OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 29 June 1989 *

Mr President,
Members of the Court,

1. In this reference for a preliminary ruling the Court must once again consider the scope of Article 30 of the EEC Treaty. It will be required to give a ruling on the question whether the prohibition of measures having an effect equivalent to quantitative restrictions on imports which is contained in that article also applies to a national measure which in principle prohibits the sale of goods on Sunday.

Background

2. The main proceedings are criminal proceedings brought by a United Kingdom local authority, the Torfaen Borough Council (hereinafter referred to as 'the Borough Council'), against a large operator of do-it-yourself stores, B & Q plc (hereinafter referred to as 'B & Q').

B & Q is charged with having contravened Sections 47 and 59 of the United Kingdom Shops Act 1950 (hereinafter referred to as 'the Shops Act') by opening its retail shop premises in Cwmbran to the public on Sundays.

For the wording of the relevant sections of the Shops Act I refer to part I.2. of the Report for the Hearing. As is indicated therein, there are a good many exceptions to the prohibition; furthermore, it is not disputed that the law is disregarded to a considerable extent and that in many places it is enforced only sporadically. It must also be observed that the law is not applicable in Scotland.

3. The parties to the main proceedings are agreed that B & Q has contravened the aforementioned provisions of the Shops Act and that the only possible defence for B & Q's conduct might be found in Article 30 of the EEC Treaty. Nor is there any dispute between the parties about the evidence which B & Q has adduced in support of its arguments concerning the consequences of the ban on Sunday trading for imports from other Member States. The main points which emerge from that evidence and which were accepted as established facts by the Cwmbran Magistrates' Court [1] are as follows:

(1) . . . (not relevant).

(2) . . . (not relevant).

(3) In the year 1987/88 B & Q purchased from other Member States items worth well in excess of UKL 40 000 000. That amount represents approximately 10% of B & Q's total purchases.

(4) As a result of the enforcement of the ban on Sunday trading there has been a substantial and continuing reduction in sales turnover in a number of B & Q's

* Original language: Dutch.

1 — See point 7 of the order for reference

stores (including the store at Cwmbran). The evidence indicates that this loss of sales has not recovered over time but has been maintained. The average loss of sales for the stores in question in the years 1986/87 and 1987/88 is nearly 23%.

(5) The reduction in sales is across the board, in the sense that all the items of stock appear to be affected.

(6) The reduction in sales has been confirmed by checking the level of orders placed by B & Q with a number of its EEC suppliers. Following the enforcement of the ban on Sunday trading a significant reduction in those orders was observed.

(7) . . . (not relevant).

(8) It follows that the enforcement of the ban on Sunday trading indirectly leads to a reduction in absolute terms in the volume of imports into the United Kingdom from other Member States of many goods sold by B & Q in their shops.

4. In those circumstances the Cwmbran Magistrates' Court decided to refer three questions to the Court concerning the compatibility of the Shops Act with Articles 30 and 36 of the EEC Treaty. Those questions read as follows:

'(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 manuafactured 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?'

I — *The first question*

5. In the first question the Court is asked to assume that 'the effect of [the ban on Sunday trading] is to reduce . . . the sales of . . . goods manufactured in other Member States, and correspondingly to reduce the volume of imports of goods from other Member States'. That part of the question is based on the factual assumption contained

in the order for reference (see paragraph 3 hereof, points 6 and 8) that the enforcement of the ban on Sunday trading leads directly to a reduction in absolute terms of imports into the United Kingdom from other Member States of many goods sold by B & Q in their stores.

The order for reference of the Cwmbran Magistrates' Court is a 'consent order', which means that its terms, including the wording of the preliminary questions, have been settled by mutual agreement of the parties. Nevertheless, it appears from the written observations submitted by the Borough Council and the United Kingdom and from the arguments put forward at the hearing that there is still much disagreement about the way in which the first preliminary question is to be understood by the Court.

Should the reference be 'reworded'?

6. In the first place, the United Kingdom observes that it is not proven that on the Sunday in question B & Q sold goods originating in other Member States. It also takes the view that, since the Shops Act does not make the selling of goods an offence but simply the keeping open of a shop, B & Q has in any case contravened the law and the preliminary questions are unnecessary for the purposes of the main proceedings. In any event, it requests the Court to make it clear that any question of incompatibility between the relevant provisions of the Shops Act and Community law can arise only in so far as those provisions are applicable to imported goods.

Secondly, the United Kingdom and the Borough Council point out that it has not been demonstrated that the disputed provisions of the Shops Act actually restrict the total volume of imports into the United Kingdom (see part II.1 and 3 of the Report for the Hearing).

Thirdly, at the hearing the United Kingdom and the Borough Council put forward an additional argument in support of their submission that the Court should not attach any importance to the indirect effect which the national court found that the Shops Act had on imports into the United Kingdom. They take the view that the effect referred to in the order for reference is not relevant because it is only felt by an individual trader and there is no evidence of an effect as against a specific product.

7. I find none of those three arguments convincing. As regards the usefulness of, or the necessity for, this preliminary question, I can be brief. As the United Kingdom itself states, the assessment of the necessity for or the usefulness of a preliminary question is a matter for the referring court alone. [2]

The proposition that a national measure could be declared incompatible with Article 30 only in so far as such a measure was applicable to imported goods is correct in the sense that Article 30 (or any other provision of Community law) is not applicable in 'purely internal' situations. [3] In the present case there is no question of the

2 — This principle was accepted by the Court in its earliest decisions and has never been called in question. See, for example, the judgments of 19 December 1968 in Case 13/68 *Salgoil SpA (in liquidation)* v *Ministry of Foreign Trade, Rome* [1968] ECR 453, at p. 459 and of 30 April 1986 in Joined Cases 209 to 213/84 *Ministère public* v *Asjes* [1986] ECR 1457, at p. 1460, paragraph 10. Only in very exceptional cases will the Court depart from this principle. See the judgments of 11 March 1980 in Case 104/79 *Foglia I* [1980] ECR 745, paragraphs 6 to 11, and of 16 December 1981 in Case 244/80 *Foglia II* [1981] ECR 3045.

3 — See, for example, the judgment of 8 December 1987 in Case 20/87 *Ministère public* v *Gauchard* [1987] ECR 4879, paragraphs 10 to 12

situation being purely internal: from the wording of the first question and the factual background it is clear that there is an 'element going beyond a purely national setting'.

