concerns the marketing of goods traded between Member States and is subject to the provisions of the Treaty concerning the free movement of goods.

2. National legislation which makes the sale by public auction of second-hand goods from another Member State conditional upon the prior entry of the undertaking which owns the goods offered for sale in the trade register at the place of the sale is incompatible with Articles 30 and 36 of the Treaty. Such a measure, which is capable of impeding the free movement of goods, cannot be justified either by mandatory requirements relating to the protection of consumers or by grounds of public policy under Article 36 since it is possible to impose conditions capable of protecting consumers which are less restrictive of the free movement of goods and the aim of preventing the sale of stolen goods can be attained by appropriate control measures.

REPORT FOR THE HEARING
in Case C-239/90 *

I — Facts and procedure

1. Pursuant to Article 1(1) of the French Law of 25 June 1841 on public auction sales, sale by public auction may not be used as a habitual means of carrying on business. Article 1(3) provides that the voluntary retail sale by that means of any second-hand goods or articles whatever belonging to or held by a trader who has not been registered for at least two years in the Registre de Commerce (Trade Register) and the Rôle des Patentes (Business Tax Roll) within the jurisdiction of the Tribunal de Grande Instance (Regional Court) in which the sale is to take place is also prohibited.

2. SCP Boscher, Studer and Fromentin, a firm of auctioneers operating in Paris, was instructed by the German company Nado ('Nado'), whose registered office is in Hamburg, to sell by public auction on 6 November 1988 a number of second-hand vehicles some of which, according to the findings of the court before which an application for interim relief was initially brought, were collectors' items and some were high-priced vehicles of recent manufacture and low mileage.

SA British Motors Wright and three other companies that sell luxury second-hand vehicles made an application to the Tribunal de Grande Instance, Paris, for an interim order prohibiting the sale pursuant to

* Language of the case: French.

Article 1 of the Law of 25 June 1841. On the basis of that provision, on 4 November 1988 the court made an order in which it found that Nado did not habitually carry on business by means of public auctions and that the provisions in question regulated a sales method without discriminating as to the origin or provenance of the goods and had not been declared contrary to the Treaty of Rome; it also prohibited the auctioneers from proceeding with the sale until it had been proved that the owner or person in possession of the vehicles was entered in the Trade Register or Business Tax Roll in accordance with Article 1 of the Law of 25 June 1841.

Boscher, Studer and Fromentin appealed against that order, but it was confirmed the next day by a judgment of the Cour d'Appel, Paris. They therefore brought a further appeal before the Cour de Cassation.

3. Considering that the dispute raised a question of interpretation of Community law, the Commercial, Economic and Financial Chamber of the Cour de Cassation stayed the proceedings and by judgment of 3 July 1990 referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'1. Is Article 59 of the EEC Treaty, properly construed, applicable to occasional sales by public auction in a Member State, by a trader established in another Member State, of second-hand goods belonging to him?

2. If so, do conditions such as those laid down by the Law of 25 June 1841 constitute restrictions?

3. Is Article 30 of the EEC Treaty, properly construed, applicable to the sale by public auction of second-hand goods coming from another Member State subject to conditions such as those laid down by the Law of 25 June 1841?

4. If so, would it be possible to rely on the exception relating to public policy provided for in Article 36 of the EEC Treaty?'

4. The order for reference was received at the Court Registry on 31 July 1990.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged:

on 9 November 1990 by SA British Motors Wright and Others, the respondents in the main proceedings, represented by Jean-Pierre Hermant, of the Paris Bar;

on 9 November 1990 by the Commission of the European Communities, represented by Étienne Lasnet, a member of its Legal Department, and Hervé Lehman, a French official seconded to the Commission's Legal Department under the scheme for exchanges with national officials, acting as Agents;

on 13 November 1990 by SCP Boscher, Studer et Fromentin, the appellant in the main proceedings, represented by Jean Consolo, of the Paris Bar.

Upon 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 and to assign the case to the Fifth Chamber.

II — Summary of the written observations submitted to the Court

5. With regard to the first question, *British Motors Wright and Others* (hereinafter referred to as 'the respondents') contend that the concept of services for the purposes of Article 59 of the Treaty must be defined on a residual basis and be taken to include everything not governed by the provisions concerning the free movement of goods, capital and persons. In the present case, occasional auction sales clearly involve the movement of goods between Germany and France by means of a particular form of sales. For such an operation to be regarded as constituting a service, it would be necessary to draw a distinction between the sale itself, which takes place between a German and a French national, and the part played by the auctioneer. The latter is not governed by Community law since the auctioneer is French and operates on French territory, and there is therefore no question of operating abroad on a temporary basis.

