In Case 113/80

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Rolf Wägenbaur, acting as Agent, assisted by Peter Oliver, a member of the Legal Department, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

applicant,

v

IRELAND, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

defendant,

APPLICATION for a declaration that by maintaining in force the Merchandise Marks (Restriction on Sale of Imported Jewellery) Order 1971, S.I. No 306 of 1971 (Iris Oifigiúil of 26 November 1971) and the Merchandise Marks (Restriction on Importation of Jewellery) Order 1971, S.I. No 307 of 1971 (Iris Oifigiúil of 26 November 1971), which are contrary to Article 30 of the EEC Treaty, Ireland has failed to fulfil its obligations under the Treaty,

THE COURT

composed of: P. Pescatore, President of the Second Chamber, Acting as President, Lord Mackenzie Stuart and T. Koopmans (Presidents of Chambers), A. O'Keeffe, G. Bosco, A. Touffait, O. Due, U. Everling and A. Chloros, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, the submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

1. The relevant legislation

The two orders in question prohibit both the sale in Ireland (S.I. No 306, hereinafter referred to as "the Sale Order") and the importation into Ireland (S.I. No 307, hereinafter referred to as "the Importation Order") of certain categories of products, referred to as jewellery, bearing or consisting of certain motifs, unless they have stamped on them an indication of origin comprising the name, in English, of their country of manufacture, or the word "foreign", or any other word or words clearly indicating that they were manufactured outside the State of Ireland.

Both orders refer to the same products and the same motifs. Although the products are referred to as jewellery they cover a wide range of goods most of which are known in the trade as "souvenirs". A list of the items in question is contained in the schedule to each order. However, they are covered by the orders only if they are made essentially of "precious metal or rolled precious metal" or if they are made wholly of such metal or are "made wholly or partly of base metal (including polished or plated articles suitable for setting)."

At the end of the list describing the various motifs covered by the orders there is to be found, in paragraph (xii), a general description worded thus: "Any other feature suggesting that the article is a souvenir of Ireland".

The only exceptions, provided for in both orders, authorizing the sale and importation of jewellery without an indication of origin concern goods to which section 18 of the Finance Act 1938 (No 25 of 1938) or section 18 of the Finance Act 1946 (No 15 of 1946) applies. The first of those provisions refers to imported articles constructed and intended specifically or primarily for the use of blind persons, which have been imported by an institution or a society which "has for its primary object the amelioration of the lot of blind persons". The second provision permits the importation, without payment of any duty of customs or of excise, of any article required for or in connexion with:

"(i) the establishment or maintenance of an international air service using or involving the use of an airport in the State;

(ii) the establishment or maintenance of radio or meteorological services or other aids to air navigation ancillary to any such international air service;

(iii) experimental purposes in connexion with the establishment or maintenance of any such international air service, or . . ."

The orders are both based on the Merchandise Marks Act 1931 (Number 48 of 1931), as amended by the Merchandise Marks Act 1970 (Number 10 of 1970). As required by Article 9 of the 1931 Act each order specifies, in paragraph 5, the manner in which such indication of origin is to be marked on such goods. In the Sale Order that paragraph provides:

"An indication of origin marked on goods pursuant to this order shall be marked legibly and conspicuously on:

(a) the goods;

(b) a label, tag or ticket attached to the goods; or

(c) any container (including a box, card or pad) in or on which the goods are sold or offered for sale."

In the Importation Order that paragraph provides as follows:

"An indication of origin marked on goods pursuant to this order shall be:

(a) indelible;

(b) legible; and

(c) in letters of a conspicuous size."