The second argument seems to me even less compatible with the case-law of the Court. In its judgment in *Dassonville* the Court made it clear, and since then has continuously repeated, that 'all trading rules . . . which *are capable of* hindering, directly or indirectly, actually or *potentially*, intra-Community trade' are to be regarded as measures having an effect equivalent to quantitative restrictions.[4] In its decisions the Court has accordingly made it clear that a trader who challenges a national measure on the ground that it constitutes a prohibited measure having equivalent effect does not need to demonstrate that the measure actually restricts intra-Community trade or restricts it overall. The Court has rejected attempts to show by means of statistics that imports of the product concerned have increased and disregarded the possibility that other factors might compensate for the hindrance in question.[5] This is logical: but for the restrictive measure imports could increase still further.

The only cases in which the Court has accepted that a measure was to be regarded as falling outside the scope of Article 30 on account of its effect in practice are those cases in which the Court came to the conclusion that the rules in question *could not* lead to a restriction of imports and exports between Member States,[6] or where the measure in question had 'in fact no connection with the importation of . . . products . . . '.[7] The factual context of those judgments was quite specific: each case concerned measures with respect to which the Court, on the basis of an empirical judgment, came to the conclusion that they did not, or could not, have an effect on intra-Community trade. The United Kingdom and the Borough Council suggest that in the present case the Court is faced by the same kind of situation and that those judgments are therefore determinative as regards the answer to be given to the preliminary question. In my view, this is not correct: according to the national court's findings of fact, imports into the United Kingdom have been reduced to some extent as a result of the application of the ban on Sunday trading. The Court is therefore asked to assume that there is a causal link between the contested legislation and the reduction in imports; such a link was not found in the *Oebel*, *Blesgen* or *Forest* cases.

8. Nor can I agree with the third argument concerning the 'relevance' of the national court's findings of fact. According to the decisions of the Court, even where a trade restriction is found to exist with regard to an individual trader, the measure producing the restriction may fall within the scope of Article 30.[8] In my view, that is the proper approach. Whilst it is true that an interpretation of Community law given in a preliminary ruling applies *erga omnes*, judgment is given with reference to the

4 — Judgment of 11 July 1974 in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, at p. 852, paragraph 5 (my emphasis).

5 — See the judgment of 24 November 1982 in Case 249/81 *Commission* v *Ireland* [1982] ECR 4005, at pp. 4022 and 4023, paragraphs 22 to 27.

6 — Judgment of 14 July 1981 in Case 155/80 *Sergius Oebel* [1981] ECR 1993, at p. 2010, paragraph 20.

7 — Judgment of 31 March 1982 in Case 75/81 *Joseph Blesgen* v *Belgium* [1982] ECR 1211, at p. 1229, paragraph 9; see also the judgment of 25 November 1986 in Case 148/85 *Direction générale des impôts and procureur de la République* v *Marie-Louisa Forest and Another* [1986] ECR 3449, in which the Court held in paragraph 19: 'it therefore appears that such a system . . . in fact has no effect on . . . imports and is not likely to impede trade between Member States'.

8 — The most recent example is the judgment of 16 May 1989 in Case 382/87 *Buet* [1989] ECR 1235; see paragraph 7 of that judgment.

application of national rules to a well-defined factual situation arising in the main proceedings. It is certainly not always possible (nor desirable) that in a preliminary ruling the Court should express its views on application situations which go beyond those arising in the main proceedings and of which the precise facts are not known or insufficiently known.

Finally, I would also hesitate to accept the assertion that in the case now before the Court there is no evidence, on account of the general scope of the provisions of the Shops Act, of a barrier against a specific product. The question which arises in this case is whether the contested rules create a barrier within the meaning of Article 30 *with regard to the products in which B & Q deals.* This is what the national court clearly finds to be the case.[9]

Does the Shops Act contain 'trading rules'?

9. The considerations set out above lead me to the conclusion that there are no convincing reasons to reject the national court's factual assumptions as irrelevant and to re-word the first question.

The question in point is therefore whether, and if so which, national rules found to have a certain restrictive effect on imports may still fall outside the scope of Article 30 of the EEC Treaty. B & Q considers that this possibility does not arise: the contested provisions of the Shops Act must be classified as falling squarely within the principle laid down in *Dassonville* and therefore prima facie fall within the prohibition laid down in Article 30. The Borough Council as well as the United Kingdom and the Commission have, however, argued that the principle laid down in *Dassonville* is *either* inapplicable in this case *or* does not lead to the conclusion that the contested provisions fall within the scope of Article 30.

10. According to the Borough Council, the contested legislation is not simply a set of 'trading rules' within the meaning of the judgment in *Dassonville* but is an expression of the 'police power' which the Member States have retained under Article 30. In the observations of the Borough Council the expression 'police power' or 'police law' is primarily defined according to the consequences to which such a measure is likely to give rise. They are rules which are too remotely connected with intra-Community trade and whose restrictive effects are the unavoidable consequence of the general regulation of social or commercial life. The Borough Council's contention (which it considers to be borne out by the judgments in *Oebel* and *Blesgen*, cited above) is that such rules fall outside the prohibition laid down in Article 30 if they are applied without distinction.

11. Without linking its argument to the term 'police measure' the *United Kingdom* argues that in its case-law on Article 30 of the EEC Treaty the Court makes a distinction between measures applicable to a specific product and measures having general scope. In the case of measures of the first kind, a disparity between the existing bodies of national legislation results almost inevitably in a restriction of

9 — In this regard, see paragraph 3 above, point 8. These findings of fact of the national court are supported in particular by a statement of a Netherlands supplier of B & Q (see Annex 4 to the order for reference), according to which the orders placed by B & Q with that undertaking decreased by 31.5% during the period in which the ban on Sunday trading was enforced

inter-State trade. Where, however, measures having general scope are concerned, it appears from the case-law of the Court that these do not fall within the scope of Article 30 of the EEC Treaty unless they are of a discriminatory nature or in practice place imported products in a more unfavourable position than domestic products. Rules regarding working or opening hours, or rules stipulating which goods may be offered for sale in specific sales outlets, do not fall under the general regulation of social or commercial life. Even if they have a certain restrictive effect, they do not prevent the importation or the marketing of imported goods; their effect (if they have any effect at all) cannot be determined precisely.

