

JUDGMENT OF THE COURT (Fourth Chamber)  
11 March 1986 \*

In Case 121/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice for a preliminary ruling in proceedings pending before that court between

**Conegate Limited**

and

**HM Customs and Excise**

on the interpretation of Articles 36 and 234 of the EEC Treaty,

THE COURT (Fourth Chamber)

composed of: T. Koopmans (President of Chamber), K. Bahlmann, G. Bosco, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: Sir Gordon Slynn

Registrar: D. Louterman, Administrator

after considering the observations submitted on behalf of

the appellant in the main proceedings, by N. Peters, Barrister,

the United Kingdom, by P. Bucknell, acting as Agent,

the Commission of the European Communities, by E. White, acting as Agent,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 January 1986,

gives the following

\* Language of the Case: English.

## JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

### Decision

- 1 By an order of 30 November 1984, which was received at the Court on 29 April 1985, the High Court of Justice, Queen's Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions concerning the interpretation of Articles 36 and 234 of the EEC Treaty in order to enable it to assess the compatibility with Community law of certain provisions of domestic customs legislation.
- 2 Those questions were raised in proceedings concerning the seizure by the United Kingdom customs authorities of various consignments of goods imported from the Federal Republic of Germany by Conegate Limited (hereinafter referred to as Conegate). In the course of an inspection at the airport where the consignments arrived, customs officials discovered that the goods consisted essentially of inflatable dolls which were clearly of a sexual nature and other erotic articles. They considered these goods to be 'indecent or obscene' articles whose importation into the United Kingdom is prohibited under section 42 of the Customs Consolidation Act 1876.
- 3 Following a complaint laid by the customs authorities, the Uxbridge Magistrates Court ordered the forfeiture of the goods. That decision was upheld by the Southwark Crown Court. Conegate appealed by way of Case Stated against the Crown Court's decision to the High Court, contending that in the particular circumstances the forfeiture of the goods in question constituted an infringement of Article 30 of the EEC Treaty which could not be justified on grounds of public morality within the meaning of Article 36 of the Treaty.
- 4 In support of its view, Conegate submitted that although in its judgment of 14 December 1979 (Case 34/79 *Henn and Darby* [1979] ECR 3795) the Court recognized that the prohibition on the importation of goods might be justified on grounds of public morality and that in principle it was for each Member State to determine the requirements of public morality in its territory, the operation of such

a prohibition nevertheless constituted a means of arbitrary discrimination, within the meaning of the second sentence of Article 36, where a lawful trade in the same goods existed in the Member State concerned. Conegate argued that that was the case in the United Kingdom where the manufacture and the marketing of erotic articles was not subject to a general prohibition, unlike the publication and marketing of obscene publications, which was at issue in the above-mentioned judgment of 14 December 1979.

5 In that respect Conegate pointed out that the manufacture of the articles in question in these proceedings was subject to no restriction under United Kingdom law, whilst the marketing of the goods was subject only to prohibitions regarding their transmission by post and their display in public places. Other restrictions were in force in certain of the constituent parts of the United Kingdom. Thus, in England and Wales the local authorities might choose whether to leave distribution unrestricted or to limit the points of sale by allowing distribution only from authorized sex shops.

6 The High Court took the view that the dispute raised a problem of interpretation of Community law. It therefore stayed the proceedings and requested the Court to give a preliminary ruling on the following questions:

'(1) Where certain articles are subject to a national absolute prohibition on importation into a Member State from another Member State, on the grounds that they are indecent or obscene, in order to constitute within the Member State of importation an absence of "lawful trade" in the articles in question, as referred to in considerations 21 and 22 of the judgment of the European Court of Justice in Case 34/79 *Henn and Darby* [1979] ECR 3795:

(a) Is it sufficient that these articles may be manufactured and marketed within the Member State of importation, subject only to

(i) an absolute prohibition on their transmission by post

(ii) a restriction on their public display and

(iii) a system of licensing of premises for their sale to customers aged 18 years and over, in certain areas of the Member State and which

licensing system in no way affects the substantive law on indecency or obscenity in that Member State;

