REPORT FOR THE HEARING
in Case C-312/89 *

I — Facts and procedure

1. Under Articles L.221-2, L.221-4 and L.221-5 of the Code du Travail (Labour Code) in force in the territory of the French Republic, the weekly rest period to be granted to employees, a minimum of 24 consecutive hours, must be allowed on Sunday.

2. That rule is subject to many exceptions, which are laid down by Article L.221-5-1 et seq. of the Code and may be divided into three broad categories:

— establishments within certain exhaustively listed sectors, such as restaurants, tobacconists' shops, florists selling natural flowers, hospitals, and industries using highly perishable materials (a category in which some retail food shops must also be included);

— industrial undertakings within a sector for which a collective agreement has allowed an exemption from the rule requiring the Sunday rest period;

— undertakings holding a permit from the Prefect, issued on the ground that the simultaneous observance of Sunday as a rest period by the entire staff would adversely affect the general public or impair the normal functioning of the undertaking in question.

3. On the ground that SIDEF Conforama, Arts et Meubles and Jima were opening their shops on Sundays and employing their staff on those days, the Union Départementale des Syndicats CGT de l'Aisne (Federation of CGT Trade Unions in the Department of Aisne) submitted an interlocutory application to the Tribunal de Grande Instance (Regional Court), Saint-Quentin, for an injunction to restrain the respondent companies from opening their shops on Sundays, subject to a fine for contravention.

4. The President of the Tribunal de Grande Instance, Saint-Quentin, made an order on 5 October 1989 referring to the Court for a preliminary ruling two questions worded as follows:

'Can the concept of "measures having equivalent effect" to quantitative restrictions on imports contained in Article 30 of the EEC Treaty be applied to a general provision whose effect is to prohibit Sunday working for employees, *inter alia* in a sector such as furniture retailing, when:

(1) that sector deals to a large extent in products imported, *inter alia*, from Member States of the EEC;

* Language of the case: French.

(2) a considerable proportion of the sales of undertakings in that sector is made on Sundays in cases where those undertakings have taken the step of contravening the provisions of national law;

(3) closure on Sundays has the effect of reducing the volume of sales effected and thus the volume of imports from Member States of the Community; and, finally,

(4) the obligation to allow employees their weekly rest period on Sundays does not apply in all the Member States?

If so, can the characteristics of the sector in question be regarded as meeting the criteria set out in Article 36 of the EEC Treaty?'

5. The order for reference was lodged at the Registry of the Court of Justice on 11 October 1989.

6. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted by the plaintiff in the main proceedings, represented by Maître Khelfat, of the Saint-Quentin Bar, and by A. Lyon-Caen, F. Fabiani and L. Liard, Avocats appearing before the Conseil d'État and the Cour de Cassation, by the defendant, Sidef Conforama, represented by M. Distel, of the Paris Bar, by the Government of the French Republic, represented by E. Belliard and G. de Bergues, acting as Agents, and by the Commission of the European Communities, represented by its Legal Adviser R. Wainwright and by H. Lehman, acting as Agents.

7. 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.

II — Written observations submitted to the Court

1. The *plaintiff* claims that there is a strong similarity between the present case and Case C-145/88 *Torfaen Borough Council* v *B & Q*. It points out that in its judgment in that case ([1989] ECR 3851) the Court held that national rules governing the opening hours of retail premises seek to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that that, in the present state of Community law, is a matter for the Member States. The plaintiff maintains that, in that ruling, the Court affirms that the pattern of trade between Member States is not affected by such rules and that it is for the national courts to determine whether their effects on the free movement of goods go beyond the effects which are intrinsic to trade rules.

The plaintiff therefore considers that in its judgment in *Torfaen* the Court has already ruled on the questions raised by the national court, and hence there is no need for the Court to give a further ruling on the matter.

The plaintiff claims that the Court should:

declare that there is no need to rule on the questions referred to it, which it has already answered in its aforesaid judgment of 23 November 1989;

in the alternative, hold as follows:

'Article 30 of the Treaty must be interpreted as meaning that the prohibition it contains does not apply to national rules prohibiting retail shops from opening on Sundays, provided that any restrictive effects on Community trade which may result do not exceed the effects intrinsic to rules of that kind.'