12. I can see various objections to the approach of the Borough Council and the United Kingdom. The application of the limiting criterion which they propose is certainly not straightforward. What is a 'too remote link with intra-Community trade' and what falls under the term 'general regulation' or 'measures having general scope'? How many products or sectors must a measure be applicable to in order to be regarded and classified as a measure of general scope?

More important, however, is the question whether the aforementioned approach is in fact compatible with the case-law of the Court. For the creation of a new category of (police) measures which, on the one hand, are applicable to the production and marketing of goods but, on the other hand, are not trading rules there is no support at all in the decisions of the Court. That principle has just been confirmed in the Court's judgment of 18 May 1989 in the case of *The Queen* v *Pharmaceutical Society of Great Britain*,[10] in which it was held that a rule requiring pharmacists to supply only the medicinal products specifically mentioned in the doctor's prescription may constitute a measure having equivalent effect. Yet the measure concerned was a 'neutral' rule of professional ethics which had no demonstrable connection with the importation of products. Nevertheless, from the established fact that imports of foreign pharmaceutical products had nearly dried up after the rule had been in force for a short while the Court concluded that the possibility could not be ruled out that the rule formed an obstacle to intra-Community trade; the question whether or not the rule was to be characterized as a trading rule was not considered.[11] Another example is provided by the judgment in the *Buet* case [12] in which the Court held that a French rule prohibiting the sale of 'educational material' by means of canvassing constituted an obstacle to the importation of reading material for the learning of a foreign language (see paragraphs 7 to 9 of the judgment).

The aforementioned decisions provide an appropriate reminder that an analysis of a national measure with reference to Article 30 of the EEC Treaty should focus on its effects (with regard to the restriction of trade) rather than on its nature (general or concerning specific products). It is true that it is easier to adduce evidence of the existence of an obstacle to trade in the case of a measure applying to a specific product than in the case of a general measure. But I

10 — Judgment of 18 May 1989 in Joined Cases 266 and 267/87 *The Queen* v *Pharmaceutical Society of Great Britain and Others* [1989] ECR 1295.

11 — See, however, the (different) conclusion of Mr Advocate General Darmon in his Opinion of 10 March 1989, in particular at paragraphs 19 to 28.

12 — Judgment of 16 May 1989, cited above in footnote 8.

do not see why an obstacle to trade might not just as well arise from a general measure as from a measure directed at a specific product.

The various categories of 'measures applying without distinction'

13. Allow me to recall, by way of introduction to this point, the observations submitted by the Commission. The Commission proceeds on the basis of the generally accepted distinction between 'discriminatory measures' and 'measures applying without distinction'. In the second group it distinguishes three different categories according to the nature of the measures in question. The first category consists of measures which regulate the conditions (as to nature or composition, size, shape, packaging, labelling and denomination) which products must satisfy to be admitted to the market. A disparity between the various national rules in this category will inevitably create barriers to trade because goods legally manufactured or brought into circulation in the Member State of exportation have to be adapted in order to be sold in the Member State of importation. A second category of measures are those which prohibit the importation and manufacture (or simply the marketing) of certain products. These measures impose an absolute ban on importation in respect of the products which they concern and as such may be regarded as quantitative restrictions on imports rather than as measures having equivalent effect. The third category of measures relate to the circumstances in which goods may be sold or used (where, when, how and by whom). Restrictions on shop-opening hours clearly fall within this category.

In the case of measures in the third category, the Commission considers that the link with the importation of goods is more remote. They do not prevent imports but may reduce them by imposing restrictions on outlets or uses of the goods falling within their scope (and thus on the demand for those goods). Those barriers are, however, quite different in nature from the barriers which arise from the first two categories: whilst the trade barriers in the first two categories arise from the disparities between the various national rules, the barriers in the third category are created by the very existence of the rules; any disparity is immaterial. In the Court's case-law the Commission has identified three cases in which the Court ruled on measures belonging to the third category: they are the *Oebel*,[13] *Blesgen*[14] and *Forest*[15] cases. In its view, those judgments are also decisive in the present case.

14. Before I come to my own assessment, it would be useful to point out that a clear line of development is evident in the Court's case-law on national measures falling under Article 30 of the Treaty. At the outset it was made clear that a national measure which was discriminatory (in form or, as was quickly emphasized, in substance) towards imported goods was caught by the prohibition laid down in Article 30. In that situation, which does not arise in this case, the Court considered the measure in question to be permissible only on one of

13 — Judgment of 14 July 1981, cited above in footnote 6

14 — Judgment of 31 March 1982, cited above in footnote 7

15 — Judgment of 25 November 1986, cited above in footnote 7

the grounds of justification mentioned in Article 36.

15. The Court subsequently considered the prohibition laid down in Article 30 also applicable in the case of measures applying to national and imported products without distinction. This situation involves measures which are not discriminatory in their aims but which are *de facto* more burdensome for imported products than for domestic products, in other words they place imported products in a disadvantageous position in relation to domestic products. In the famous judgment in the 'Cassis de Dijon' case the Court held that in principle such measures also fall under the prohibition laid down in Article 30:

'Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements . . .'.[16]

The main consideration underlying that decision is that such disparities between national laws may result in serious obstacles to intra-Community trade since they may necessitate extra expense or additional efforts in order to make the manufacture or the marketing of the product comply with laws differing from one Member State to another. The rules involved here are either rules relating to the composition, size, shape, weight, presentation, labelling, designation or the packaging of products[17] or rules relating to permissible sales methods.[18] As the Commission has correctly pointed out, in this category there is a causal link between the disparity and the trade barrier. Such measures are therefore not permissible under Article 30, at least where they are not necessary in order to satisfy 'mandatory requirements', nor acceptable on the basis of the grounds of justification listed in Article 36. That prohibition applies, of course, only in the absence of common rules and pending the adoption of a harmonizing directive pursuant to Article 100 *et seq.* of the Treaty.

16. In the present case it is established that the contested United Kingdom legislation does not affect imported products any differently than domestic products. The national court found that the reduction in sales occurring as a result of the enforcement of the ban on Sunday trading is 'across the board', that is to say that it affects *all* the goods offered for sale by B & Q. Moreover, B & Q has not stated that it has to vary its marketing methods as a result of a disparity between the various bodies of national legislation governing closing days. There is therefore no evidence that the production or marketing of the imported products sold by B & Q is more difficult than the production or marketing of domestic products.

