHolland hallmarks do not offer protection equivalent to Czech hallmarks and (b) that practice respects the principle of proportionality.

a) Equivalence and mutual recognition of Czech and Netherlands hallmarks

44. The Commission submits that the Czech and Netherlands hallmarks provide consumers with similar protection, from which it follows that the Czech Republic ought to allow their mutual recognition in line with the case-law of the Court.[22] In fact, the Czech authorities do not dispute that assertion of the Commission and accept that their hallmark is equivalent to the Netherlands hallmark but only in respect of articles marked by WaarborgHolland on Netherlands territory and not in respect of articles marked by WaarborgHolland in third countries and then released for free circulation in the European Union and imported into the Czech Republic.

45. The Commission contends that mutual recognition of the Czech and Netherlands hallmarks cannot be refused because WaarborgHolland has relocated some of its operations to third countries, for the Netherlands authorities continue to monitor those operations in accordance with national law. For those purposes, articles hallmarked by WaarborgHolland on Netherlands territory and those marked by that assay office in third countries are equivalent once the latter have been released for free circulation in any Member State.

46. By contrast, the Czech Republic, supported by France, submits that mutual recognition is only possible for articles of precious metals when the hallmark has been stamped in the territory of a Member State, but not in the case of articles of precious metals marked in third countries, even where the hallmark is stamped by an assay office of a Member State and, it is to be presumed, in accordance with the law of that State. Such articles are goods from third countries and are not covered by the principle of mutual recognition even if they have been released into free circulation in a Member State, unless they are placed on the market in that State in accordance with its national law.

22 — Pursuant to which a Member State will be in breach of Article 34 TFEU if it imposes on goods imported from other Member States, where they are lawfully hallmarked and marketed, the obligation to obtain a fresh hallmark in the Member State of destination.

47. To my mind, the resolution of the dispute calls for the application of the principle of mutual recognition of hallmarks in a manner which is compatible with the facts of the case. First, I believe that the principle is fully applicable to articles which are lawfully produced and marketed in the Netherlands and later exported to the Czech Republic. The case-law of the Court on the mutual recognition of equivalent hallmarks is perfectly clear in those circumstances.

48. Second, the principle is also applicable to articles which are manufactured from precious metals in third countries and stamped by WaarborgHolland with the Netherlands hallmark in its offices in China or Thailand, and which are then, consecutively, imported to and released for free circulation in the European Union, lawfully marketed in the Netherlands, and later exported to the Czech Republic. In that situation, mutual recognition of the Czech and Netherlands hallmarks is again required, since the Netherlands authorities will have verified whether articles imported from third countries bearing the WaarborgHolland hallmarks are compatible with their national law.

49. Third, there are articles which are made from precious metals in third countries, stamped by WaarborgHolland with the Netherlands hallmark at its offices in China or Thailand, and then later imported to and released for free circulation in the European Union and lawfully marketed in a Member State other than the Netherlands whose domestic law provides for the use of hallmarks similar to the Czech mark. In that situation, I propose that the principle of mutual recognition should operate in the same way as in the previous situation, since the Member State of origin will verify whether the WaarborgHolland hallmarks stamped in a third country are compatible with its domestic law. The Czech Republic should have confidence in that verification and apply the principle of mutual recognition of hallmarks to articles exported to its territory under those conditions.

50. There are, however, three situations in which the application of the principle of mutual recognition (of the Netherlands and Czech hallmarks) will not be appropriate: (a) where articles are imported directly to the Czech Republic;(b) where articles marked by WaarborgHolland at its offices in China or Thailand are imported to and released for free circulation in a Member State without being marketed in that State and are then exported to the Czech Republic, and (c) where articles marked by WaarborgHolland at its offices outside the EU are imported to, released for free circulation and marketed in a Member State in which there are no national provisions requiring the use of a hallmark, and are later exported to the Czech Republic.

51. In relation to those three categories, there is the problem — as yet not definitively resolved — of the application to goods imported from third countries of the principle of mutual recognition developed by the case-law of the Court in connection with intra-Community trade.

52. The Commission argues that release for free circulation places imported articles bearing the Netherlands hallmarks stamped by WaarborgHolland in third countries on the same footing as articles hallmarked by that office on Netherlands territory. The Czech Republic maintains, on the other hand, that mutual recognition of hallmarks necessitates release for free circulation and, in addition, the marketing of such articles in a Member State pursuant to that State's national law.

