REPORT FOR THE HEARING
in Case C-306/88 *

I — Facts and procedure

1. Injunction proceedings have been brought by Rochdale Borough Council (hereinafter 'Council') before the Queen's Bench Division of the High Court of Justice concerning the contravention by Stewart John Anders ('Mr Anders') of Section 47 of the Shops Act 1950 by his opening and continuing to open for the serving of customers on Sunday for transactions other than those mentioned in the Fifth Schedule to that Act retail shop premises situated at Dale Mill. The Council is therefore seeking to obtain from the High Court an injunction to restrain Mr Anders by himself, his servants or agents, or otherwise howsoever from opening a shop or causing or permitting others to open a shop at Dale Mill for the serving of customers on a Sunday save for the transactions listed in the Fifth Schedule to the Shops Act 1950.

2. Section 47 of the Shops Act provides that 'every shop shall, save as otherwise provided by this part of the Act, be closed for the serving of customers on Sunday. Provided that a shop may be open for the serving of customers on Sunday for the purposes of any transaction mentioned in the Fifth Schedule to this Act.' In that connection the Fifth Schedule to the Shops Act 1950 contains a list of items for the sale of which a shop is permitted to open on Sunday. Those articles are intoxicating liquors, certain foodstuffs, tobacco, newspapers and other products of everyday consumption.

3. The High Court found the following facts:

(a) The majority of the goods sold in Dale Mill by Mr Anders are not items which benefit from the exception to the Sunday trading ban.

(b) Among the items sold by Mr Anders from Dale Mill, products originating in or imported from other Member States of the European Community during the period from 1 April 1987 to 31 March 1988 accounted for a minimum of 26.80% of all the products which were sold by Mr Anders from Dale Mill. Since that time such sales have continued to account for a similar if not greater percentage figure.

(c) During the period from 1 April 1987 to 31 March 1988 retail sales from Dale Mill totalled £ 1 292 880. Retail sales on Sunday totalled £ 489 260 which was 37.84% of the total. The sales of the products

* Language of the case: English.

originating in or imported from other Member States of the European Community did not significantly vary over different days of the week. It is estimated that the value of such sales on Sundays over that period was not less than £ 131 260.

(d) If Dale Mill had been closed on Sundays during the period from 1 April 1987 to 31 March 1988, there would have been a consequential and substantial reduction in the overall volume of goods sold *not only on Sundays but throughout the week*. If there had been such a ban during that period, it is estimated that the loss of sales would have equalled and most likely exceeded £ 489 260.

(e) The enforcement of the Sunday trading ban indirectly reduces in absolute terms the volume of imports into the United Kingdom from other Member States of many of the goods sold by Dale Mill.

4. In the national proceedings the *Council* maintains that Section 47 of the Shops Act 1950 is not a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30, since in the absence of common rules relating to the marketing of a product it is for the Member States to regulate all matters relating to its marketing on their own territory, and Section 47 applies to domestic and imported products alike and does not put imported products at any disadvantage compared with identical or competing domestic products. Moreover, Section 47 must be recognized as necessary to satisfy certain 'mandatory requirements', and as being justified under Article 36 on grounds of public morality, public policy or the protection of health and life of humans. In any event, the provision at issue does not constitute an arbitrary discrimination or a disguised restriction on trade between Member States and there is no infringement of the principle of proportionality.

5. For his part, *Mr Anders* considered that Section 47 of the Shops Act 1950 is a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30, inasmuch as the ban on Sunday trading is capable of hindering intra-Community trade. That infringement of Article 30 cannot be justified under Article 36, first because it does not come within any of the finite categories of exemptions which must be strictly construed; secondly, even if it was brought within one of those categories, it would not escape the prohibition because to do so it must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States, which would be the case here; thirdly, because the prohibition on Sunday trading is more restrictive of trade than is necessary in order to attain the protection of the principle referred to in Article 36, and that the prohibition cannot be justified as reasonable, regard being had to the extraordinary anomalies in its application and effect.

6. In the light of the foregoing considerations, the Queen's Bench Division of the High Court of Justice requested the Court of Justice to give a preliminary ruling on the following questions:

1. Where a Member State prohibits retail premises from being open on Sunday for the sale of goods to customers, save in respect of certain specified items sales of which are permitted, and where the effect of the prohibition is to reduce in absolute terms the sales of goods in those premises including goods manufactured in other Member States, and correspondingly to reduce the volume of imports of goods from other Member States, is such a prohibition a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty?

2. If the answer to question 1 is in the affirmative, does such a measure benefit from any of the exceptions to Article 30 contained in Article 36, or from any other exception recognized by Community law?