or

- (b) Is it necessary that there be an absolute prohibition on their manufacturing or marketing within the Member State of importation?
- (2) If there is a “lawful trade” within a Member State of importation in articles subject to a national absolute prohibition on importation from another Member State, on the grounds that they are indecent or obscene, is the Member State of importation, in such circumstances, justified on the grounds of public morality under Article 36 of the European Economic Community Treaty, in prohibiting the importation from another Member State, of such articles, on the basis that they are indecent or obscene, or does such a prohibition constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States?
- (3) Does the prohibition on the importation of indecent or obscene articles by section 42 of the Customs Consolidation Act 1876 constitute a means of arbitrary discrimination or a disguised restriction on trade within the meaning of Article 36 of the European Economic Community Treaty in so far as it applies to Articles prohibited under that Act but not prohibited under the Obscene Publications Act 1959?
- (4) Notwithstanding the answers to the questions above, if, acting in accordance with its international obligations under the Geneva Convention 1923 for the Suppression of Traffic in Obscene Publications and the Universal Postal Convention (renewed at Lausanne in 1974, which came into force on 1 January 1976) a Member State imposes an absolute prohibition on the importation from another Member State of articles which are classed as indecent or obscene, is such a prohibition thereby consistent with Article 234 of the European Community Treaty?
- 7 Observations were submitted by Conegate, the United Kingdom and the Commission.

## The first question

- 8 Conegate refers to its submissions before the national courts and argues that, inasmuch as it prohibits in general terms the importation of indecent or obscene articles, section 42 of the Customs Consolidation Act 1876 imposes a restriction which is more severe than that arising under the legislation applicable to the trade in those products in the different parts of the country, such as England and Wales. That observation applies *a fortiori* to the situation in Northern Ireland where the legislation imposes no restrictions on the marketing of the products in question other than those concerning their transmission by post and display in public.
- 9 The United Kingdom notes in the first place that the first question as formulated by the High Court correctly states the position regarding the restrictions on the marketing of indecent or obscene articles existing in England, Wales and Northern Ireland, but fails to take into account the more rigorous restrictions applying in Scotland and the Isle of Man. In Scotland the applicable legislation prohibits the distribution of 'obscene material' with a view to its eventual sale; 'material' is defined as including, *inter alia*, representations and models. However, the courts have not yet ruled on whether the expression 'obscene material' covers products such as those imported by Conegate. On the other hand, such products clearly come within the scope of 'indecent or obscene representations', whose manufacture and distribution is prohibited under the legislation applicable in the Isle of Man. In the United Kingdom's view, a State which is comprised of different constituent parts and which allows differences to subsist in the legislation applicable thereto but which nevertheless has a common customs régime, must of necessity bring that régime into line with the most rigorous internal rules.
- 10 The United Kingdom adds that, taken as a whole, the provisions applicable in the different parts of the United Kingdom reflect an approach which is uncompromising in its hostility to the marketing of indecent articles. In that connection it is relevant to note that the United Kingdom legislation has been made stricter in recent years, in particular with regard to pornographic photographs, the conditions for the authorization of sex shops and the way in which obscene material may be displayed in public. The United Kingdom considers that accordingly, in substance, the criteria do not differ according to whether the products concerned are domestic or imported.

- 11 The Commission maintains in the first place that the expression 'lawful trade' which appears in the judgment of 14 December 1979, cited above, to which the first question refers, does not mean legitimate or respectable business. It simply refers to all trade which is lawful in the Member State concerned. In the Commission's view that is the case for the goods in question in this instance, since the restrictions described by the High Court in its first question do not constitute an absence of lawful trade in those articles.
- 12 The Commission argues in addition that, although in the present state of development of Community law Member States are free to establish their own standards concerning public morality, that freedom is subject to the principle that Member States may not apply conditions to imports which are stricter than those applicable to the manufacture and marketing of the same products within their territory.
- 13 The Court would observe that the first question raises, in the first place, the general problem of whether a prohibition on the importation of certain goods may be justified on grounds of public morality where the legislation of the Member State concerned contains no prohibition on the manufacture or marketing of the same products within the national territory.
- 14 So far as that problem is concerned, it must be borne in mind that according to Article 36 of the EEC Treaty the provisions relating to the free movement of goods within the Community do not preclude prohibitions on imports justified 'on grounds of public morality'. As the Court held in its judgment of 14 December 1979, cited above, in principle it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory.
- 15 However, although Community law leaves the Member States free to make their own assessments of the indecent or obscene character of certain articles, it must be pointed out that the fact that goods cause offence cannot be regarded as sufficiently serious to justify restrictions on the free movement of goods where the Member State concerned does not adopt, with respect to the same goods manufactured or marketed within its territory, penal measures or other serious and effective measures intended to prevent the distribution of such goods in its territory.