As to the restrictions on sale (the Sale Order), paragraph 4 (2) stipulates that where the goods in question were manufactured only partly in another State the indication of origin may be confined to so much of the goods as was manufactured in that other State. In addition the principal Act, the Merchandise Marks Act 1931, which applies to the order by virtue of section 13 of the Interpretation Act 1937, allows another exception in the case of re-imported "goods produced or manufactured in" Ireland "which have undergone outside" that country "any treatment or process not resulting in a substantial change in the goods". Lastly the Sale Order also contains an additional requirement in paragraph 6 to mark display material where that material directs attention to any of the materials or features referred to in the schedule to the order.

2. Procedure

By a letter dated 9 December 1975 the Commission requested Ireland for information about the orders in question.

No reply was forthcoming from the Irish Government but the matter was discussed at a meeting which took place in Dublin. Following that meeting the Director General for Internal Market and Industrialized Affairs sent the Irish Permanent Representative a second letter dated 9 March 1977 stating categorically

that the measures in question were contrary to Article 30 of the EEC Treaty and were not justified under the provisions of Article 36 because the appearance and characteristics of the products involved were not such as to raise a presumption of origin; the Director General concluded the letter with a request to the Irish authorities to remedy this infringement of Community law.

Since the request met with no response, the Commission asked the Irish Government, by letter of 8 May 1978 sent pursuant to the first paragraph of Article 169 of the EEC Treaty, to submit to the Commission within one month its observations on the infringement referred to. In response to that letter the Irish Permanent Representative sent the Commission on 13 June 1978 a reply contesting the Commission's view.

In spite of a meeting held in Brussels between an official of the Irish Permanent Representation and a number of officials of the Commission, the legislation complained of was still not amended. Consequently, the Commission forwarded its reasoned opinion to the Irish Minister for Foreign Affairs on 19 March 1979. A letter dated 24 March 1979 stating that the matter was under consideration was received by the Commission in reply to its reasoned opinion.

Since that date the Commission has not received any communication of substance on this question. As Ireland had not complied with the reasoned opinion the Commission decided to submit this application, which reached the Court of Justice on 28 April 1980.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

"1. Declare that by requiring that the imported articles falling within the Merchandise Marks (Restriction on Sale of Imported Jewellery) Order 1971 and the Merchandise Marks (Restriction on Importation of Jewellery) Order 1971 bear an indication of origin, Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty;

2. Order the Government of Ireland to pay the costs."

The *defendant* contends in its defence that the Court should:

"— Dismiss the proceedings;

— Order the Commission to pay the costs;"

and in its rejoinder:

"— Dismiss the proceedings in their entirety;

— Order the Commission to pay the costs."

However, Ireland respectfully asks the Court, if it should accept the basic argument upon which Ireland's defence is based and its application in principle to the present case, but find that in some particular respect the orders at issue go beyond the strict limits of what is permitted by Article 36 of the Treaty, to state in its judgment the respects, if any, in which the orders go beyond the permitted limits.

III — Summary of the submissions and arguments of the parties

The *Commission* submits that the Irish Sale Order and Importation Order prohibiting the importation, sale or exposure for sale in Ireland of articles of jewellery with Irish motifs or characteristics unless such articles bear an indication of origin, constitute measures having an effect equivalent to quantitative restrictions contrary to Article 30 of the EEC Treaty and not justified under the provisions of Article 36, being applicable exclusively to imported products.

Its view is based on the case-law of the Court of Justice which has held 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" (Case 8/74 [1974] ECR 837 at p. 852), and on Directive 70/50/EEC of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17) which defines as measures having an effect equivalent to quantitative restrictions on imports measures whereby Member States "lower the value of an imported product, in particular by causing a reduction in its intrinsic value, or increase its costs" (Article 2 (3) (f)).

First, the obligation to give an indication of origin increases the production costs of the goods in question, since it requires the affixing of an indication which is "indelible, legible and in letters of a conspicuous size," especially as the mark will normally have to be made on metal. Next, the obligation also has the effect of reducing the intrinsic value of such goods because marking them disfigures them, in particular when they are small and delicate, and because drawing the purchaser's attention to the country of origin reduces the likelihood of his choosing to buy a souvenir bearing an indication of non-Irish origin. In those circumstances the value of such goods is reduced in relation to that of national goods. The orders are in addition discriminatory, and therefore contrary to the provisions of Article 30, because they require the marking of an indication of origin only on imported articles whilst such goods if Irish are not subject to such a requirement.