3. Is the answer to question 1 or question 2 above affected by any factor so as to render the measure in question a means of arbitrary discrimination or a disguised restriction on trade between Member States or a measure lacking in proportionality or otherwise unjustified?

4. If the prohibition referred to in question 1 contravenes Article 30 and is not justified under Article 36, is it totally unenforceable against a trader in the Member State or only unenforceable to the extent that it prohibits transactions involving goods manufactured in or imported from other Member States?

7. The order for reference was registered at the Court Registry on 19 October 1988.

8. In accordance with Article 20 of the Protocol of the Statute on the Court of Justice of the EEC, written observations were submitted by Rochdale Borough Council, represented by Michael J. Beloff, QC, and Stephen Sauvain, Barrister, by Mr Anders, represented by David Vaughan, QC, and William Elland, Barrister, by the United Kingdom, represented by Nicholas Paines, Barrister, and S. J. Hay, Treasury Solicitor's Department, and by the Commission of the European Communities, represented by Eric L. White, acting as Agent.

9. After the order for reference had been made, the Court in its judgment in Case C-145/88 (*Torfaen Borough Council* v *B & Q Plc* [1989] ECR 3851) 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. Similarly, in judgments of 28 February 1991, the Court also 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 the employment of staff on Sundays (Case C-312/89 *Conforama* [1991] ECR I-997), or on Sundays after 12 noon (Case

C-332/89 *Marchandise* [1991] ECR I-1027). Following the communication of these three judgments to the national court, the latter, by letter of 13 June 1991 registered at the Court Registry on 18 June 1991, stated that, whilst the three first questions were no longer relevant, in particular in the light of the judgment in *Torfaen Borough Council* v *B & Q Plc*, it considered that a decision was still necessary on the fourth question.

10. 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. On the fourth question, the *Council*, the plaintiff in the national proceedings, maintains that if, contrary to what it considers to be correct in law, the Court of Justice were to hold the substantive provisions of the Shops Act 1950 to be inconsistent with Article 30 of the Treaty, that would only be the case to the extent to which they have an equivalent effect to a quantitative restriction on imports from Member States. In fact, Article 30 does not concern imports into the Member States of goods from countries situated outside the European Community, and it cannot be relied upon to allow the sale of such goods in circumstances which contravene domestic legislation.

The Council proposes that the Court should reply to the fourth question asked by the national court in the following terms:

If the prohibition referred to in question 1 contravenes Article 30 and is not justified under Article 36, it is unenforceable only to the extent that it prohibits goods manufactured in or imported from other Member States.

2. *Mr Anders*, the defendant in the national proceedings, for whom the fourth question is academic, relies on the case-law of the Court, and in particular the judgments in Case 130/80 *Kelderman* [1981] ECR 527, and Case 286/81 *Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575, and Case 407/85 *Drei Glocken* [1988] ECR 4275, in support of the argument that the effect of a measure on domestic products can be viewed in isolation from the effect of that measure upon imported products. In other words, since the provisions potentially contrary to the free movement of goods must be considered by the Court in the context of their cumulative effect on intra-Community trade, the provisions of legislation such as that in the present case cannot be severed so as to apply only to domestic products.

He adds that, in the case of the Shops Act 1950, the evidence he has produced has shown that the provisions of the legislation affect and apply to both domestic products and products imported from other Member States of the EEC indiscriminately, and are

not severable in the manner of the Italian law in issue in the *Drei Glocken* case, cited above. In any event, were severance permissible, it would have the effect of restricting the sale of domestically produced or manufactured goods on Sundays, which would or could potentially restrict exports and contravene Article 34. It is common ground in this regard that at any given time, perhaps particularly at the weekend, there are a substantial number of visitors to England and Wales from other Member States. If they could not purchase UK produced goods on Sunday, no doubt it would or could have a direct effect upon exports.

Moreover, in so far as discrimination is required as an element of Article 34 (unlike Article 30), that requirement is satisfied, for the law clearly discriminates against some United Kingdom manufacturers and producers and not others depending upon whether or not their products fall within the Fifth Schedule to the Act, which would be contrary to the spirit of Article 7 of the Treaty.

Mr Anders suggests that the reply to the fourth question posed by the national court should be as follows:

where a measure such as that described in question 1 contravenes Article 30 and is not justified under Article 36 or otherwise such a measure is totally unenforceable in a Member State.

3. The *United Kingdom* considers that the fourth question does not call for a reply.

4. In its observations, the *Commission* adduces no arguments on the fourth question submitted by the national court.

M. Diez de Velasco
Judge-Rapporteur