53. Article 28(2) TFEU stipulates that the provisions on the free movement of goods 'shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States'. Article 29 TFEU states that 'products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges'. Article 79 of the Community Customs Code and Article 129 of the Modernised Customs

Code,[23] applicable from 16 April 2016, provide that release for free circulation confers on non-Community goods the customs status of Community goods.

54. Those provisions assimilate goods coming from third countries, which have been released for free circulation after completing customs and commercial policy formalities, to Union goods, and this has been confirmed by the case-law of the Court, starting with the judgment in *Donckerwolke and Others*.[24] Assimilation does not simply guarantee goods imported from third countries and released for free circulation in a Member State complete freedom of movement in the other Member States.[25] Imported goods must comply with the legislation of the Member State where they are first marketed in order to benefit later from freedom of movement and, therefore, from the application of the principle of mutual recognition.[26]

55. The Court retained that criterion in the judgment in *Expo Casa Manta*,[27] stating that 'placing products on the market is a stage subsequent to importation. Just as a product lawfully manufactured within the Community may not be placed on the market on that ground alone, the lawful importation of a product does not imply that it will automatically be allowed onto the market'. The Court also pointed out that, 'in so far as there are no Community rules harmonising the conditions governing the marketing of the products concerned, the Member State into which they are put into free circulation may prevent their being placed on the market if they do not satisfy the conditions laid down for that purpose under national law'.

56. Those assertions of the Court are reflected in Articles 27 to 29 of Regulation (EC) No 765/2008,[28] which provides for the controls which national market surveillance authorities and customs authorities may carry out on goods imported from third countries before these are put into free circulation, in order to ensure compliance with the harmonised EU provisions. The controls are limited to the detection of serious risks to health and safety, which do not include the counterfeiting of articles of precious metals.

23 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), and Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1).

24 — In that judgment, the Court stated, in relation to the free movement of goods within the Community, that goods in 'free circulation' are definitively and wholly assimilated to products originating in Member States. The Court also pointed out that the result of this assimilation is that the provisions of Article 30 concerning the elimination of quantitative restrictions and all measures having equivalent effect are applicable without distinction to products originating in the Community and to those which were put into free circulation in any one of the Member States, irrespective of the actual origin of these products (judgment in *Donckerwolke and Others*, 41/76, EU:C:1976:182, paragraphs 17 and 18). See also the judgments in *Peureux*, 119/78, EU:C:1979:66, paragraph 26; *Tezi* v *Commission*, 59/84, EU:C:1986:102, paragraph 26; *Budéjovicky Budvar*, C-216/01, EU:C:2003:618, paragraph 95; and *UNIC and Uni.co.pel*, C-95/14, EU:C:2015:492, paragraph 41.

25 — That issue is debated in legal literature and I refer to the articles by Ankersmit, L., 'What if Cassis de Dijon were Cassis de Quebec? The assimilation of goods of third country origin in the internal market', *Common Market Law Review*, 2013, No 6, pp. 1387 to 1410, and Tegeder, J., 'Applying the Cassis de Dijon doctrine to goods originating in third countries', *European Law Revie*w, 1994, No 1, pp. 86 to 94.

26 — See Enchelmaier, S., 'Article 36 TFEU: General', in Oliver, Peter (ed.), *Oliver on the Free Movement of Goods in the European Union*, 5th ed., Hart, Oxford, 2010, p. 233.

27 — C-296/00, EU:C:2002:316, paragraphs 31 and 32, and judgment in *Alliance for Natural Health and Others*, C-154/04 and C-155/04, EU:C:2005:449, paragraph 95.

28 — Regulation of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (OJ 2008 L 218, p. 30).

57. Moreover, the rationale behind the principle of mutual recognition leads me to conclude that its application must be confined to: (a) intra-Community trade in goods originating in the European Union which are lawfully manufactured and put on sale in a Member State pursuant to that State's national law, and (b) trade in goods from third countries which are in free circulation, which have been lawfully placed on the market in one Member State and which are exported to another. [29]

58. The reverse of that is that importers are not entitled to benefit from mutual recognition in order to place on the market in the EU goods from third countries which do not comply with the law of any Member State. [30] Application of the technique of mutual recognition in international trade between the EU and third countries requires the conclusion of a specific international treaty [31] or the inclusion in a broader trade agreement of provisions in that regard, which are compatible with the rules of the World Trade Organisation.

59. On that basis, it is necessary to determine whether the Czech Republic may reject the application of the principle of mutual recognition, with a view to protecting its consumers, and require the stamping of its own hallmark on articles which WaarborgHolland has hallmarked at its offices outside the European Union. In my view, and in line with the foregoing arguments, the Czech Republic is entitled to do so in the three situations set out above, [32] to which it is not possible to apply the case-law of the Court on the mutual recognition of hallmarks between Member States.