The Commission also maintains that the orders are not justified under Article 36 of the Treaty. Although the Court held in its judgment of 20 February 1979 (Case 120/78, *Rewe-Zentral* [1979] ECR 649) that consumer protection may justify restrictive measures the restrictions at issue are not justified under Community law because they are not necessary to protect the consumer.

The Commission believes that the criterion to be applied in deciding whether such measures are justified is "whether the public might be misled as to the true origin of a product if it bears a false or misleading indication or none at all", so that in this case the test is whether the goods "hold themselves out to the ... purchaser as being of Irish origin even where nothing is written or stamped on them to imply this." In the Commission's view, however, there is nothing in either their appearance or their characteristics to raise presumptions

that they are of Irish origin, especially as not all the motifs in question — and certainly not fairies — have Irish associations.

Furthermore the effect of the judgment of 20 February 1975 *(Commission* v *Federal Republic of Germany,* Case 12/74 [1975] ECR 181), which admittedly deals with circumstances different from the present ones, is "that it is unnecessary for the purchaser to know whether a product is or is not of a particular origin, unless such origin implies a certain quality, basic materials or process of manufacture or a particular place in the folklore or tradition of the region in question"; the goods covered by the orders, however, do not in the opinion of the Commission have such characteristics, and the fact that they bear or refer to Irish motifs is not sufficient to justify the measures adopted, for if it were otherwise, all trade between Member States in tourist souvenirs and postcards could be stopped by requiring indications of origin.

As to the argument put forward by Ireland that there is a contradiction between the submission set out above, according to which the purchaser is interested only in the intrinsic technical features of the products and is hardly interested at all in where the product comes from, and the Commission's statement that the purchaser tends to avoid souvenirs which are clearly marked as being of non-Irish origin, the Commission maintains that there is no such contradiction for, in the first place, the purchaser does not presume that the goods in question are of Irish origin and, moreover, is not interested in whether they are or not, and in the second place he would be loath to buy them if it is brought to his notice that they are not made in Ireland.

Hence these measures are not necessary in order to protect consumers, and this is all the more apparent in view of the exceptions that have been made in relation to blind persons and airports, exceptions which are both curious and illuminating inasmuch as they are inconsistent with the Irish Government's claim that the purpose and effect of the orders is merely to protect the consumer.

Finally, it would not be enough to require national goods to bear the indication of origin, for that would not prevent the value of the imported goods from being diminished as a result of the fact that the buyer's attention was directed to the origin of the latter. On the other hand, there would be "no objection ... to Irish manufacturers' marking their goods with an indication of Irish origin if they so wish" and "to that obligation being removed in the case of imported articles," in which case the object of the measures in question would equally well be served.

Ireland does not dispute that these measures constitute measures having an effect equivalent to quantitative restrictions, but it claims that they are justified and therefore lawful under Article 36 of the Treaty, both on the ground of consumer protection and on the ground of maintaining fairness in commercial transactions between producers.

Ireland considers, first, that it is crucial for an understanding of the scope of these orders that they are directed to articles which are of such a nature as to suggest that they are souvenirs of Ireland, as becomes apparent in paragraph (xii) of Part I of the schedule

to each order, which is worded as follows:

"Any other feature suggesting that the article is a souvenir of Ireland."

The orders are thus concerned with items which would normally be sold as souvenirs of Ireland. The application of the orders is restricted to articles which include the motifs or features set out in the schedules to the orders and they are all features which appear on souvenirs of Ireland. Any unreasonable application of the orders is effectively ruled out by the provision in paragraph (xii) of each of the schedules.