As far as Article 30 of the Treaty is concerned, the respondents state that the Law in question is compatible with that article since it regulates a method of selling goods without discriminating by reference to the origin and provenance of the goods (French or foreign) and without impeding their free movement (the goods entered France without restriction). Moreover, it is compatible with Article 30 in the light of the mandatory requirements laid down in the *Cassis de Dijon* line of cases, since it seeks to promote fair dealing and consumer protection in relation to public auctions, which are acknowledged to involve considerable dangers in those two respects.

Finally, they contend that if, impossible though it might seem, the Court should perceive some conflict between the Law of 1841 and Article 30 of the Treaty, Article 36 would enable them to co-exist.

6. *SCP Boscher, Studer et Fromentin* ('the appellant') claims in the first place that the definition of measures having equivalent effect adopted by the Court of Justice in its judgment in Case 8/74 *Dassonville* [1974] ECR 837, to the effect that all trading rules that are capable of hindering intra-Community trade directly or indirectly, actually or potentially, are measures having equivalent effect, places particular emphasis on the fact that account must be taken of the impact of a measure and not its aim in deciding whether or not it is caught by the prohibition contained in Article 30 et seq. of the Treaty.

After referring to certain aspects of the Court's case-law on measures having equivalent effect, the appellant points out the particular relevance to the present case of the judgment in Case 247/81 *Commission* v *Germany* [1984] ECR 1111, in which the

Court held that by reserving the marketing of medicinal preparations to pharmaceutical undertakings with their headquarters in the area in which the German Law on medicinal preparations was applicable, Germany had failed to fulfil its obligations under Article 30 et seq. of the Treaty. The Court also took the view that such a restriction was liable to involve additional expenses for those undertakings that did not consider it necessary to have their own representative established in the territory of the Member State of importation. The appellant maintains that the situation is even more serious where the legislation of a Member States makes the access of imported products to the national market subject to the condition that the exporter be entered on the Trade Register in the territory of the importing Member State. Such legislation restricts trade between Member States in so far as a company which has no establishment in the territory of the State and is not entered on any Trade Register within a particular judicial district of a commercial court is denied access to the French market outright.

The appellant adds that the Court has recently held that national rules which reserve to undertakings established in particular regions of national territory a percentage of public supply contracts are caught by the prohibition contained in Article 30 of the Treaty (Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889).

According to the appellant, the legislation in question does not give rise to a wholly internal situation on which Community law has no bearing. For certain types of product, such as top-of-the-range vehicles of recent manufacture, as in the present case, recourse to public sales is the only way of reaching a scattered market, since the potential customers are spread throughout the world and only the safeguards and the publicity offered by official public auctioneers enable products of that kind to be disposed of under normal conditions. Moreover, the auctioneer is merely the agent of the German company, and the latter remains the seller. Finally, it states that in Germany public auctions are not subject to any restrictions whatsoever.

As regards reliance on Article 36 to justify the French legislation, the appellant claims that only public policy could be pleaded, but that it would have to be established that such a restrictive measure was necessary in order to attain the aim pursued (judgments in Case 104/75 *De Peijper* [1976] ECR 613 and Case 247/81 *Commission* v *Germany*, *supra*). In that regard, it maintains that the mere fact that a provision is enforceable by a criminal penalty does not mean that it is justified in any event under Article 36 of the EEC Treaty, on the pretext that the cachet of criminal law attaches a particular public-policy aspect to the provision in question. Moreover, the appellant considers that the fears that prompted the legislation, which was adopted with a view to preventing infringements or unfair conduct and to protecting the traditional pattern of trade, no longer have any foundation as far as public auctions are concerned, since the sales in question are in most cases exceptional, prestige transactions which can be carried out only through the offices of persons vested with public authority, officially accredited auctioneers, and require advertising. They thus represent a method of selling which offers considerable safeguards. It has not been shown that the draconian restrictions imposed by the legislation at issue are in fact capable of serving a superior interest which renders them

necessary, in such a way that the limitation on the free movement of goods to which they give rise is justified. The reference to Article 36 is therefore inappropriate.