60. If the article of precious metals does not comply with the (non-harmonised) national law of any Member State on the marketing of such goods, or if it is imported directly from a third country, it will not be able to benefit from the principle of mutual recognition of hallmarks. That principle is, I repeat, applicable solely to articles which comply with the provisions of a Member State whose legislation requires the use of hallmarks or other similar mechanisms, since it is founded on the mutual trust between Member States concerning the effectiveness of their respective measures for preventing fraud on consumers in relation to goods made from precious metals.

61. That trust does not exist where articles of precious metals are traded between the European Union and third countries in which the use of hallmarks is not widespread, with the exception of the signatories to the Vienna Convention. The European Union is not a party to that convention but 16 of its Member States have signed it, including the Netherlands and the Czech Republic. The Vienna Convention, which is outside the scope of EU law, cannot serve as a basis for the application of the principle of mutual recognition which is derived from EU law.

29 — Recital 3 of Regulation No 764/2008 states that the principle of mutual recognition, which derives from the case-law of the Court of Justice, means that 'a Member State may not prohibit the sale on its territory of products which are lawfully marketed in another Member State, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject. The only exceptions to that principle are restrictions which are justified on the grounds set out in Article 30 of the Treaty, or on the basis of other overriding reasons of public interest and which are proportionate to the aim pursued'.
The Commission points out that 'as regards products imported from third countries, they must lawfully be marketed in a Member State or in an EFTA state that is a contracting party to the EEA Agreement in order to benefit from mutual recognition' (Guidance document. The concept of 'lawfully marketed' in the Mutual Recognition Regulation No 764/2008 (COM(2013) 592 final), 18 August 2013, p. 6).

30 — Gardeñes Santiago takes the view that, in trade with third countries, 'the rule to apply is not the mutual recognition rule but precisely the opposite, that is the rule concerning strict application of the law of the State of importation or reception. This means that when a product or service from a third country is imported into the Community, it must comply with the harmonised Community provisions, where these exist, and the provisions of the Member State into which it is introduced, while compliance with the legislation of the State of origin is not sufficient' (Gardeñes Santiago, M., *La aplicación de la regla del reconocimiento mutuo y su incidencia en el comercio de mercancías y servicios en el ámbito comunitario e internacional*, Eurolex, Madrid, 1999, p. 314).

31 — The European Union has concluded a number of agreements concerning the mutual recognition of conformity assessments with countries having advanced economies, like the United States, Canada, Australia, New Zealand, Japan, Switzerland and Israel. All of these and their implementing rules may be viewed on the Commission's website at the address http://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements/index_en.htm.

32 — These are: (a) articles imported into and released for free circulation in the Czech Republic, (b) articles imported into and released for free circulation in a Member State, without being placed on the market in that State, and later exported to the Czech Republic, and (c) articles imported into, released for free circulation and placed on the market in a Member State which does not have national provisions requiring the use of a hallmark, and then exported to the Czech Republic.

62. The Commission contends that the case-law of the Court on the mutual recognition of hallmarks should also apply to those three situations. In its submission, articles imported from third countries and marketed in free circulation in Member States comply with Netherlands legislation because, when WaarborgHolland stamps its hallmarks at offices situated in third countries, it complies with that legislation and it makes its offices subject to controls by the Netherlands authorities which are similar to the controls they perform on activities carried out in the Netherlands. The relocation of hallmarking services to third countries, which is permitted under Netherlands law,[33] should not preclude the application of the principle of mutual recognition.

63. The Commission stated, on the same lines, that WaarborgHolland has a certificate issued by the Netherlands accreditation body,[34] which authorises it to carry out hallmarking activities outside Netherlands territory. At the hearing, the Commission submitted that, under Article 11(2) of Regulation No 765/2008,[35] the Czech authorities are required to recognise the equivalence of certificates issued by conformity assessment bodies (WaarborgHolland, in this case), duly authorised by the national accreditation body (in this case, the Raad voor Accrediatie (Accreditation Council)).

64. The Commission also drew attention to the Netherlands authorities' supervisory powers when applying their national law to the activities of WaarborgHolland in third countries, although it did not adduce any evidence concerning the frequency or the intensity of such supervision.