A proper construction of that provision leads to the conclusion that the legislation affects only articles of a "souvenir" type; hence buttons and buckles depicting fairies do not come within the application of the orders.

Furthermore, as to the nature of the goods to which the two orders refer, Ireland considers that the point made by the Commission concerning disfigurement of imported goods overlooks the fact that the orders apply to the articles mentioned therein only if they bear the motifs or emblems specified. It seems not unreasonable, therefore, to conclude that if an article is of sufficient substance to be capable of bearing one of these motifs or emblems, it should also be of sufficient substance to be capable of bearing an imprint of the word "foreign" or of some other indication of origin without suffering disfigurement; there is thus no reason to conclude that the requirement that products be marked might cause them to be disfigured and thus reduced in value.

On the question of discrimination, Ireland contends that if — as it maintains — the articles of jewellery bear in themselves an implied statement that they are of Irish origin, it is not necessary to require that home-produced products carry an express statement to that effect. However, the application of such measures to imported products is both justified and necessary. Therefore the solution suggested by the Commission — to apply the requirement of indication of origin solely to home-produced products — would expose the consumer, and especially the tourist, to the risk of being misled by the imported product because he would not know its true origin: the Commission's suggestion therefore confuses the issue. The Irish Government reiterates that the crux of the issue is whether measures for the protection of the consumer or the producer are justified in this case under Article 36 of the Treaty.

On that point, Ireland reverts to the two judgments cited by the Commission, the decisions in *Rewe-Zentral* and *Commission* v *Federal Republic of Germany*, but as far as the latter decision is concerned, it disagrees with the conclusions drawn from it by the Commission, maintaining that the judgment delivered by the Court in that case fully supports its argument because the decision confirms that the protection of consumers against misleading information and of producers against unfair competition falls within the scope of Article 36, and even though the question raised in that case differs from this one. Here the main point is whether, "apart altogether from its physical qualities or characteristics, the origin of a souvenir is

in itself one of the essentials of a genuine souvenir, and Ireland is entitled to take the necessary steps to protect tourists from being misled as to the origins of articles which by their physical qualities or characteristics represent themselves as genuine souvenirs produced in Ireland when they are not."

Ireland maintains that the measures in question are justified within the meaning of Article 36 and are necessary both to protect the consumer and to protect the producer against unfair competition.

As far as protection of the consumer is concerned, Ireland notes that the definition of the word "souvenir" which is applicable here is "a token of remembrance, a keepsake," and observes that it follows as a matter of common sense from the very nature of a souvenir that an article which is held out to be a souvenir of a particular country is also held out as having its origin in that country and "a purchaser will naturally make that assumption unless he is informed to the contrary."

Ireland declares, moreover, that it is unable to understand the arguments submitted by the Commission on this subject, as follows:

(a) The goods considered in the orders to be "souvenirs" of Ireland but which are not expressly marked to that effect, "do not hold themselves out as being of Irish origin" to the average purchaser and he will not presume that they have been manufactured in Ireland;

(b) Clearly, souvenirs bearing indications of non-Irish origin will have little attraction for tourists.

It is submitted that this presents a contradiction which undermines the Commission's whole case, for it follows from the second argument that "if the consumer will be 'loath to buy' the goods when their origin is brought to his notice, then he must be 'interested to know' their origin." But it is reasonable to suppose in fact that the consumer is entitled to presume, and does presume, unless he is informed to the contrary, that souvenirs of Ireland are of Irish origin.