In such a case may it still be feared that the aim of Article 30, namely the integration of the national markets, will be jeopardized? In his Opinion in the *Cinéthèque* case[19]

16 — Judgment of 20 February 1979 in Case 120/78 *REWE-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, at p. 662, paragraph 8.

17 — A notable example is the judgment of 10 November 1982 in Case 261/81 *Walter Rau Lebensmittelwerke* v *De Smedt PvbA* [1982] ECR 3961, in particular paragraph 13, which concerned Belgian rules which only allowed packaged butter to be sold or imported in cube form.

18 — See, for example, the judgment of 15 December 1982 in Case 286/81 *Oosthoek's Uitgeversmaatschappij BV* [1982] ECR 4575 (in particular at p. 4587, paragraph 15) which concerned a ban on the use of certain forms of advertising and certain means of sales promotion.

19 — Judgment of 11 July 1985 in Joined Cases 60 and 61/84 *Cinéthèque SA and Others* v *Fédération nationale des cinémas français*, (1985) ECR 2605. The issue in this case was whether a French law which in principle imposed a (temporary) ban on the sale or hire of video-cassettes of a film being shown in cinemas was compatible with Article 30 of the Treaty.

Advocate General Sir Gordon Slynn answered that question in the negative:

'... where a national measure is not specifically directed at imports, does not discrimiante against imports, does not make it any more difficult for an importer to sell his products than it is for a domestic producer, and gives no protection to domestic producers, then in my view, prima facie, the measure does not fall within Article 30 even if it does in fact lead to a restriction or reduction of imports'. [20]

In the case of the French legislation at issue in the *Cinéthèque* case, such an additional difficulty for imports was not demonstrable either. In the words of the Advocate General:

'The importer can in fact import. He is then on exactly the same footing as the domestic trader. The latter gets no extra benefit over the importer, the former suffers no extra detriment over the French trader as a result of the ban on the exploitation of video-cassettes. The factor which would lead a trader in France not to buy from a French video distributor (inability to sell or hire) is the same as that which would lead him not to buy from a distributor in another Member State. In this respect both distributors are subject to the same conditions of trade. They are effectively operating in the same market. Article 30 cannot have been intended in this respect to give the distributor in another Member State better conditions than the domestic distributor. It may be that if it was patently unreasonable to put imports on the same footing as domestic products that the measure could be bad for that reason. That however is not the position here and in my view this law does not fall within Article 30'. [21]

The Court did not take that view. Yet in the judgment it was acknowledged that the system of rules in question

'... does not have the purpose of regulating trade patterns; its effect is not to favour national production as against the production of other Member States, but to encourage cinematographic production as such' (paragraph 21).

Even so, the Court considered that the prohibition laid down in Article 30 was in principle applicable:

'Nevertheless, the application of such a system may create barriers to intra-Community trade in video-cassettes because of the disparities between the systems operated in the different Member States and between the conditions for the release of cinematographic works in the cinemas of those States. In those circumstances a prohibition of exploitation laid down by such a system is not compatible with (Article 30) unless any obstacle to intra-Community trade thereby created does not exceed that which is necessary in order to ensure the attainment of the objective in view and unless that objective is justified with regard

20 — [1985] ECR 2611

21 — [1984] ECR 2611 and 2612

to Community law' (paragraph 22 of the judgment).

17. In expressing those considerations the Court made it clear that the prohibition laid down in Article 30 may also be applicable to rules which do not discriminate against imported goods nor make the production or marketing of imported goods more difficult than the production and marketing of domestic goods. In my view, this situation concerns the case where rules, either on their own or as part of an entire legal and economic context, can lead to a national market being screened off, or access to that market being made unacceptably difficult, less profitable or less attractive for economic operators from other Member States.

In fact, this situation arose in the *Cinéthèque* case: the Court found that the French rules imposed a marketing ban which as a rule lasted longer in France than in other Member States.[22] This marketing ban meant that access to the French market was (temporarily) closed to undertakings from other Member States which exploited video-cassettes and which were not subject to such strict rules in the country of exportation. The obstacle to intra-Community trade arising in that situation was due not (so much) to the disparity between legislation (which did exist in that case) but rather to the very existence of the rules. In such a situation the integration of markets was actually in jeopardy and the application of Article 30 was indeed justified.

22 — See paragraph 19 of the judgment.

18. The judgment in the *Cinéthèque* case is in fact a further application of the rule in *Dassonville*, as applied to national rules which, although not involving any detriment for imported products in relation to domestic products, make the entry into and the penetration of new markets by undertakings from other Member States impossible or much more difficult (more costly) or less attractive (unprofitable). In such a situation the relevant comparison is not between imported and domestic products but between national markets. The prohibition of quantitative restrictions laid down in Article 30, which is one of the mainstays of the unity of the common market, implies, of course, that all national markets in the Community should remain sufficiently accessible to undertakings from other Member States. Before clarifying this point further, I will first consider the case-law of the Court in relation to this 'new' situation.

A new development in the case-law of the Court

That the judgment in the *Cinéthèque* case was not an isolated decision but introduced a new dimension in the application of Article 30 is clear from various other recent judgments. I am referring here in particular to the case concerning substitutes for milk powder and concentrated milk,[23] the *Warner Brothers* case,[24] the *Buet* case[25] and the *Pharmaceutical Society* case.[26]

23 — Judgment of 23 February 1988 in Case 216/84 *Commission* v *France* [1988] ECR 793. This judgment has just been confirmed by the judgment of the Court of 11 May 1989 in Case 76/86 *Commission* v *Germany* (milk substitutes) [1989] ECR 1021. I will deal only with the first-mentioned judgment.

24 — Judgment of 17 May 1988 in Case 158/86 [1988] ECR 2605.

25 — Cited above, in footnote 8.

26 — Judgment of 18 May 1989, cited above in footnote 10. This approach could also have been adopted by the Court in the *Oebel*, *Blesgen* and *Forest* cases (cited above in footnotes 6 and 7) if the Court had accepted that an obstacle existed.