65. However, I do not believe that those factors are sufficient to validate the Commission's argument. First, the mutual recognition which Regulation No 765/2008 provides for in relation to certificates issued by conformity assessment bodies, duly authorised by a national accreditation body, takes effect only where such certificates are issued in the territory of a Member State. By way of exception, Article 7 of Regulation No 765/2008 permits cross-border accreditation in certain cases but it does not refer to the possibility of certificates issued outside the territory of the Union, in line with the practice of accepting such certificates only when the European Union has concluded an international treaty with the third country concerned.[36] The European Union has not concluded with China or Thailand any international agreements concerning the mutual recognition of conformity assessments, which might apply to the hallmarks stamped by WaarborgHolland in those countries.

66. Second, as the Czech Republic and France observed, the supervisory powers of the Netherlands national accreditation body which oversees the activities of assay offices cannot be the same on Netherlands territory as in a third country. Counterfeiting controls of articles of precious metals require interadministrative collaboration between assay offices, which detect counterfeits through chemical analysis of products, and other public authorities (customs and tax departments, police authorities, the judiciary), which prosecute and punish counterfeiters. The exercise of those supervisory powers includes the possibility of implementing punitive measures under administrative or criminal law, both of which are of necessity territorial in nature, and which the Netherlands authorities would be unable to do in a third country.

33 — The College van Beroep voor het Bedrijfsleven (Administrative Court for Trade and Industry, Netherlands) ruled on a dispute concerning the application of Netherlands law in this area which arose between two assay offices as a result of the relocation of WaarborgHolland's operations to third countries; this was held to be legal by the judgment of 29 January 2008. The text of the judgment in English is available at http://www.hallmarking.com/downloads/decision_by_the_netherlands_and_industry_appeals_tribunal_ewn_versus_min_ea.pdf.

34 — The Commission stated as much in reply to a question put to it by the Court.

35 — That provision is worded as follows: 'National authorities shall recognise the equivalence of the services delivered by those accreditation bodies which have successfully undergone peer evaluation under Article 10, and thereby accept, on the basis of the presumption referred to in paragraph 1 of this Article, the accreditation certificates of those bodies and the attestations issued by the conformity assessment bodies accredited by them.'

36 — See, for example, the Agreement between the European Union and Australia amending the Agreement on mutual recognition in relation to conformity assessment, certificates and markings between the European Community and Australia (OJ 2012 L 359, p. 2).

67. In short, compulsory hallmarking, in countries which use it, is an administrative activity connected to the exercise of State sovereignty, which is not compatible with the possibility of relocation to third countries, unless an international agreement exists. [37]

68. The administrative nature of hallmarking activities also ensures that assay offices carrying out those activities have a greater degree of independence from undertakings in the sector. Relocation to third countries may jeopardise independence, for, as France pointed out at the hearing, the protection provided under administrative law in a third country may not be the same as that provided in the European Union.

69. In summary, while complying with Article 34 TFEU and the case-law of the Court interpreting that article in relation to the mutual recognition of hallmarks, the Czech Republic would be able to require the stamping of its own hallmark on articles made from precious metals in third countries and stamped with the Netherlands hallmark by WaarborgHolland outside the European Union in the following three cases:

— where those articles are imported directly to the Czech Republic;

— where those articles are imported to and put into free circulation in but are not lawfully marketed in another Member State before being exported to the Czech Republic;

— where those articles are imported to, put into free circulation in and lawfully marketed in a Member State which does not use hallmarks.

70. However, in view of the substantial equivalence of the Czech hallmark and the Netherlands hallmark stamped by WaarborgHolland, the Czech Republic is in breach of Article 34 TFEU, and the case-law interpreting that article, by requiring the stamping of the Czech hallmark on the following categories of articles of precious metals:

— articles lawfully produced and marketed in the Netherlands and stamped by WaarborgHolland with the Netherlands hallmark, which are exported to the Czech Republic;

— articles produced in third countries and stamped by WaarborgHolland with the Netherlands hallmark at its offices outside the EU, which are imported to, released for free circulation and lawfully marketed in the Netherlands, and later exported to the Czech Republic;

— articles produced in third countries and stamped by WaarborgHolland with the Netherlands hallmark at its offices outside the EU, which are imported to and released for free circulation in the EU, and lawfully marketed in a Member State other than the Netherlands, whose national law provides for the use of hallmarks similar to the Czech hallmark.

b) Proportionality of the measure

71. In the situations in which I believe the Czech Republic to be in breach of Article 34 TFEU, it is still necessary to determine whether its conduct could be deemed to respect the principle of proportionality; in other words, to establish whether there is no other measure for protecting consumers against the fraudulent marketing of articles of precious metals which is less restrictive of intra-Community trade. [38]

37 — In my opinion, that factor justifies the rejection by the member countries of the Vienna Convention of 'offshore hallmarking' or relocation of assay office activities. All the States parties to the Vienna Convention, with the exception of the Netherlands, were opposed to the acceptance of offshoring at the meeting of the Standing Committee of the Convention, held in 2008 in London (http://www.hallmarkingconvention.org/2008-spring-meeting-in-london-2.htm and document PMC/SR 2/2008 of 16 May 2008, p. 6).

