Free movement of goods concerns not only traders but also individuals. it requires, particularly in frontier areas, that consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population. That freedom for consumers is compromised if they are deprived of access to advertising available in the country where purchases are made. Consequently a prohibition against distributing such advertising must be examined in the light of Articles 30, 31 and 36 of the EEC Treaty.

2. Under Articles 30 and 36 of the Treaty, advertising lawfully distributed in another Member State cannot be made subject to national legislation prohibiting the inclusion, in advertisements relating to a special purchase offer, of a statement showing the duration of the offer or the previous price.

Since Community law regards the provision of information to the consumer as one of the principal requirements with regard to consumer protection, Article 30 of the Treaty cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection.

REPORT FOR THE HEARING
delivered in Case C-362/88 *

I — Facts and procedure

1. *Legal context and the facts underlying the main proceedings*

Article 8 of the Grand-Ducal Regulation of 23 December 1974 on unfair competition (*Mémorial* A 1974, p. 2392), as amended by the Grand-Ducal Regulation of 17 December 1976 (*Mémorial* A 1976, p. 1458) and the Grand-Ducal Regulation of 22 December 1981 (*Mémorial* A 1981, p. 2400), prohibits retail sales offers involving a temporary price reduction, outside the context of a special sale or clearance sale, when those offers state their duration or refer to previous prices.

That Luxembourg regulation, as well as the law of 27 November 1986, which entered into force on 1 December 1986 (*Mémorial* A 1986, p. 2214) and replaced the regulation, specifically defines what is meant by special sales or clearances.

* Language of the case: French.

GB-INNO-BM, a Belgian company which operates 'Super-GB' and 'Maxi-GB' supermarkets in Belgium, distributed in the Grand Duchy of Luxembourg publicity leaflets promoting the sale of its products. These advertisements, which were identical to those distributed in Belgium, included, amongst other items, the following offers:

(i) price reductions for a limited period (reduced prices valid from Thursday 4 to Tuesday 9 September 1986);

(ii) advertisement of reduced prices by reference to the previous price (pots of yogurt for the price of BFR 48 — deleted price BFR 78).

The advertising contained in these leaflets was in compliance with the Belgian legislation relating to unfair competition. In the Grand Duchy of Luxembourg the advertising constituted offers for sale other than in special sales or clearances, within the meaning of the provisions of Luxembourg law.

The Confédération du commerce luxembourgeois (hereinafter referred to as 'CCL') brought interlocutory proceedings against GB-INNO before the presiding judge of the Chamber of the tribunal d'arrondissement (District Court), Luxembourg, competent for commercial matters. By an order dated 7 November 1986 that judge prohibited the distribution of the advertising leaflets in the Grand Duchy of Luxembourg on the ground that they contravened the Grand-Ducal Regulation on unfair competition, pursuant to which offers giving a price reduction may neither state the duration of the offer nor refer to previous prices. That order was confirmed by a judgment of 27 May 1987 of the cour d'appel (Court of Appeal), Luxembourg, sitting as a commercial court.

GB-INNO sought an order quashing this judgment from the Cour supérieure de justice (Supreme Court of Justice), Luxembourg, in its capacity as Cour de cassation (Final Court of Appeal). That court dismissed GB-INNO's first two submissions, but it considered that Article 8 of the Grand-Ducal Regulation of 23 December 1974 on unfair competition raised a question of the interpretation of Community law.

2. *Preliminary question*

The Cour de cassation of the Grand Duchy of Luxembourg submitted to the Court, pursuant to Article 177 of the Treaty, the following request for a preliminary ruling:

'Is a legislative provision of a Member State whereby the offering of goods for retail sale at a temporarily reduced price, other than in special sales or clearance sales, is permitted only on condition that the offers may not state their duration and that there may be no reference to previous prices, contrary to Article 30, the first paragraph of Article 31 and Article 36 of the EEC Treaty, properly construed?'

3. *Procedure*

The order dated 8 December 1988 making the reference was received at the Court Registry on 14 December 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by

GB-INNO-BM SA, the appellant, represented by Nicolas Decker, of the Luxembourg Bar, Antoine de Bruyn, avocat at the Belgian Court of Cassation, and Louis van Bunnen and Michel Mahieu, both of the Brussels Bar,

Confédération du commerce luxembourgeois ASBL, the respondent, represented by Yvette Hamilius, of the Luxembourg Bar,

the Government of the Grand Duchy of Luxembourg, represented by Alain Gross, of the Luxembourg Bar,

the Government of the Federal Republic of Germany, represented by Dr Martin Seidel and Dr Horst Teske, acting as Agents,

the Commission of the European Communities, represented by Christine Berardis-Kayser, a Member of its Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court assigned the case to the Sixth Chamber and decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations

Scope of Article 30 of the Treaty

GB-INNO and the Commission argue that the requirements of Luxembourg legislation constitute a measure having equivalent effect to a quantitative restriction on imports, which is prohibited by Article 30 of the Treaty.