2. The *defendant* contends that, in the order for reference, the Tribunal de Grande Instance found that the business sector to which it belongs markets products from within the Community, that a major share of turnover is realized on Sundays, and that Sunday closing pursuant to Article L.221-5 of the Code du Travail would entail a decrease in turnover and hence a decline in the volume of imports from within the Community.

The defendant argues that this finding of fact, which lies within the sole jurisdiction of the national court, demonstrates that the legislation at issue has a restrictive effect on intra-Community trade, from which the French court could have drawn all the proper inferences without seeking an interpretation by the Court of Justice. In that connection the defendant contends that in its *Torfaen* judgment the Court necessarily — albeit implicitly — accepted that British legislation governing Sunday trading, as opposed to employees' rest periods, gave rise in practice to restrictions on trade within the Community.

It follows, according to the defendant, that the answer to be given to the first question is that the application of Article L.221-5 of the Code du Travail constitutes a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the EEC Treaty.

The defendant further submits that the provisions of Article L.221-5 of the Code do not pursue an aim which is justified under Community law. Given that 26% of employees and 66% of self-employed persons work on Sundays, it does not seem possible to speak of a general rule in French law regarding the weekly rest period. The purely ancillary nature of the rule on a Sunday rest period is borne out by the existence of a specific, well-developed body of legislation on Sunday working.

The defendant contends that if the Sunday rest period — as opposed to a weekly rest period — is clearly not a fundamental principle of French law, it cannot be regarded as an aim justified under Article 36 of the EEC Treaty either. The prohibition of working on Sundays, which is only partial and is subject to exemptions entailing compensatory concessions of considerable benefit to employees, cannot be justified 'on

grounds of public morality, public policy or public security, [or] the protection of health and life of humans . . . '.

The defendant submits that the disputed rule concerning the taking of the weekly period of rest, created by an instrument antedating the EEC Treaty by more than half a century, reflects only the attention given to religious considerations, which were still highly influential in 1906 but which should not be regarded as a justified objective under Community law and thereby impede the principle of the free movement of goods, which is an essential aspect of the Community structure. Furthermore, the resultant obstacles to intra-Community trade are manifestly pointless and excessive in relation to the attainment of the only objective which may be considered justified under Community law. The imposition of a compulsory weekly day of rest, at the expense of restrictions on imports, cannot be regarded as a measure commensurate with the single objective capable of justification under the EEC Treaty, namely the promotion of 'improved working conditions and an improved standard of living for workers', to which Article 117 of the Treaty refers.

According to the defendant, the principle of proportionality demands that the costs of a measure should be offset by the social advantage, in the broadest sense of the term, which is derived from it. In this case, the contested legislation can be held to comply with the principle of proportionality only if it is demonstrated that the attainment of the aims pursued by that legislation warrants the restrictions imposed on intra-Community trade.

In the defendant's opinion, examination of the matter shows that there can be no such justification from the point of view of the dynamics of the Community. The obligation to grant a weekly rest period on Sundays, as opposed to the obligation to grant a weekly rest period *simpliciter*, of which it is merely one possible manifestation, is clearly not necessary for the purpose of improving the standard of living of workers. It maintains that, once the social aims pursued can fail to be attained — and, in many cases, are not attained in practice — by a measure entailing restrictions, that measure is disproportionate and constitutes a measure having equivalent effect which cannot be justified by pleading the provisions of Article 36 of the EEC Treaty.

The defendant further argues that the Court must also consider whether the national provisions in question are compatible with Article 85 of the EEC Treaty. Examination of the scheme created by Articles L.221-5 et seq. of the Code du Travail and of the case-law defining its operation shows that the restriction under which the Sunday working of employees is prohibited may in some cases be due to the existence of agreements or concerted practices of the kind prohibited by Article 85.

The defendant concludes that the Court should give the following answers to the questions referred to it:

'(1) A general provision whose effect is to prohibit the employment of workers on Sundays, in particular in a business sector such as furniture retailing, when that sector draws to a large extent on imported products, including imports from Community countries, a large

share of the turnover of undertakings in that sector is realized on Sundays where those undertakings have taken the initiative of contravening the provisions of national law, and Sunday closing is liable to reduce turnover and hence the volume of imports from Community countries, constitutes a measure having equivalent effect to a quantitative restriction on imports which is incompatible with the Treaty.

(2) Such a provision cannot fall within the scope of Article 36 of the Treaty.'

