

national or regional socio-cultural characteristics and since they are not designed to govern the patterns of trade between Member States.

## REPORT FOR THE HEARING delivered in Case C-145/88 \*

### I — Facts and procedure

1. Cwmbran Magistrates' Court is required to give a decision on information laid before it by Torfaen Borough Council (hereinafter referred to as 'the Council') alleging that the defendant, B & Q plc (hereinafter referred to as 'B & Q') contravened Sections 47 and 59 of the United Kingdom Shops Act 1950 by causing its retail shop premises at Llantarnam Road, Cwmbran, Gwent, to be open for the serving of customers on Sundays other than for transactions mentioned in the Fifth Schedule to that Act, so that it is liable to a maximum fine of UKL 1 000.

2. The relevant parts of Sections 47 and 59 of the Shops Act 1950 are worded as follows:

#### 'Section 47

Every shop shall, save as otherwise provided by this part of this 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.'

#### 'Section 59

#### *Offences connected with Sunday trading*

(1) In the case of any contravention of any of the foregoing provisions of this part of this Act, the occupier of the shop shall be liable to a fine not exceeding [level 4 on the standard scale].'

By way of an exception to those provisions the Fifth Schedule to the Shops Act 1950 contains a list of items for the sale of which a shop is permitted to be open on Sundays, such as intoxicating liquors, certain food-stuffs, tobacco, newspapers and other products of everyday consumption.

\* Language of the case: English.

3. B & Q is one of the largest operators of do-it-yourself centres and garden centres in the United Kingdom and Europe. In the year 1987/88 B & Q purchased items valued at well in excess of UKL 40 million from other Member States. That represents approximately 10% of B & Q's total purchases from all sources for that year. The majority of the goods sold in their stores are not items which benefit from the exceptions to the prohibition of Sunday trading contained in the Fifth Schedule to the Shops Act 1950.

4. In the main proceedings, B & Q maintained, however, that it was not guilty of the offence with which it was charged in view of the facts that Article 30 of the EEC Treaty had direct effect and that in the context of criminal proceedings a person could not be convicted on the basis of a national law which was incompatible with 'directly effective' Community law.

B & Q also maintained that that infringement of Article 30 of the EEC Treaty could not be justified under Article 36 of the EEC Treaty. It did not fall within any of the categories of exemption, which are well defined and must be construed strictly. Even if it could be brought within one of those categories it would not escape the prohibition because, in order to be regarded as justified, it must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Article 36 was also subject to the principle of proportionality in so far as the measure in question must be no more restrictive of trade than is necessary in order to attain the protection of the principle in question in Article 36. B & Q maintained that the prohibition of Sunday trading could not be regarded as reasonable in view of the extraordinary anomalies in its application and effect.

In its view, Section 47 of the Shops Act 1950 was a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 in that the prohibition of Sunday trading was 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. B & Q contended in particular that as regards those of their shops which had been affected by the ban on Sunday trading, that ban had restricted sales made in those shops to a considerable extent and that, since a significant proportion of their stock was imported directly from the Member States of the Community, it had also restricted the value of imports from such Member States.

Similarly, B & Q contended that Section 47 could escape the prohibition laid down in Article 30 by reference to the judgment of the Court of Justice of 20 February 1979 in Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, 'Cassis de Dijon'. No category of 'mandatory requirement' might be relied upon in support of the prohibition of Sunday trading. In any event, the principle of proportionality applied equally to such exceptions as to those referred to in Article 36. B & Q contended, moreover, that evidence must be adduced by the Council in order to justify the prohibition in question under either Article 36 of the EEC Treaty or the 'mandatory requirements' exceptions.

5. The Council denied that the prohibition on Sunday trading constituted a measure having an effect equivalent to a quantitative restriction on the ground that it applied to domestic and imported products alike and it did not put imported products at any disadvantage. It referred to the Court's judgments of 31 March 1982 in Case 75/81 *Blesgen v Belgium* [1982] ECR 1211, of 13 March 1984 in Case 16/83 *Criminal proceedings against Karl Prantl* [1984] ECR 1299 and of 14 July 1981 in Case 155/80 *Summary proceedings against Sergius Oebel* [1981] ECR 1993, and to Commission Directive 70/50 of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17), abolishing measures having an effect equivalent to quantitative restrictions on imports, which in its view also supported the contention that in the absence of discrimination there was no infringement of Article 30. The Council also stated that, in the absence of common rules relating to the marketing of a product, it was for the Member States to regulate all matters relating to its marketing on their own territory.