They point out that, in accordance with the judgment of the Court of 15 December 1982 in Case 268/81 *Oosthoek* [1982] ECR 4575, paragraph 15, domestic legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. To compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction.

GB-INNO and the Commission consider that the concept of intra-Community trade embraces retail sales in border areas to the residents of another Member State. The contested regulation has the effect of impeding such trade, particularly in a case such as the present one which affects border areas.

CCL and the German and Luxembourg Governments point out that the contested national provisions prohibit neither the sale nor the importation of goods or certain

stated products. They apply solely to advertising which refers to the previous price of a product on offer or to the duration of a sales offer.

As GB-INNO's goods are sold exclusively in Belgium, there is no impediment to intra-Community trade. Article 30 of the EEC Treaty is not therefore applicable.

The German Government adds that the Court held in its judgment of 31 March 1982 in Case 75/81 *Blesgen* v *Belgium* [1982] ECR 1211, that Article 30 of the Treaty does not prohibit measures relating to marketing which apply without distinction to domestic and imported products, in fact have no connection with the importation of the products and for that reason are not of such a nature as to impede intra-Community trade. Although it is clear from the Court's judgment in *Oosthoek* that national legislation on advertising may in certain cases be caught by Article 30 there is no feature in this case which may hinder the marketing of the products in question in such a way as to affect trade.

CCL dmaintains, moreover, that the Court does not have jurisdiction to rule on the issue raised by the national court, as the request for a preliminary ruling does not relate in any way to the importation of products. In its judgment of 13 March 1980 in Case 104/79 *Foglia* v *Novello* [1980] ECR 745, the Court held that its duty under Article 177 of the EEC Treaty is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them.

Justification and proportionality of the contested legislation

GB-INNO and the Commission observe that, in accordance with the Court's case-law (judgment of 20 February 1979 in Case 120/78 *Cassis de Dijon* [1979] ECR 649), obstacles to the free movement of goods resulting from disparities between national laws must be accepted in so far as those laws apply without distinction to domestic and imported products and appear to be necessary in order to satisfy mandatory requirements relating in particular to consumer protection and the fairness of commercial transactions. In the *Oosthoek* case, mentioned above, the Court found that provisions which restrict certain forms of advertising and certain means of sales promotion may constitute such a measure. According to that judgment, the national prohibition may be justified on the ground that free gifts may mislead consumers as to the real prices of products and thus distort the conditions on which genuine competition is based. The prohibition must not exceed what is necessary for the attainment of legitimate objectives of consumer protection and fairness of transactions.

GB-INNO and the Commission compare the contested provisions of Luxembourg law with the law relating to the advertising of sales offers in other Member States, in order to determine whether the Luxembourg rules are to be deemed excessive or disproportionate.

Belgian law provides that a price reduction indicating both the previous price and the reduced price is lawful provided that the reference price is the price normally charged

in the month preceding the reduction. As regards the duration of the offer, the date as from which the reduced price applies must be stated. It is open to the trader to indicate the period during which the offer is valid.

In France, the previous deleted price or the percentage reduction must be indicated as well as the duration of the offer. The trader may not increase the price just before announcing a reduction.

In Spain, a law is in preparation pursuant to which there will be an obligation to indicate, in respect of special offers and annual sales, the previous price and the new price.

In the United Kingdom, the Trade Descriptions Act 1968 makes it an offence to give misleading information which seeks to give the impression that the price of a product is lower than a recommended price or a reference price.

The Federal Republic of Germany is the only Member State which forbids price comparisons, following an amendment to the Law on Unfair Competition which entered into force on 1 January 1987. The new provisions forbid price comparisons in respect of products which are offered at a stated price reduction or in the form of a percentage reduction, thereby giving the impression that higher prices were charged before.

GB-INNO and the Commission conclude from this survey that certain legislative provisions of other Member States have in common the fact that they permit the two prices to be indicated when the reference price is the price actually charged, even if the solutions adopted are different as regards the definition of the reference price. Moreover, the new Luxembourg law, adopted in 1986, is based on the same idea, as Article 4 thereof states that 'prices at sales must be truly lower than the prices usually asked by the seller for the same items', and does not forbid a comparison of the prices. This attitude on the part of the legislature is understandable given that the reference to the previous price is an interesting and even decisive item of information for the consumer. When this information is accurate and fair, it constitutes an additional degree of protection for the consumer and encourages fair competition. Moreover, other solutions may be envisaged in order to avoid the misleading practice of exaggerated reference prices. A general definition of the reference price might be useful in guiding the courts in the application of such rules.