- 16 It follows that a Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory.
- 17 It is not for the Court, within the framework of the powers conferred upon it by Article 177 of the EEC Treaty, to consider whether, and to what extent, the United Kingdom legislation contains such a prohibition. However, the question whether or not such a prohibition exists in a State comprised of different constituent parts which have their own internal legislation, can be resolved only by taking into consideration all the relevant legislation. Although it is not necessary, for the purposes of the application of the above-mentioned rule, that the manufacture and marketing of the products whose importation has been prohibited should be prohibited in the territory of all the constituent parts, it must at least be possible to conclude from the applicable rules, taken as a whole, that their purpose is, in substance, to prohibit the manufacture and marketing of those products.
- 18 In this instance, in the actual wording of its first question the High Court took care to define the substance of the national legislation the compatibility of which with Community law is a question which it proposes to determine. Thus it refers to rules in the importing Member State under which the goods in question may be manufactured freely and marketed subject only to certain restrictions, which it sets out explicitly, namely an absolute prohibition on the transmission of such goods by post, a restriction on their public display and, in certain areas of the Member State concerned, a system of licensing of premises for the sale of those goods to customers aged 18 years and over. Such restrictions cannot however be regarded as equivalent in substance to a prohibition on manufacture and marketing.
- 19 At the hearing, the United Kingdom again stressed the fact that at present no articles comparable to those imported by Conegate are manufactured on United Kingdom territory, but that fact, which does not exclude the possibility of manufacturing such articles and which, moreover, was not referred to by the High Court, is not such as to lead to a different assessment of the situation.
- 20 In reply to the first question it must therefore be stated that a Member State may not rely on grounds of public morality within the meaning of Article 36 of the

Treaty in order to prohibit the importation of certain goods on the grounds that they are indecent or obscene, where the same goods may be manufactured freely on its territory and marketed on its territory subject only to an absolute prohibition on their transmission by post, a restriction on their public display and, in certain regions, a system of licensing of premises for the sale of those goods to customers aged 18 and over.

- 21 That conclusion does not preclude the authorities of the Member State concerned from applying to those goods, once imported, the same restrictions on marketing which are applied to similar products manufactured and marketed within the country.

#### **The second and third questions**

- 22 In the light of the reply given to the first question, the second and third questions no longer call for an answer.

#### **The fourth question**

- 23 Conegate, the United Kingdom and the Commission all take the view that the fourth question is not relevant to the solution of the dispute in the main proceedings. The Geneva Convention of 1923 concerns only obscene 'publications', which are not at issue in these proceedings, whilst the Universal Postal Convention cannot apply to imported goods which were not sent by post.
- 24 The Commission also drew attention to the fact that the Court has consistently held that in protecting 'the rights and obligations' deriving from agreements concluded prior to the Treaty, Article 234 of that Treaty concerns only the rights and obligations established between Member States and non-member countries. Such agreements cannot therefore be relied upon in order to justify restrictions on trade between the Member States of the Community.
- 25 The Commission's argument must be accepted. As the Court stated in its judgment of 14 October 1980 (Case 812/79 *Attorney General v Burgoa* [1980] ECR 2787), Article 234 is intended to ensure that the application of the Treaty does not affect

either the duty to observe the rights of non-member countries under an agreement previously concluded with a Member State, or the observance by that Member State of its obligations under that agreement. Agreements concluded prior to the entry into force of the Treaty may not therefore be relied upon in relations between Member States in order to justify restrictions on trade within the Community.

- 26 In reply to the fourth question it must therefore be stated that Article 234 of the Treaty must be interpreted as meaning that an agreement concluded prior to the entry into force of the Treaty may not be relied upon in order to justify restrictions on trade between Member States.

### Costs

- 27 The costs incurred by the United Kingdom and the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions submitted to it by the High Court of Justice by order of 30 November 1984, hereby rules:

- (1) A Member State may not rely on grounds of public morality within the meaning of Article 36 of the Treaty in order to prohibit the importation of certain goods on the ground that they are indecent or obscene, where the same goods may be manufactured freely in its territory and marketed in that territory subject only to an absolute prohibition on their transmission by post, a restriction on their public display and, in certain regions, a system of licensing of premises for the sale of those goods to customers aged 18 years and over.

**(2) Article 234 of the EEC Treaty must be interpreted as meaning that an agreement concluded prior to the entry into force of the EEC Treaty may not be relied upon in order to justify restrictions on trade between Member States.**

Koopmans

Bahlmann

Bosco

O'Higgins

Schockweiler

Delivered in open court in Luxembourg on 11 March 1986.

P. Heim

Registrar

T. Koopmans

President of the Fourth Chamber