The Council also argued that the restrictions with regard to Sunday trading must be regarded as justified both as 'mandatory requirements' and under Article 36 of the EEC Treaty on grounds of public morality, public policy and the protection of health and life of humans, and that it was not possible to rely in this case on any arbitrary discrimination, disguised restriction on trade or any infringement of the principle of proportionality.

6. The Cwmbran Magistrates' Court asks 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?

7. The order for reference was registered at the Court Registry on 24 May 1988.

8. 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 the

prosecuting authority in the main proceedings, represented by D. Robinson, borough solicitor, Torfaen Borough Council, by the defendant in the main proceedings, represented by D. Vaughan, QC, G. Barling, barrister, and A. Askham, solicitor, by the United Kingdom, represented by S. J. Hay, Treasury Solicitor's Department, and by the Commission of the European Communities, represented by Eric L. White, acting as Agent.

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

## II — Written observations submitted to the Court

1. The Council, the prosecuting authority in the main proceedings, refers initially to the provisions of the Shops Act 1950 at issue and their origin and maintains that those provisions do not infringe Article 30 of the EEC Treaty. It considers that B & Q has failed to establish that the relevant provisions have the effect of restricting quantitatively imports into the United Kingdom as a whole.

The reference to a reduction in absolute terms is ambiguous. The Council submits that it refers to no more than a reduction in the volume of imports of goods from other Member States corresponding to a reduction in B & Q's sales of goods at its shop in Llantarnan Road, without taking into account any countervailing increase in the volume of imports of goods from other Member States by other traders. In so far as

B & Q may allege that the reduction in absolute terms is in the volume of imports of goods from other Member States globally, such an allegation is not well founded since no evidence was presented before the Magistrates' Court as to the effect which a reduction in B & Q's imports could have on the pattern of imports into the United Kingdom.

It is impossible to speculate or predict what effect, if any, the closure of B & Q's shop on a Sunday would have on the level of imports into the United Kingdom, either of the goods sold by B & Q or of goods generally.

The Council submits that a reduction in the volume of imports of goods from other Member States corresponding to a reduction in B & Q's sales of goods manufactured in other Member States does not constitute a sufficient quantitative restriction on imports for the purposes of Article 30.

It maintains that the relevant legislative provisions are not properly to be regarded as 'trading rules' at all. They have nothing to do with trade as such but are more in the nature of a 'police power'. The same is true of the legislative provisions in question and for the legislation of other Member States which regulates shop-opening hours.

In order for a 'police power' to fall outside the scope of Article 30 of the EEC Treaty it is necessary for the measure in question to apply without discrimination to domestic

products and products imported from other Member States.

The relevant provisions of the Shops Act apply without distinction to both domestic and imported products. They do not put imported products at a disadvantage compared with identical or competing domestic products, they do not make importation more costly or more difficult and they do not impose on imported products any condition differing from that required for domestic products or more difficult to satisfy.

As regards the prohibition of Sunday trading from the point of view of its necessity in order to satisfy mandatory requirements, the Council considers that the stage is not reached where it becomes obliged to justify the prohibition of Sunday trading as being necessary in order to satisfy mandatory requirements within the meaning of the Court's judgment in the *Rewe-Zentral* case, 'Cassis de Dijon'. However, if, contrary to the Council's strong primary submission, the prohibition of Sunday trading must be regarded as an infringement of Article 30 of the EEC Treaty, the Council submits in the alternative that it does not in fact do so because that measure is necessary in order to satisfy mandatory requirements relating to the improvement of working conditions, the protection of the health and welfare of workers and the protection of public health. With regard to that question it refers to the Court's case-law.

On the assumption that, contrary to what the Council submits to be the case in the instant proceedings, the prohibition of Sunday trading constitutes a restriction on imports contrary to Article 30, the Council,

relying on the provisions of Article 36 of the EEC Treaty, maintains that the prohibition is justified on the grounds of the protection of health and life of humans, of public policy and of public morality. Many members of the general public wish for Sunday to be kept as a day of rest and there is a strong feeling that it would be immoral to have full trading on a Sunday. In addition, the prohibition does not constitute arbitrary discrimination or a disguised restriction on trade between Member States because the relevant provisions of the Shops Act apply without distinction to domestic and imported goods.

Furthermore, the prohibition does not infringe the principle of proportionality; the fact that the prohibition of Sunday trading does not apply in Scotland is due to historical reasons. In addition, since different social, political and economic factors apply to different parts of a Member State, in particular a unitary Member State such as the United Kingdom where different legal systems apply, it is wholly reasonable for different conditions to prevail in different parts of that Member State. If the uniform enforcement of the prohibition were consistent with Article 30 of the EEC Treaty, it is difficult to see how the failure to enforce it uniformly throughout the United Kingdom would make it inconsistent.