As to protecting producers against unfair competition, Ireland contends that the absence of an indication of origin on an article which is believed by the consumer to be from Ireland when in fact it comes from another Member State is prejudicial to Irish producers in so far as the true origin of the article is, "as the Commission admits, of such importance to the consumer that he will not purchase it if he is made aware that it originates" in another country. Irish producers are entitled to be protected by law from the damage thus caused them. The Paris Convention for the Protection of Industrial Property of 20 March 1883 (last revised in Stockholm on 14 July 1967) and the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 14 April 1891 (last revised in Lisbon in 1958: Additional Act of Stockholm on 14 July 1967) constitute international

recognition of the necessity of preventing false indications of origin in international trade and the measures taken to that end must be taken as falling within the provisions of Article 36 of the EEC Treaty. The two orders are therefore, it is submitted, justified under the heading of protection of producers against unfair competition as well as protection of the consumer against misleading indications of origin.

In its reply the *Commission's* main concern is to refute the Irish submissions concerning the "justification for the restrictions" imposed by the two orders.

First, it challenges the argument advanced by Ireland that the orders apply exclusively to "souvenirs," an argument based on paragraph (xii) in the list of motifs. Ireland suggests that this "catch-all" phrase appearing at the end of the list of motifs is to apply to everything on the list and has the effect of depriving clear words of their meaning. The Commission finds the submission all the more remarkable in that at no point until the very end, to wit in paragraph (xii), *supra*, does the word "souvenir" appear in either order. And the Commission points out that in the orders themselves the products in question are referred to as "goods" whilst at the beginning of each schedule they are referred to as "articles". Finally, the Commission knows of no rule of Irish law which states that a "catch-all" phrase at the end of a list may be used to interpret the terms appearing before it in the list. Rather, it submits that a phrase such as that must be understood in the light of what precedes it: thus, while the above-mentioned paragraph (xii) "might widen the lists, it certainly cannot restrict their meaning". The Commission therefore considers that buttons or buckles depicting fairies do fall within the provisions in question and that some of the motifs included in the list are not particularly Irish.

It also challenges the Irish submission that articles intimately connected with the tourist trade "hold themselves out as being of national origin" and thus require a specific statement of origin if they are imported. The consequences for trade between Member States of such a view would be alarming: a State could then require indications of origin on imported postcards depicting sites within their borders. Consequently the Commission reiterates its main submission as to the proper test to be applied in order to justify the need to give an indication of origin, namely that the goods are of a given quality, are made of certain basic materials or by a specific process of manufacture, or play a special rôle in the folklore or tradition of the region. The Commission concludes that "neither articles made wholly of or containing, otherwise than as a minor constituent, precious metal or rolled precious metal nor articles made wholly or partly of base metal hold themselves out as particularly Irish."

As to the contradiction which Ireland perceives between those tests and the applicant's statement that a buyer would be reluctant to purchase goods bearing a statement of origin showing that they are not Irish, the Commission repeats its statement that "no such contradiction exists in fact," for the purchaser is not

concerned with knowing the origin of the goods, but he would be reluctant to buy them if his attention were drawn to its non-Irish origin. It is, moreover, equally possible to find a contradiction between two of the submissions put forward by Ireland, the first of which attempts to point out that the discrimination due to the fact that articles originating in Ireland are not marked is justified, and the second of which states that "a souvenir should have originated in the place of which it is supposed to be a souvenir."

The Commission also repeats its submission that the orders constitute "arbitrary discrimination" under Article 36 of the Treaty and strike at the very root of the principle of the unity of the common market. It gives two examples to support its submission. First, some of the motifs on the list are not connected with Ireland as a whole but merely with a particular Irish locality, such as, for instance, maps of Donegal; that means that in the logic of the Irish measures in question articles which bear such a motif would have to be manufactured in the region or town which they are supposed to represent, and if they had been made in another Irish locality, they, too, would have to be marked with an indication of origin, for Wicklow is no more entitled to offer specialities of Donegal than Wimbledon or Wiesbaden. Second, some of the motifs concerned, such as those relating to the Irish language, literature and folklore, will often be common both to Ireland and Northern Ireland; nevertheless the provisions in question require an indication of origin to be inscribed on goods from Northern Ireland in the same way as on those imported from other Member States: that provision is equally arbitrary discrimination contrary to Article 36.