3. The *French Government* takes the view that its legislation on the weekly Sunday rest period does not fall within the scope of the prohibition laid down in Article 30 of the EEC Treaty. In the first place, it observes that the legislation applies to imported and domestic products without distinction. In its view, neither its purpose nor its effect can be to render the marketing of imported products more difficult or expensive than that of domestic products (see judgment in Case 132/80 *United Foods and Van den Abeele* v *Belgium* [1981] ECR 995).

It further considers that such legislation gives expression to social policy for the protection of employees. The statutory exemptions from the general rule of a weekly Sunday rest period — some of which are also based on social considerations such as the maintenance of a minimum level of activity necessary for social life on Sundays — are based on impartial criteria having no connection with whether the products sold by the establishments entitled to exemption are domestic or imported products.

The French Government maintains that the Court has clearly accepted the compatibility of that type of legislation with Community law. The Court first held in its judgment in Case 155/80 (*Oebel* [1981] ECR 1993) that national provisions governing the hours for work, deliveries and sales in the bread and confectionery industry constituted a legitimate element of economic and social policy, consistent with the objectives of public interest pursued by the EEC Treaty.

The French Government argues that greater emphasis should be laid in this case on the Court's ruling on the British Sunday trading legislation, in which the Court held that 'Article 30 of the Treaty must be interpreted as meaning that the prohibition which it lays down does not apply to national rules prohibiting retailers from opening their premises on Sunday where the restrictive effects on Community trade which may result therefrom do not exceed the effects intrinsic to rules of that kind' (judgment in *Torfaen*, cited above).

The French Government submits that in the *Torfaen* judgment the Court left open the possibility that the effects of those provisions might exceed the effects intrinsic to rules of that kind. It claims that this cannot be said of the French legislation, which applies to domestic and imported products without distinction and whose limited exemptions are based on objective criteria having no connection with whether the products sold by the establishments entitled to exemption are domestic or imported products.

The French Government takes the view that the fact that some of the sectors concerned rely heavily on imports, that a major share of the turnover of undertakings forced to discontinue trading on Sundays would otherwise be realized on that day, or that their turnover and — indirectly — imports from other Member States of the

Community would be affected by that prohibition, is, apart from being difficult to grasp, not such as to cast doubt on the compatibility of such legislation with Community law.

It claims that the above conclusion cannot be affected by the volume of imports in some of the sectors concerned, by the fact that the turnover of undertakings forced to discontinue trading on Sundays may thereby be reduced, or by the existence of more liberal laws in other Member States.

In view of the foregoing, the French Government is also of the opinion that the existence of more liberal laws in other Member States cannot be pleaded as an argument to show that French legislation is incompatible with Community law. In its view, any disparity between national laws which are applied in any given sector is attributable to the absence of harmonization in that sector and does not, as such, indicate that the more restrictive legislative systems are incompatible with Community law, unless the view is taken that the Community institutions are under an obligation to harmonize national laws in all sectors.

The *Commission* refers to the judgment in Case C-145/88 (*Torfaen*, cited above), and contends that the questions raised by the national court must be assessed in the light of the principle laid down in that judgment. However, unlike the legislation examined in that case, the national legislation now under consideration does not concern a prohibition on the Sunday opening of shops but the obligation to grant employees a weekly day of rest on Sundays.

In conclusion, the French Government proposes that the Court should, in answer to the national court, rule that Article 30 is to be interpreted as meaning that the prohibition which it contains does not apply to national rules requiring that the weekly rest period be granted on Sundays, subject to exemptions based on objective criteria.

The Commission submits that the case concerns a social welfare provision which reaches beyond the commercial sector and extends to all sectors, such as industrial and business activities; conversely, it does not affect all commercial premises, since there are express exemptions for restaurants, public houses and tobacconists, florists selling natural flowers, newsagents and information bureaux, and certain retail food shops, which are permitted to grant the

weekly rest period on a rota basis, and for undertakings holding a permit issued by the administrative authorities.

The Commission takes the view that social welfare legislation having a direct effect on the marketing of products is liable to affect the opportunities for selling imported goods, and hence, possibly, the importation of those goods. The prohibition on the employment of staff on Sundays is, in the circumstances described above, a measure applicable to domestic products and imported products without distinction: accordingly, in the case submitted by the national court, although the prohibition on the opening of furniture stores affects Sunday sales of imported furniture, it does so only to the same extent as it affects furniture produced within the territory of the Member State.