Consequently, the Council proposes that the reply to the questions put to the Court should be 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 sale 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, such a prohibition is not a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

2. This question does not require to be answered.

3. The reply to the first question above is not 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.

In the event that, contrary to the Council's submissions, the Court's reply to the first question is in the affirmative, the Council claims that the Court should give the following reply to the second question:

The prohibition is, however, justified either as necessary to satisfy a mandatory requirement or under Article 36 of the EEC Treaty;

and the following reply to the third question:

The reply to the second question above is not 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.'

2. B & Q, the defendant in the main proceedings, refers to its current business profile, its policy on Sunday trading and the effect of the enforcement of Section 47 of the Shops Act 1950 on its turnover and on imports from other Member States.

B & Q maintains that Section 47 of the Shops Act 1950 is incompatible with Article 30 of the EEC Treaty and that it is not capable of being justified by reference to either Article 36 of the EEC Treaty or the 'rule of reason' exemplified in the Court's judgment in the *Rewe-Zentral* case. In view of the direct effect of Article 30 the result of such incompatibility is that no conviction or penalty based on an alleged breach of Section 47 of the Shops Act can lawfully be imposed on B & Q in the context of the criminal proceedings pending before the national court.

The national law at issue in the instant case constitutes a measure having an effect equivalent to a quantitative restriction on imports from other Member States contrary to Article 30 in that the prohibition of Sunday trading is 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade', in the words of the Court's judgment of 11 July 1974 in Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

In so far as those of B & Q's shops which have been affected by the prohibition of Sunday trading are concerned, it is estab-

lished beyond a doubt and accepted by the national court that the prohibition has to a considerable extent restricted sales made in the shops and, thereby, since a significant proportion of stock is imported directly from other Member States of the Community, actually reduced the volume of imports from other Member States.

The Court's classic definition in the *Dassonville* case of a measure having an effect equivalent to a quantitative restriction on imports contains no suggestion that discrimination between imports and domestic products or a protective effect for the latter products is a necessary element of such a measure. All that is necessary is that there should be a hindrance, direct or indirect, actual or potential, to intra-Community trade. Indeed, in principle there is no reason why discrimination should need to be present: the achievement of unhindered trade across national frontiers should not be dependent upon more favourable treatment reserved for domestic production of similar goods or even the existence of such production. A requirement of such a kind would severely limit the effectiveness of Article 30 of the EEC Treaty.

B & Q observes that a measure which restricts trade may be justified as a 'mandatory requirement' within the meaning of the judgment in the *Rewe-Zentral* case only if the measure is non-discriminatory. Thus, notwithstanding that it is equally applicable, a measure which restricts trade is still capable of infringing Article 30 of the EEC Treaty and must be justified either under Article 36 or as a 'mandatory requirement'.

In the light of the Court's judgment in this field, any argument that discrimination against imports or favouring or protecting domestic products is a necessary element before an infringement of Article 30 can be established is manifestly untenable.

B & Q states that the exceptions to the free movement of goods, which is a fundamental principle of Community law, are to be construed strictly. Even if a restriction is *prima facie* covered by one of the categories of derogation referred to in Article 36 or *prima facie* capable of being treated as a mandatory requirement it cannot be justified if it is unreasonable.

In its present form, the prohibition of Sunday trading in the Shops Act is incapable of justification either by reference to Article 36 or to the 'rule of reason'. It does not fall within any of the categories of mandatory requirements or the categories of exceptions laid down in Article 36. Moreover, both in itself and as applied and enforced it is unreasonable and offensive to the principle of proportionality. It constitutes a disguised restriction on trade between Member States.

One of the most obvious anomalies in the rules is the fact that they have no application in Scotland except in certain immaterial respects. The non-application in Scotland, together with the lack of any significant demand for its application to that part of the United Kingdom, itself renders

impossible any attempt to justify the prohibition of Sunday trading as a 'mandatory requirement' or as falling within Article 36, on whatever ground.

B & Q states that the complexity of the rules concerning Sunday trading has generated a great deal of litigation as to their meaning and scope. It is therefore inconceivable that a discredited, unnecessary and unwanted measure such as the one under consideration could be 'necessary' in order to satisfy an imperative requirement of any kind, or could be justified under any of the exceptions set out in Article 36. The measure clearly fails the tests of reasonableness and proportionality. The law, particularly the criminal law, should not interfere with basically innocuous human activities unless there is some justifiable purpose in doing so. For the reasons set out in B & Q's observations there is no interest or combination of interests justifying the provisions of Section 47 of the Shops Act 1950. The measure cannot therefore be saved and remains an unlawful hindrance to imports and is thus prohibited by Article 30 of the EEC Treaty.