Lastly, as to the arguments that the measures in question are justified on the ground of preventing unfair competition, the Commission considers that that submission of the defendant's must stand or fall with that of consumer protection and as a result the test must in each case be the same, "since if the goods do not hold themselves out to the consumer as being of Irish origin ... there can be no unfair competition."

As to the two Conventions to which Ireland refers in support of its case, they were entered into before the Treaty came into force and do not apply as between Member States of the Community in so far as they conflict with the Treaty and in particular with the principle of the free movement of goods.

In the rejoinder, after reviewing its "fundamental propositions," Ireland first clarifies a point concerning the description of the articles. Whilst accepting that some of the motifs in the list have a less evident, but none the less genuine, connexion with Ireland, it considers that the motifs are commonly associated with the souvenir trade; consequently the goods concerned are "very much the stuff of trade in souvenirs." As to the "catch-all" formula — as the applicant calls it — it does, of course, appear at the end of the list of motifs but it is confirmed by the Explanatory Note to each order which "expressly states that the articles affected are those incorporating features suggesting that they are souvenirs of Ireland;" although that note

is not an integral part of the orders it would undoubtedly be looked at by a court construing the orders. Ireland therefore maintains its view concerning the articles referred to in the orders, explains that it was not its intention to give them any wider sphere of application and states moreover, that the competent Irish Minister who is empowered to grant exceptions would be willing to receive representations where justified from interested persons.

Ireland again rejects the Commission's submission that an article bearing an Irish motif "cannot itself constitute an indication of origin." It considers that view, for which the Commission gives no reason, to be untenable, for "it is plain common sense that a motif or emblem may give rise to as strong an inference as to the origin of an article as a statement of origin written or stamped on the article." The test advanced by the Commission to justify measures such as those adopted by Ireland is unacceptable, because although it is stated that a reference to Irish folklore or tradition is capable of giving rise to an indication of origin, it excludes motifs depicting cities, personalities and such like. Ireland adds that the test is even more difficult to accept in view of the contradiction between it and the Commission's statement, set out above, a contradiction which can be explained only by the fact that "tourists presume, in the absence of an indication to the contrary, that the articles are of Irish origin, and ... they consider this to be important."

To the Commission's allegation of discrimination Ireland replies that the difference in treatment between the home-produced and the imported article constitutes a measure which is justified under the provisions of Article 36 and not discrimination, as it has explained above. That argument is thus of lesser consequence compared with the main issue, which is the justification for the measures which have been adopted, especially as the Commission has indicated clearly that even if the measures in question were extended to locally produced articles that would not be sufficient to bring them into line with the requirements on the free movement of goods.

As to the Commission's argument that Wicklow is no more entitled to offer specialities from Donegal than are Wimbledon or Wiesbaden, the defendant observes that should the possibility arise of a consumer's being misled as to the place in Ireland where an Irish article has been made, the question would be dealt with on the basis of the Consumer Information Act 1978, one of the aims of which is to protect consumers from false or misleading information in the sale of goods. By contrast, should articles made abroad but "falsely holding themselves out as true souvenirs of Ireland" succeed in penetrating the Irish market, that would constitue, in the view of the Irish Government, a real threat requiring the adoption of measures such as those envisaged by the orders in question, from which it may be concluded, not that they should be revoked, but that legislation to protect the consumer on a domestic front should be strengthened still further.

Finally, as far as articles imported from Northern Ireland are concerned, the requirement of marking does not amount

to arbitrary discrimination but is a measure essential in order to prevent the articles in question, when produced elsewhere than in Northern Ireland, from circumventing the provisions of the orders by passing through Northern Ireland. The Irish authorities would, however, be willing to consider any complaint from any person in Northern Ireland claiming that his legitimate interests have been unjustifiably affected by the said orders.