19. In the case concerning substitutes for milk powder and concentrated milk the Commission challenged a French rule which imposed an absolute prohibition on the marketing and importation of any product intended to replace milk powder or concentrated milk. Although the rule did not protect domestic products or place imported products at a disadvantage, it entirely sealed off the French market with regard to the products to which it applied. Furthermore, the prohibition was not limited in time and was therefore even more far-reaching than the prohibition at issue in the *Cinéthèque* case. Consequently, the Court came to the conclusion on that ground alone that the application of the rule to imported products was compatible with Community law only if it could be justified under Article 36 or on the basis of any mandatory requirement. [27]

20. The *Warner Brothers* case concerned Danish legislation which entitled the owner of copyright in a musical or cinematographic work to prevent the hiring out of video-cassettes of that work for a specified period. The Court observed that the commercial distribution of video-cassettes (certainly in the case of recorded, rather than blank, cassettes) increasingly took the form of the hiring out of such cassettes. Under those circumstances, the Court found that the Danish ban on hiring might hinder [28] intra-Community trade in video-cassettes which had been put into free circulation in another State where they were not subject to the same ban on hiring. [29] The approach is therefore identical to that in the *Cinéthèque* case: the rule may prevent undertakings whose business consists of hiring out video-cassettes in a Member State which imposes no restrictions (or restrictions which are not as strict) on the hiring out of video-cassettes from penetrating the Danish market or make it much more difficult for them to do so.

The *Buet* case concerned French legislation which prohibited the sale of educational material by means of canvassing. Although it did not appear (as in the *Oosthoek* case [30]) that there was a disparity between the various national rules as a result of which the production or marketing of imported goods were in fact put at a disadvantage, the legislation could result in keeping out of the French market a seller of reading materials to be used for learning a foreign language; this would certainly be the case if it prevented the seller concerned from using a sales method by which he achieved the greater part of his sales. [31]

In the *Pharmaceutical Society* case, the Court stated that shortly after the (re-)introduction of the contested ethical rule foreign pharmaceutical products virtually disappeared from the United Kingdom market. [32] That may be regarded as sufficient evidence that the practical effect of the contested rule was to make it more difficult to trade in

27 — See paragraph 7 of the judgment. The French Government had not contested the applicability of the prohibition in Article 30: see paragraph 4 of the judgment. In any event the applicability of Article 30 to prohibitions on marketing applying without any temporal limit had already been established See the judgment of 17 December 1981 in Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten BV* [1981] ECR 3277

28 — Just as in *Cinéthèque*, it is to be expected that, by the end of the longer prohibition period, interest in video-cassettes of a film will have declined.

29 — See paragraph 19 of the judgment.

30 — Cited above in footnote 18

31 — See paragraphs 7 and 8 of the judgment

32 — See paragraph 18 of the judgment

foreign pharmaceutical products than in domestic products. Another, and in my view more exact, interpretation of the judgment is that the disappearance of foreign pharmaceutical products from the market shows that the application of the contested rule had the effect of screening off the United Kingdom market.

Partitioning of the market defined

21. As has been seen, in this recent series of judgments the Court's line of approach was to examine not whether imported products were put at a disadvantage but whether the Community market was partitioned into separate national markets. In this connection it is appropriate to make a comparison with the judgments of the Court on the prohibition of cartels laid down in Article 85. The concepts of the partitioning or compartmentalization of the market are certainly well known in that domain. Furthermore, in its judgment in *Dassonville*, the Court used virtually the same formula as it had previously used to define more precisely the words 'affect trade between Member States' appearing in Article 85. Thus in its judgment of 30 June 1966[33] in Case 56/65 *Société technique minière* v *Maschinenbau Ulm*, the Court stated that a cartel agreement might affect trade between Member States if it was to be feared that the agreement

'might have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of preventing the realization of a single market between the said States' (see the operative part of the judgment on p. 251).

33 — See the judgment of 30 June 1966 in Case 56/65 *Société technique minière* v *Maschinenbau Ulm* [1966] ECR 235.

In its judgment in *Dassonville*[34] it stated as follows:

'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions' (paragraph 5).

In fact, in both fields the doctrine of the economic balance of the consequences of the 'cartel agreement' or the 'trading rules' is rejected.[35] [36]

22. This is not the place to dwell on the comparison between Article 30 and Article 85 as regards the hindering of intra-Community trade, which is mentioned in both articles. The two articles are worded differently, not least because they are addressed to different entities (Member States and undertakings, respectively) and consequently have different types of obstacles (national rules and cartel agreements) in view. In addition, one of the purposes (or, according to some commentators, the only purpose) of the rule in Article 85 that intra-Community trade must be affected is to delimit the field of

34 — Cited above in footnote 4.

35 — As regards cartel agreements, see the judgment of 13 July 1966 in Joined Cases 56 and 58/64 *Consten-Grundig* v *Commission* [1966] ECR 299, at pp. 341 and 342; on trading rules, see the judgment of 24 November 1982 in Case 249/81, cited above in footnote 5.

36 — There are also differences in application. Thus for example in the case of Article 30 no application could be made of the *de minimis* rule (see the judgment of 5 April 1984 in Joined Cases 177 and 178/82 *Van de Haar* and *Kaveka De Meern* [1984] ECR 1797, paragraph 13). That rule does apply in the case of Article 85, in particular as regards the requirement that there must be an *appreciable* effect on trade between Member States (see the judgment of 9 July 1969 in Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295).

application of Community law from that of national law.

These differences, however, do not alter the fact that both articles (together with others) pursue the same fundamental purpose, as laid down in Articles 2 and 3 of the Treaty, which is to establish and maintain the Community market (and to approximate the economic policies of the Member States). For that purpose they prohibit (*inter alia*) national rules and agreements between undertakings which are responsible in trade between Member States for partitioning the Community market into separate national markets.

In view of this general scheme of the Treaty and in the light of the aforementioned parallels in the terms used by the Court to define obstacles to trade between Member States under Articles 30 and 85, the obvious step is to consult the extensive case-law of the Court on Article 85 in order to understand the concept of 'partitioning (or "compartmentalization") of the market'.