The Commission submits that the Court ruled in the *Torfaen* judgment that in assessing such a measure which is applicable without distinction it is necessary first to consider whether the legislation at issue pursues an objection which is justified under Community law and then to ascertain whether any obstacle to Community trade thereby created exceeds what is necessary to achieve the desired objective.

According to the Commission, the intention of the Court was to establish a principle applicable to all legislation of that kind within the Community. Indeed, it may readily be observed that the legislation in question seeks to protect employees by ensuring, first, that they enjoy a weekly holiday and, secondly, that the holiday falls on the same day for everyone, in the interests of family life and, as the Advocate General noted in his Opinion in Case C-145/88, for the promotion of non-working activities and social contacts — the choice of Sunday being due to an historical and religious tradition. It represents a choice of economic and social policy which is in keeping with the public-policy aims of the EEC Treaty and is comparable to the social welfare measures afforded by the prohibition of night work, the limitation of weekly and daily working hours, or the granting of annual paid holidays.

As to whether the potential obstacles to intra-Community trade are proportionate to the legitimate aims pursued, the Court held in *Torfaen* that 'the question whether the effects of specific national rules do in fact remain within that limit is a question of fact to be determined by the national court'.

The Commission maintains that such an assessment cannot be left to the national courts. In the first place, there is the fear that in undertaking that assessment, national courts may in some cases reach conclusions at odds with Community law. There is, moreover, a real risk that different courts will reach divergent conclusions in similar or even identical cases, unless consistency is ensured by a single court at Community level.

The Commission argues that although the diversity of the national laws governing shop opening hours makes consistency of assessment a delicate task, consideration of a given body of legislation must nevertheless make it possible to state whether or not the rules which it lays down are contrary to Community law and to furnish the national court with the answer to the question of interpretation which will enable it to settle the dispute brought before it.

In this case, the Commission considers that there is nothing to indicate that the restrictive effects which the prohibition on the employment of staff on Sundays has on the free movement of goods, attenuated as it is by exemptions relating mainly to the sale of goods for immediate consumption, are disproportionate to the result sought. Those effects are in fact very limited. Consumers are undoubtedly prevented on Sundays from purchasing certain goods, whether imported or not, such as the furniture in the case before the national court. It is not inconceivable that this restriction will depress total demand for certain products and consequently reduce imports.

Nevertheless, the Commission considers it unlikely, all in all, that the closure of certain categories of shop on Sundays will cause consumers to forgo permanently the purchase of goods sold on the other six days of the week. In practice consumers, who are quite aware that certain goods are unobtainable on Sundays, adjust to the situation and arrange their purchases accordingly. Furthermore, it is not clear that the slight displacement which may affect consumption will not benefit imported products.

The Commission considers that the fact that the obligation to allow employees their weekly rest period on Sunday does not exist in all Member States is not liable to depress intra-Community trade. On the contrary, the differences between shops' opening hours may increase trade between two Member States having a common frontier. Those factors support the assertion that the prohibition on the employment of staff on Sundays does not affect trade in a way that is disproportionate to the legitimate aim of social welfare. Similarly, in view of the statutory exemptions in favour of shops selling products for immediate consumption, there is no indication that the social welfare aim pursued by the legislation can be attained by any other means which would impede trade less.

Turning to the scheme of administrative exemptions for which the Code du Travail makes provision, the Commission submits that if the competent administrative authorities were to permit the opening on Sundays of shops selling products mainly of national origin whilst withholding such permission from those selling comparable goods originating from elsewhere in the Community, there would then be discrimination against imported products. Such a case, which does not seem to correspond to the case before the national court, would involve a measure having equivalent effect to a quantitative restriction which was selectively applicable to imported products alone without any justification in terms of imperative requirements, and hence contrary to the prohibition under Article 30.

Accordingly, the Commission proposes that the Court should give the following answer to the question referred to it:

'The prohibition contained in Article 30 of the Treaty, properly construed, does not apply to national legislation prohibiting the employment of staff on commercial premises on Sundays, on condition that the exemptions allowed do not in practice entail discrimination against imported products as opposed to domestic products.'

M. Díez de Velasco
Judge Rapporteur