IV — Oral procedure

The Commission of the European Communities, represented by P. Oliver and R. Wägenbaur, and the Irish Government, represented by J. Cooke, Senior Counsel, and L. Dockery, presented oral argument and replied to the questions put to them by the Court at the sitting on 10 March 1981.

The Advocate General delivered his opinion at the sitting on 5 May 1981.

Decision

1 By an application lodged at the Court Registry on 28 April 1980, the Commission instituted proceedings under Article 169 of the EEC Treaty, for a declaration that Ireland had failed to fulfil its obligations under Article 30 of the EEC Treaty by requiring that the imported goods falling within the scope of the Merchandise Marks (Restriction on Sale of Imported Jewellery) Order 1971 (S. I. No 306, Iris Oifigiúil of 21 November 1971) and the Merchandise Marks (Restriction on Importation of Jewellery) Order 1971 (S. I. No 307, Iris Oifigiúil of 21 November 1971) bear an indication of origin or the word "foreign".

2 According to the explanatory notes thereto, Statutory Instrument No 306 (hereinafter referred to as "the Sale Order") prohibits the sale or exposure for sale of imported articles of jewellery depicting motifs or possessing characteristics which suggest that they are souvenirs of Ireland, for example an Irish character, event or scene, wolfhound, round tower, shamrock etc. and Statutory Instrument No 307 (hereinafter referred to as "the Importation Order") prohibits the importation of such articles unless, in either case, they bear an indication of their country of origin or the word "foreign".

3 The articles concerned are listed in a schedule to each order. However, in order to come within the scope of the orders the article must be made of precious metal or rolled precious metal or of base metal, including polished or plated articles suitable for setting.

4 In the Commission's opinion, the restrictions on the free movement of the goods covered by the two orders constitute measures having an effect equivalent to quantitative restrictions on imports, contrary to the provisions of Article 30 of the EEC Treaty; it also observes that according to Article 2 (3) (f) of Directive 70/50/EEC of 22 December 1969, based on the provisions of Article 33 (7) of the Treaty, on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (Official Journal, English Special Edition 1970 (I), p. 17) "measures which lower the value of an imported product, in particular by causing a reduction in its intrinsic value, or increase its costs" must be regarded as measures having an effect equivalent to quantitative restrictions, contrary to Article 30 of the EEC Treaty.

5 The Irish Government does not dispute the restrictive effects of these orders on the free movement of goods. However, it contends that the disputed measures are justified in the interests of consumer protection and of fairness in commercial transactions between producers. In this regard, it relies upon Article 36 of the Treaty which provides that Articles 30 to 34 shall not preclude prohibitions or restrictions on imports justified on grounds of public policy or the protection of industrial and commercial property.

6 The defendant is, however, mistaken in placing reliance on Article 36 of the Treaty as the legal basis for its contention.

7 In fact, since the Court stated in its judgment of 25 January 1977 in Case 46/76 *Bauhuis* [1977] ECR 5 that Article 36 of the Treaty "constitutes a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated and must be interpreted strictly", the exceptions listed therein cannot be extended to cases other than those specifically laid down.

8 In view of the fact that neither the protection of consumers nor the fairness of commercial transactions is included amongst the exceptions set out in Article 36, those grounds cannot be relied upon as such in connexion with that article.

9 However, since the Irish Government describes its recourse to these concepts as "the central issue in the case", it is necessary to study this argument in connexion with Article 30 and to consider whether it is possible, in reliance on those concepts, to say that the Irish orders are not measures having an effect equivalent to quantitative restrictions on imports within the meaning of that article, bearing in mind that, according to the established case-law of the Court, such measures include "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" (judgment of 11 July 1974 in Case 8/74 *Dassonville* [1974] ECR 837).

10 In this respect, the Court has repeatedly affirmed (in the judgments of 20 February 1979 in Case 120/78 *REWE* [1979] ECR 649, 26 June 1980 in Case 788/79 *Gilli and Andres* [1980] ECR 2071, 19 February 1981 in Case 130/80 *Kelderman* [1981] ECR) that "in the absence of common rules relating to the production and marketing of the product in question it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle ... to intra-Community trade" and that "it is only where national rules, which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to ... the fairness of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising under Article 30".