23. In the case-law concerning the words 'affect trade between Member States' used in Article 85, two situations involving compartmentalization of the market may be distinguished: those in which a horizontal or vertical agreement usually, but not necessarily, concluded between undertakings from different States, in itself screens off a national market, for example by straightforward sharing out of the single market ('chacun chez soi') or by preventing parallel imports from other States; and those in which an agreement, for example a price-fixing agreement, though concluded between undertakings from the same Member State, nevertheless in the light of the whole legal and economic context renders access to a national market more difficult. In the first situation, the prohibition laid down in Article 85(1) applies virtually automatically,[37] by reason of the absolute territorial protection which by sealing off a national market it affords to the undertakings concerned. In the second situation, the prohibition laid down in Article 85(1) applies only[38] if it can be demonstrated, on the basis of the whole 'legal and economic context', that the agreement 'extending over the whole of the territory of a Member State' by its very nature

'has the effect of reinforcing the compartmentalization of markets on a national basis,[39] thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production . . . [making it] more difficult for producers or sellers from other Member States to be active in or penetrate the [relevant national] market)'.[40]

It seems to me that a similar distinction between the screening off of national markets and the increasing of barriers to the national markets must be drawn in applying Article 30 to the situation at issue here,

37 — Subject of course to the *de minimis* rule and possibly, but only very exceptionally, to the application of Article 85(3)

38 — Again subject to the *de minimis* rule and to the application of Article 85(3).

39 — Translator's note: The expression used in the authentic Dutch text was 'een versterking van de nationale drempelvorming'; for the purposes of the translation of this Opinion, the expression 'drempelvorming' (formation of a bar or raising of a threshold) is hereinafter variously translated by the concepts of making access to, or penetration of, a national market more difficult or of increasing barriers to a national market.

40 — Judgment of 17 October 1972 in Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977, paragraphs 29 and 30. That case concerned a horizontal agreement between producers. Previously the Court had already stated that even a vertical agreement with limited scope, namely a brewery agreement between a local brewer and a local client, might, regard being had to the entire legal and economic context, breach the prohibition in Article 85(1). See the judgment of 12 December 1967 in Case 23/67 *Brasserie de Haecht* v *Wilkin* [1967] ECR 407

which concerns a national rule which is not in fact discriminatory and does not adversely affect imported products but whose very existence may constitute a threat to market integration between Member States (see paragraphs 17 and 18 above).

If the contested national rule itself *screens off* a national market, then Article 30 is automatically applicable.[41] This is the case with national rules which (as in the *Cinéthèque* case or in the case concerning substitutes for milk powder and concentrated milk) establish a straightforward ban (or a ban limited in time) on marketing (comparable, according to the Commission,[42] to a quantitative restriction).

If the national rule at issue merely increases the difficulty in penetrating the national market, the prohibition in Article 30 is applicable[43] only if it appears from the entire legal and economic context that the economic interweaving of national markets sought by the Treaty is thereby threatened. In such a case, the compartmentalization of the market should be made sufficiently probable by a number of quantitative factors which show that the application of the rule makes it more difficult to penetrate the market, thereby rendering the market so inaccessible (expensive, unprofitable) that it must be feared that the majority of imported goods will disappear from the market. That was the case, for example, in the *Warner Brothers*, *Buet* and *Pharmaceutical Society* cases. In the *Warner Brothers* and *Buet* cases an unacceptable increase in barriers resulted from the fact that an indispensable method of marketing the products concerned was excluded. In the *Pharmaceutical Society* case it could be shown that the market share of imported products virtually shrunk to nothing a short time after the contested ethical rule had been announced.[44]

24. With regard to the foregoing, three observations should be made. First of all, in the abovementioned case of a national rule which makes penetration of the market more difficult there is naturally no scope for the application of a *de minimis* rule because the application of the prohibition in Article 30 already presupposes a serious, and therefore a more than appreciable, obstruction to trade between Member States. Secondly, in that situation it is for the national courts to evaluate the entire legal and economic context and if necessary to conclude from that evaluation that there is a barrier to greater market penetration covered by the Treaty and therefore prohibited obstruction of trade between Member States. That is not an easy assessment to make, but it is no different from that which is already entrusted to the national courts in the framework of Article 85(1) outlined above. Thirdly, it is clear from the decisions of the Court that in both the aforesaid situations involving market partitioning, that is to say where a market is screened off and where greater penetration of a national market is made more difficult, it may be possible to justify the national rule in question on the basis of the grounds laid down in Article 36 and on the basis of 'mandatory requirements'.

41 — Naturally, as is clear from the judgment in *Cinéthèque* and the most recent judgments, subject to the application of Article 36 and of 'mandatory requirements'.

42 — Paragraph 13 above.

43 — Once again, subject to the application of Article 36 or of 'mandatory requirements'.

44 — See paragraphs 4 and 18 of the judgment.

No market partitioning effect in this case

25. By applying the foregoing considerations to the present case, I reach the conclusion that it does not appear that a rule such as that at issue in the main proceedings screens off the national market or unacceptably increases the difficulty of penetrating that market in the case of the products offered for sale by B & Q. Such a rule certainly contains no prohibition of marketing comparable to a quantitative restriction by which the national market is screened off; nor does it make it so much more difficult to penetrate that market that the economic interweaving of national markets is thereby threatened.

It is true that it has been established that the application of the Sunday trading ban reduces turnover: it reduces sales of products offered for sale by B & Q by approximately 23%. There is no evidence, however, that such a rule has the effect of partitioning the Community market. Thus it does not make access to (or operating on) the national market much more difficult for undertakings from other Member States (as might appear *inter alia* from the fact that, as in *Pharmaceutical Society*, the market share of domestic products increases substantially to the detriment of imported products). Nor may it be claimed (as in *Warner Brothers* or *Buet*) that such a rule excludes a marketing method which is indispensable for gaining access to or operating on the national market. Even if for do-it-yourself and gardening products it is an efficient sales method to open a sales outlet on Sunday, a ban on Sunday opening does not seem capable of increasing barriers to such an extent that access to the national market is much more difficult (more expensive) or much less attractive (unprofitable) for producers of or traders in products from other Member States.

In those circumstances I conclude that the application of a rule such as that at issue in the main proceedings, even if it has a certain appreciable (adverse) effect on imports of the goods concerned, is not of such a nature as to restrict intra-Community trade so as to warrant the application of Article 30 of the Treaty.

II — *In the alternative: the second and third questions*

26. Before considering the second and third preliminary questions (which concern grounds on which measures may be justified under Articles 30 and 36), I would make one further remark. It seems to me that the alternative to the aforesaid approach, which ascribes a certain limit to the scope of the *Dassonville* formula, consists of a 'mechanical' application of that formula: any national rule the removal of which might (directly or indirectly, actually or potentially) lead to an increase in imports is then incompatible with Community law unless it can be justified on the basis of 'mandatory requirements' or by virtue of Article 36. This means that, according to that conception, only 'reasonable' barriers are still permitted by the Treaty. 'Reasonable' means then (according to the decisions of the Court) necessary, proportionate and as unrestrictive as possible.