The prohibition on indicating the duration of a special offer, whilst pursuing the legitimate objective of avoiding confusion between offers of price reductions and regulated special sales which are limited as to their duration, is also disproportionate. The risk of confusion arising between the two types of sale would appear in fact to be very limited. On the other hand, a prohibition on indicating the duration is likely to disconcert the consumer, who cannot know during what period the special offer is valid.

GB-INNO adds that the Luxembourg legislation seriously affects the opportunities for Belgian shops established in border areas to market their products in the Grand Duchy of Luxembourg. It stresses that it has always drafted its advertising material in full conformity with the provisions of Belgian law, which take account of the interests of consumers. The Luxembourg rules constitute for it an obstacle to intra-Community trade. The fact that its effects

may appear insignificant is of little relevance as any hindrance to imports, even slight, is sufficient to enable the national measure in question to be described as a measure having equivalent effect to a quantitative restriction.

CCL points out that in the judgment of 22 January 1981 in Case 58/80 *Dansk Supermarked* [1981] ECR 181, the Court held that certain provisions which could constitute an obstacle to intra-Community trade but are regarded by a Member State as being necessary to safeguard consumer protection and the fairness of commercial transactions are compatible with Community law.

The contested prohibitions are justified by the need to identify, in the consumer's mind, special short-term sales or clearances, which are precisely for a limited period, and to protect the consumer, who is not in a position to check the reality and truthfulness of the previous prices indicated. At Community level, the Council acknowledged these needs in 1975 and 1981 by the adoption of programmes relating to a policy of consumer protection and information.

CCL goes on to point out that, in accordance with the judgment of 17 March 1983 in Case 94/82 *De Kikvorsch* [1983] ECR 947, paragraphs 11 and 12, consumer protection may entail a prohibition on the provision of certain information on a product, particularly if that information is likely to mislead the consumer. Moreover, CCL takes the view that it is for the national courts to determine whether certain information is likely to create confusion in the mind of the consumer, as was done by the court of first instance and the appeal court in the present case.

Finally, CCL observes that, generally, the consumer must be protected against excessive consumption and against the psychological pressure exercised by sales offers at supposedly reduced prices. It concludes that the Luxembourg provisions in question are in conformity with Articles 30 *et seq.* of the Treaty.

The Luxembourg Government states that the Luxembourg provisions are justified on grounds of consumer protection, in accordance with the Court's judgment in the *Oosthoek* case mentioned above, although that case, contrary to the present case, concerned a genuine problem of importation.

The prohibition on any reference to the previous price was introduced in order to prevent traders from using sales at reduced prices in order to organize a disguised bargain sale outside the periods laid down by law and to prevent it from becoming necessary to carry out checks on the genuineness of the previous price. The Luxembourg Government therefore wished to regulate the market by imposing strict limits on all commercial practices capable of harming the consumer and disrupting normal competitive conditions. The interests of the consumer are not safeguarded by the proliferation of such commercial practices, which lead traders to increase the profit margin in normal periods in compensation for the losses suffered on the occasion of special sales.

The German Government considers that the conditions enabling the rules in question to be justified are met. The provisions in question are applied without distinction to domestic and imported products and fall within a legal field in which there has not yet been any harmonization of laws, and

they are justified by mandatory requirements, in particular in the field of competition. The national provisions in question essentially seek to regulate competition. A competitor is not permitted, by means of sales taking place outside the usual trading patterns, to place before the public the offer of certain inducements and thus gain a lead on his competitors. Such a situation would be likely to set off a chain of increased offers which would not be profitable. At the same time the consumer is protected against the inducement to buy to which he has been subject.

The prohibition on reference to the previous price is necessary because it is not possible for the consumer to undertake a comparison between the previous and new prices.

The German Government takes the view that such provisions, which are justified on grounds of fair trading, are not disproportionate in relation to that objective, even if national systems are different. In the *Oosthoek* case the Court found a Netherlands prohibition to be compatible with the principle of the free movement of goods, although there was no similar prohibition in Belgium.

Furthermore, in the preamble to Directive 84/450 of 10 September 1984 on the approximation of the laws, regulations and administrative provisions of the Member States on misleading advertising (Official Journal 1984, L 250, p. 17), the Council declared that Member States are entitled to adopt provisions which seek to ensure more extensive consumer protection.

The German Government adds that since 1 January 1987 German law has contained provisions comparable to those in force in Luxembourg.

III — The Commission's conclusion

The Commission proposes that the Court should give the following answer to the question referred to it by the national court:

'Article 30 of the EEC Treaty precludes a Member State from applying a legislative provision whereby the offering of goods for retail sale at a temporarily reduced price, other than in special sales or clearance sales, is permitted only on condition that the offers may not state their duration and that there may be no reference to previous prices, where that legislation also applies to products to be imported into another Member State where they are lawfully offered for sale.'

T. Koopmans
Judge-Raporteur