11 The orders concerned in the present case are not measures which are applicable to domestic products and to imported products without distinction but rather a set of rules which apply only to imported products and are therefore discriminatory in nature, with the result that the measures in issue are not covered by the decisions cited above which relate exclusively to provisions that regulate in a uniform manner the marketing of domestic products and imported products.

12 The Irish Government recognizes that the contested measures apply solely to imported articles and render their importation and sale more difficult than the sale of domestic products. However, it maintains that this difference in the treatment awarded to home-produced articles and to imported articles does not constitute discrimination on the ground that the articles referred to in the contested orders consist mainly of souvenirs; the appeal of such articles lies essentially in the fact of their being manufactured in the place where they are purchased and they bear in themselves an implied indication of their Irish origin, with the result that the purchaser would be misled if the souvenir bought in Ireland was manufactured elsewhere. Consequently, the requirement that all imported "souvenirs" covered by the two orders must bear an indication of origin is justified and in no way constitutes discrimination because the articles concerned are different on account of the differences between their essential characteristics.

13 The Commission rejects this reasoning. In reliance on the judgment of 20 February 1975 in Case 12/74 *Commission* v *Federal Republic of Germany* [1975] ECR 191, it submits that it is unnecessary for a purchaser to know whether or not a product is of a particular origin, unless such origin implies a certain quality, basic materials or process of manufacture or a particular place in the folklore or tradition of the region in question; since none of the articles referred to in the orders display these features, the measures in question cannot be justified and are therefore "overtly discriminatory".

14 It is therefore necessary to consider whether the contested measures are indeed discriminatory or whether they constitute discrimination in appearance only.

15 The souvenirs referred to in the Sale Order and in the Importation Order are generally articles of ornamentation of little commercial value representing or incorporating a motif or emblem which is reminiscent of an Irish place, object, character or historical event or suggestive of an Irish symbol and their value stems from the fact that the purchaser, more often than not a tourist, buys them on the spot. The essential characteristic of the souvenirs in

question is that they constitute a pictorial reminder of the place visited, which does not by itself mean that a souvenir, as defined in the orders, must necessarily be manufactured in the country of origin.

16 Furthermore, leaving aside the point argued by the Commission — with regard to the articles covered by the contested orders — that it would not be enough to require a statement of origin to be affixed to domestic products also, it is important to note that the interests of consumers and fair trading would be adequately safeguarded if it were left to domestic manufacturers to take appropriate steps such as affixing, if they so wished, their mark of origin to their own products or packaging.

17 Thus by granting souvenirs imported from other Member States access to the domestic market solely on condition that they bear a statement of origin, whilst no such statement is required in the case of domestic products, the provisions contained in the Sale Order and the Importation Order indisputably constitute a discriminatory measure.

18 The conclusion to be drawn therefore is that by requiring all souvenirs and articles of jewellery imported from other Member States which are covered by the Sale Order and the Importation Order to bear an indication of origin or the word "foreign", the Irish rules constitute a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty. Ireland has consequently failed to fulfil its obligations under the article.

Costs

19 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading.

20 In this case, since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that by requiring all articles imported from other Member States which are covered by the Merchandise Marks (Restriction on Sale of Imported Jewellery) Order 1971 and by the Merchandise Marks (Restriction on Importation of Jewellery) Order 1971 to bear an indication of origin or the word "foreign", Ireland has failed to fulfil its obligations under Article 30 of the EEC Treaty;**

2. **Orders the defendant to pay the costs.**

Pescatore Mackenzie Stuart Koopmans O'Keeffe Bosco

Touffait Due Everling Chloros

Delivered in open court in Luxembourg on 17 June 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber
Acting as President