The great disadvantage of this alternative view is (as will also be seen from my

subsequent examination of the grounds of justification) that the Court will inevitably have to decide in an increasing number of cases on the reasonableness of policy decisions of Member States taken in the innumerable spheres where there is no question of direct or indirect, factual or legal discrimination against, or detriment to, imported products.[45] The question may arise whether excessive demands would not then be put on the Court, which would be confronted with countless new 'mandatory requirements' and grounds of justification. In connection with Article 30, national policy decisions would constantly be submitted to it with a request to extend the list of examples of mandatory requirements. It is to be feared that that list would grow constantly and would coincide with a certain residual power of the Member States.[46] It therefore seems to me preferable, as I have suggested above, to define at the outset the scope and limits of Article 30 on the basis of the general objectives of that article and of the Treaty.

27. In case the Court should decide that a ban on Sunday trading must be regarded as a restriction on intra-Community trade that is covered by Article 30 of the Treaty, I will now consider in the alternative whether such a restriction is necessary in order to satisfy mandatory requirements or one or more of the grounds of public interest listed in Article 36 of the Treaty.

The Borough Council considers that there are various means of justifying the restriction. In its view, the protection of the working environment and the protection of the health and welfare of workers are in this case mandatory requirements which make the contested rule necessary. As regards Article 36, the Borough Council considers the rule justified on grounds of the protection of health and life of humans, of public policy and of public morality.

The United Kingdom's position is more straightforward: in its view, the Shops Act is intended to meet the imperative need to protect the general character of Sunday as a non-trading day; alternatively, the rule is in its view justified under Article 36, on the ground of the protection of public policy. The United Kingdom and the Borough Council consider on the basis of the judgment in *Cinéthèque* that they may draw the conclusion that, once a measure is acceptable as a 'mandatory requirement', there is no need for absolute correspondence between the mandatory requirements and the measure at issue.

28. Regardless of what mandatory requirements or grounds may be accepted as justifying the measure in this case, there is a preliminary question which must be answered: may a rule which is enforced by a Member State only sporadically[47] be relied

45 — Apart from a restriction on Sunday trading, other examples would be restrictions on the opening of new businesses in the framework of planning legislation (see the judgment in *Gauchard*, cited above in footnote 3), regulations which provide for the confiscation of goods for failure to pay taxes (see Case 69/88, pending before the Court), the imposition of speed limits, and so forth.

46 — The Court has always confirmed that the purpose of Article 36 of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States. See the judgments of 10 July 1984 in Case 72/83 *Campus Oil Ltd* v *Minister for Industry and Energy* [1984] ECR 2727, paragraph 32, and of 12 July 1979 in Case 153/78 *Commission* v *Germany* [1979] ECR 2555, paragraph 5, and the judgments cited there. In my view this principle applies equally to the case of mandatory requirements.

47 — The *Home Office Report* entitled 'The Shops Act — Late-night and Sunday opening: Report of the Committee of Inquiry into proposals to amend the Shops Acts', presented to Parliament in November 1984 and attached as Annex 2 to B & Q's observations, states that since 1974 enforcement of the Shops Act has been the responsibility of the local authorities. Some authorities have adopted a policy of not enforcing the law at all; many others act only in response to complaints (paragraph 25 of the report). The report also states that very few local authorities prosecute as a matter of policy all traders who open outside the permitted hours (ibid.).

upon by that State as being necessary in order to comply with mandatory requirements? This is a difficult question. A negative answer would be tantamount to the application of a form of estoppel in the assessment of the acceptability of a mandatory requirement: a Member State would be estopped from departing from Community law on the basis of a 'necessity' which the Member State relies on but does not in fact endeavour to meet.[48] I am inclined to the view that it should not be possible to rely on a mandatory requirement if it is established that a Member State entirely fails to make any effort to fulfil such a requirement. That cannot, however, be said of the national rule at issue in this case. It is true that there are indications that the Shops Act is enforced only sporadically or inconsistently (in this regard see paragraph 32 below), but not that it has fallen into disuse (as is shown *inter alia* by the fact that in 1985 a proposal to repeal the Shops Act was rejected by the United Kingdom Parliament).

29. Let me now consider first whether the grounds relied upon in Article 36 may be accepted. As regards protection of public morality: in the observations of the Borough Council this is described as preventing offence from being taken to the opening of sales outlets on a Sunday. That does not seem to me to fall within the concept of 'public morality'. It is true that the Court in its judgment in *Henn and Darby*[49] accepted that 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. However, the principle that it is not the purpose of Article 36 to reserve certain matters to the exclusive jurisdiction of the Member States[50] implies that the Court must exercise some control over what is regarded by a Member State as falling within the concept of public morality. The prevention of offence to religious convictions does not seem to me to fall within that concept.

Nor does the protection of public policy seem to me to be applicable here. Reliance on that ground, the scope of which must be interpreted strictly,[51] requires

'the existence . . . of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'.[52]

It is not difficult to see that there is no question of such a threat in this case.

30. Next, I must investigate whether the mandatory requirements relied upon are acceptable as such. It cannot be denied that the category of mandatory requirements is not closed (as is the case, however, with the list in Article 36 of the Treaty). The protection of the working environment (which is expressly mentioned in Article 100a of the Treaty) and of the health and well-being of workers or self-employed persons (a subcategory of the 'health of persons' referred to in Article 36) may undoubtedly be regarded as a mandatory requirement. I have more difficulty with the

48 — The estoppel principle is referred to in the judgment of 10 February 1983 in Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraphs 22 to 26. See also the Opinion of Mr Advocate General Mancini in that case, (1983) ECR 293, at p 295

49 — Judgment of 14 December 1979 in Case 34/79 *Regina* v *Henn and Darby* (1979) ECR 3795. See also the judgment of 11 March 1986 in Case 121/85 *Conegate Ltd* v *HM Customs & Excise* [1986] ECR 1007, in particular paragraphs 14 and 15.

50 — See the judgments cited above in footnote 46.