38 — Judgment in *Ker-Optika*, C-108/09, EU:C:2010:725, paragraph 65.

72. As France states in its statement in intervention, a less restrictive option might have involved the use by WaarborgHolland, in its activities in third countries, of a different hallmark from the one used on Netherlands territory. That would have meant that the Czech Republic could have required the stamping of the Czech hallmark only on articles stamped by WaarborgHolland at its offices outside the EU, while recognising the equivalence of the Netherlands hallmark stamped by WaarborgHolland in the Netherlands. The Czech Republic appears to have explored that option but WaarborgHolland did not agree to it,[39] and, as a result, given the impossibility of differentiating between articles hallmarked by WaarborgHolland in the Netherlands, on the one hand, and those hallmarked at its premises outside the EU, on the other, the Czech Republic imposed in all cases the obligation to obtain the Czech hallmark as a condition for marketing articles of precious metals in its territory.

73. In my opinion, that practice does not respect the principle of proportionality because there are measures less restrictive of intra-Community trade, such as the requirement, by the Czech authorities, of proof of an article's origin. That could be effected, for example, by requiring articles hallmarked by WaarborgHolland to be stamped with a sponsor's mark giving information about the place of production.[40] Using that method, the Czech authorities could have recognised the Netherlands hallmark stamped by WaarborgHolland on articles produced in the Netherlands while at the same time requiring the stamping of the Czech hallmark only on articles marked by WaarborgHolland in third countries.

74. However, the measure described is not suitable for identifying articles stamped by WaarborgHolland in third countries which are imported to and placed on the market in the Netherlands (or in Member States with hallmarking systems similar to the Czech system), and then exported to the Czech Republic. In those cases, an importer could establish that an article has previously been lawfully marketed in a Member State using a number of means of evidence, such as product invoices, product labels, tax or sales records, or written confirmation from the competent authority of the Member State in which the product was marketed.[41] All those means are less restrictive of the trade in articles of precious metals than requiring the stamping of the Czech hallmark on objects bearing the WaarborgHolland hallmark.

IV – **Conclusion**

75. In the light of the foregoing considerations, I propose that the Court should:

(1) Declare the action inadmissible, on the grounds of lack of precision, in relation to the allegations put forward by the Commission against the Czech Republic concerning the latter's refusal to recognise the Netherlands hallmarks not stamped by WaarborgHolland;

(2) Partially allow the action brought by the Commission and declare that the Czech Republic has failed to fulfil the obligations incumbent on it under Article 34 TFEU by requiring the Czech hallmark to be stamped on articles of precious metals:

— lawfully produced and marketed in the Netherlands and stamped by WaarborgHolland with the Netherlands hallmark, which are exported to the Czech Republic;

39 — WaarborgHolland submits that the use of a specific hallmark, which differs from the Netherlands hallmark (at its offices situated in third countries), could lead to a loss of the commercial value inherent in the reputation of its hallmark on the market. In those circumstances, it might not have been interested in moving its hallmarking activities offshore.

40 — A sponsor's mark is regularly required and is identified, for example, in the Vienna Convention.

41 — The Commission lists these and other means of evidence in its Guidance document. The concept of 'lawfully marketed' in the Mutual Recognition Regulation No 764/2008 (COM(2013) 592 final), 18 August 2013, p. 7.

— produced in third countries and stamped by WaarborgHolland with the Netherlands hallmark at its offices outside the EU, which are imported to, released for free circulation and lawfully marketed in the Netherlands, and later exported to the Czech Republic;

— produced in third countries and stamped by WaarborgHolland with the Netherlands hallmark at its offices outside the EU, which are imported to and released for free circulation in the EU, and lawfully marketed in a Member State other than the Netherlands, whose national law provides for the use of hallmarks equivalent to the Czech hallmark, and later exported to the Czech Republic;

(3) Dismiss the action as to the remainder;

(4) Order each party intervening in the proceedings to bear its own costs.