Finally, according to the appellant, Articles 59 and 60 of the Treaty require the elimination of all discrimination, overt or covert, based on ostensibly neutral criteria, against a provider of services by reason of his nationality or the fact that he is established in a Member State other than that in which the service is provided. Article 60 makes it clear that services include in particular activities of a commercial character. Companies which sell second-hand vehicles by public auction fall within that category and consequently Article 59 of the Treaty must be interpreted as applying to public auction sales in a Member State at which a trader established in another Member State sells second-hand goods belonging to him.

7. As regards the questions concerning the freedom to provide services, the *Commission* submits that Article 60 treats as services those services that are normally provided in return for remuneration, to the exclusion, in particular, of cases where they are subject to the provisions on the free movement of goods. Pursuant to that article, a prohibition whereby a trader may not have recourse to public auction sales if he has not been entered on the local trade register for two years relates only to the actual act of selling and not to any ancillary service; it therefore constitutes a rule governing only the marketing of goods and cannot be examined in the light of the prohibition of restrictions on the freedom to provide services.

As regards the questions concerning Articles 30 and 36 of the EEC Treaty, the Commission states in the first place that the definition contained in *Dassonville*, *supra*, applies to second-hand goods in the same way as to new goods, as the Court indeed held with respect to used vehicles in Case 406/85 *Gofette and Gilliard* [1987] ECR 2525.

The Commission states that the rule precluding recourse to public auctions by traders not entered in the trade register at the place of sale constitutes a barrier to the movement of second-hand goods since it requires the importer either to refrain from using auctions or to use the services of a trader established locally who will become the person in possession of the goods.

With respect to the first of those two hypotheses, the Commission states that the Court has already held on several occasions that the requirement that a trader abandon an effective marketing method or procedure, whether it be a type of advertising (Case 286/81 *Oosthoek* [1982] ECR 4575 and Case C-362/88 *GB-INNO* [1990] ECR I-667) or a marketing method (Case 382/87 *Buet* [1989] ECR 1235) is liable to constitute a measure equivalent in effect to a quantitative restriction. In the present case, a company which wishes to sell second-hand goods imported into France is obliged not to have recourse to public auctions, which is a particularly effective method of selling valuable articles because it makes it possible, by bringing together collectors or buyers with a special interest in

the type of goods on sale and by promoting open competition, to secure rapid sales at very high prices and, what is more, under favourable tax conditions.

As regards the second hypothesis, the Commission stresses that, whilst it is true that the national provisions in question enable an importer to use the services of a registered trader to sell by public auction, that procedure involves a significant obstacle to trade since it is not certain that the importer will always be able to conclude an agreement with a local trader and the latter's participation involves negotiations, complications and additional expense. In the Commission's opinion, that view has been confirmed by the Court (Case 155/82 *Commission* v *Belgium* [1983] ECR 531) and is supported by Commission Directive 70/50/EEC of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports (Official Journal, English Special Edition 1970 (I), p. 17), which classified as measures having equivalent effect rules which make access of imported products to the domestic market conditional on the existence of an agent or representative in the territory of the importing Member State.

The Commission adds that even if these are measures which apply without distinction they cannot be justified by the need to protect local trade, which cannot be regarded as capable of representing a mandatory requirement deserving to be taken into account by Community law. On the contrary, such a justification involves a protectionist aspect which renders it comparable to a disguised restriction on trade between Member States.

Finally, the Commission considers that fairness of commercial transactions cannot be accepted as a mandatory requirement, since such requirements do not entail systematic suspicion towards traders established elsewhere as to the origin and authenticity of the items sold. As the Court held in its judgment in Case 155/82 *Commission* v *Belgium*, *supra*, the requirement that an importer have a representative in the country of importation is not such as to provide additional safeguards so as to justify an exception to the prohibition contained in Article 30. Moreover, the French legislation provides sufficient safeguards by virtue of the compulsory involvement of a person vested with public authority, who is personally responsible and must be entered in a list prepared by the national association of official auctioneers and approved by the Minister of Justice.

The Commission adds finally that the only possible basis for justification under Article 36 is protection against the risks of fraud and trafficking in stolen goods as a matter of public policy. Such a justification, however, covers the same ground as consumer protection and the fairness of commercial transactions, which, as just stated, cannot be regarded as mandatory requirements.

G. C. Rodríguez Iglesias
Judge-Rapporteur