51 — Judgment of 27 October 1977 in Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, paragraph 33 (with reference to the judgment of 4 December 1974 in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, at p 1350).

52 — Judgment in *Bouchereau*, cited in note 51 above, paragraph 35 See also the Opinion of Mr Advocate General Warner in that case, [1977] ECR 2016, at pp 2024 to 2026

idea of 'protecting Sunday as a non-trading day'. If this is a collective term for the mandatory requirements referred to above, it need not be considered separately. It would, however, be difficult to prove that it is proportionate to the aim pursued (see paragraph 31, below). If, on the other hand, it refers to a separate mandatory requirement and is understood, for example, as a need to give citizens on one and the same day the opportunity to devote their time to all kinds of (non-working and *inter alia* religious) activities and social contacts, then I myself can accept that, but not without great hesitation: it shows how easy it is to put forward new and prima facie justified mandatory requirements and how difficult it is for the Court to evaluate them in an objective manner.

31. But even if one of the aforesaid mandatory requirements is accepted, it must still be considered whether the contested rule, in its present form, is necessary for the fulfilment of, and proportionate to, the mandatory requirement relied upon.

In the first place, there is the aim of keeping Sunday a day of rest, as a way of protecting the health and welfare of workers and self-employed persons. On this point the Commission has observed that there is a less restrictive means of achieving this aim: by limiting the number of working hours (for persons in employment) or permitting (or obliging) self-employed persons to choose any one closing day rather than imposing Sunday as the closing day. That argument needs to be qualified. No one would deny that the choice of one specific day is more restrictive of personal freedom. The question is, however, whether it restricts trade between Member States more than is necessary. If it is assumed that Sunday, as opposed to other days of the week, is a better day for selling the goods concerned in this case, [53] then to leave open the choice of a specific day, no matter which, is undoubtedly a less restrictive alternative as far as intra-Community trade is concerned.

The position is different, however, if one accepts (as I have suggested, with great hesitation, in paragraph 30 above) that a ban on Sunday trading meets the desire to encourage all manner of (non-working) activities and social contacts on one and the same day. In that case, the imposition of a general closing or non-trading day on a day already devoted to such activities and contacts by a large part of the population is indeed necessary and proportionate to the aim pursued.

32. So far in my analysis I have not attached much importance to the complexity and inconsistency (both *ratione personae* and *ratione loci*) of the legislation at issue in the main proceedings, which have been criticized in detail by B & Q, or to the sporadic way in which its observance is controlled. I do in fact agree with B & Q's premiss, namely that in deciding whether a rule is justified account should be taken of the factual characteristics of that rule. B & Q's line of argument, however, concerns primarily the effectiveness and consistency of the rule. Community law lays down a different type of requirement: the obstacle which in practice results from the rule must be proportionate to the aim

53 — Such a finding is made by the court of reference. See point 4 of paragraph 3 above.

pursued, that is to say no more restrictive for intra-Community trade than is necessary for the intended purpose; whether the rule achieves[54] its purpose in this respect is irrelevant. The 'reasonableness' of a measure is relevant for purposes of Community law only in so far as the measure may not be a means of arbitrary discrimination or a disguised restriction: in this case, this means arbitrary discrimination against goods from other Member States or concealed protection of the Member State's own market. The fact that within a single Member State the rule is not uniformly applicable or enforced may well provide a cause for action under national law, but not under Community law.

In support of the foregoing analysis I would refer to the judgment of the Court in *Henn and Darby*,[55] which concerned the application of a ban on imports into the United Kingdom of 'indecent or obscene articles'. This case also concerned the justification of a provision of English law which was not applied in a uniform manner throughout the territory of the United Kingdom; furthermore, it was apparent that in practice (unlike in the present case) the strictest rule was applied to imported goods. There again, the Court was asked whether there was any arbitrary discrimination or a disguised restriction on trade. On that point the Court stated as follows:

'Whatever may be the differences between the laws on this subject in force in the different constituent parts of the United Kingdom, and notwithstanding the fact that they contain certain exceptions of limited scope, these laws, taken as a whole, have as their purpose the prohibition, or at least, the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character' (paragraph 21 of the judgment).

In those circumstances the Court reached the conclusion that, although the strictest rule was applied to imported goods, the legislation in question

'... cannot be regarded as amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination between goods of this type depending on whether they are produced within the national territory or another Member State' (ibid.).

33. To conclude the foregoing inquiry into possible grounds justifying the measure, I would once again stress the following point: this inquiry in my view strikingly illustrates the fact that a measure which is regarded as necessary by a Member State may often only be appraised if the Court is prepared to concern itself with areas of policy for which Community law provides no, or at any rate few, criteria of assessment. This is the reason why I suggest that such a difficult inquiry relating to national measures such as those at issue here should be avoided as far as possible by interpreting Article 30 in accordance with the intendment of the Treaty.

54 — There is considerable doubt on this point. all the grounds relied upon to justify the rule presuppose that shops are closed on Sunday, in fact, however, the Shops Act permits shops to open on Sunday, at least if they open only to sell exempted goods In practice it is clear that this exception is widely used See paragraph 22 of the *Home Office Report*, cited above in footnote 47

55 — Cited above in footnote 49

Proposed reply to the preliminary questions

34. In conclusion, I propose that the Court should reply to the preliminary questions asked by Cwmbran Magistrates' Court as follows:

'A national rule which prohibits retail premises from being open on Sunday for the sale of goods to customers, save in respect of certain specified items, is not covered by the prohibition laid down in Article 30 if the rule does not cause imported goods tobe discriminated against or placed at an actual disadvantage compared with domestic goods and if it does not screen off the domestic market of the Member State in question or make access to that market substantially more difficult or unattractive for imported goods to which the rule applies.'

In the event that the Court should nevertheless decide that such a rule is in principle a measure caught by Article 30, I propose in the alternative that the Court should answer the preliminary questions as follows:

'Articles 30 and 36 of the Treaty do not preclude a national rule which prohibits retail premises from being open on Sunday for the sale of goods to customers, save in respect of certain specified articles, if the rule does not cause imported goods to be discriminated against or placed at an actual disadvantage compared with domestic goods and if any obstacles to intra-Community trade which may be caused by the application of that prohibition are not greater than is necessary for encouraging non-working activities and social contacts on a specified day which is already devoted to those purposes by a large part of the population.'