In the light of its observations, B & Q submits that the reply to the questions put by the Cwmbran Magistrates' Court should be as follows:

#### *'Question 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, such a prohibition constitutes a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30 of the Treaty.

#### *Questions 2 and 3*

A measure such as that described in Question 1 cannot benefit from any of the exceptions to Article 30 set out in Article 36, nor from any other exception recognized by Community law, including any of those exceptions known as "mandatory requirements", where the measure in question has characteristics which render the measure unnecessary, unreasonable and lacking in proportionality and such as to constitute a disguised restriction on intra-Community trade.'

3. The United Kingdom presented a summary of the legislation on shop-opening hours in the other Member States. In that connection it states that it is likely that the legislation of each Member State has evolved in response to differing social and political conditions. The absence of any legislative restriction in a State does not indicate that Sunday trading is necessarily common in that State. Whilst there is not unanimity amongst Member States as to the legislative restrictions imposed, it is interesting to note that the system of a general prohibition with categories of exceptions has been adopted in a number of other Member States as well as the United Kingdom and



that nearly all Member States place some regulation on the opening of shops or the employment of shop workers on Sundays, or both.

The United Kingdom considers that it is not clear that the national proceedings involve goods imported from other Member States. By opening its shop for the sale of all the goods in its stock, the defendant has inevitably committed an offence; that is so whether or not the provision at issue is contrary to Article 30 of the EEC Treaty in so far as it applies to imported goods. Consequently, the present reference is unnecessary, although that is a matter within the jurisdiction of the national court. In order to avoid any doubt as to the interpretation of its judgment in the event that the Court of Justice should decide that Section 47 of the Shops Act is contrary to Article 30, the United Kingdom requests the Court to make it clear that that is so only in so far as that provision applies to goods imported from other Member States.

The United Kingdom considers that it has not been established that the provision of the Shops Act 1950 at issue affects imports. The provision limits the period during which shops may sell goods, whether domestic or imported. That does not mean that it limits the total volume of imports into the United Kingdom either of goods of the type sold by the defendant or of goods generally.

It states that no information is available as to the effect of the alleged reduction in the defendant's turnover on the pattern of

imports into the United Kingdom and that it is impossible to speculate with any confidence what effect the closure of the defendant's shop on a Sunday would have on the level of imports into the United Kingdom, either of goods sold by the defendant or of goods generally.

The United Kingdom draws attention to the differences between the figures for different shops. The figures relate to the same length of time in each case (three months with Sunday opening and three months with Sunday closing). Nevertheless, there is a wide divergence between the effect of Sunday closing in particular cases, ranging from a 26.9% loss of turnover in one case to a loss of turnover of only 4.1% in another. Between those extremes there is a range of different figures. That strongly suggests therefore that the effect of Sunday closing on a particular shop depends upon local circumstances. The most obvious factor is the existence of other shops selling similar goods.

The United Kingdom also observes that the defendant's argument misinterprets the Court's case-law on Article 30 of the EEC Treaty. That case-law has drawn a distinction between measures which affect particular imported products on the one hand and measures which do not on the other. Measures falling within the first category, where the obstacle to imports necessarily derives from a disparity between the corresponding rules in different Member States, are subject to the requirement of justification laid down by the Court in its judgment in the *Rewe-Zentral* case, cited above. Measures in the second category are

not regarded by the Court as hindering imports within the meaning of its judgment in the *Dassonville* case, cited above, unless they are discriminatory or put imports at a disadvantage in comparison with domestic goods. That is not the case with rules relating to matters such as working hours, or regulating the opening hours of retail outlets or the categories of goods which may be sold by particular outlets.

In the alternative, the United Kingdom considers that the Shops Act can be justified as falling within the discretion conferred on Member States within the framework of 'mandatory requirements' or under Article 36 of the EEC Treaty.

Nevertheless, it would be consistent with the Court's existing case-law to hold that rules such as those at issue, which pursue an objective which is justified with regard to Community law, are lawful provided that they do not give rise to discrimination or put imports at a disadvantage, without its being necessary for a Member State to lay before the Court a comprehensive justification of every provision of those rules.

As regards the contention that the rules are a means of arbitrary discrimination or a disguised restriction on trade, the United Kingdom points out in the first place that no discriminatory effects of the rules have been referred to and submits that there are none. Nor is it clear in what sense the rules could be considered to be a disguised restriction of trade.

As regards the fact that the legislation at issue does not apply in Scotland, the United

Kingdom considers that it is likewise difficult to see why this should deprive the provision in question of justification. The different constituent parts of the United Kingdom have a different history, different traditions and, to some extent, different attitudes. In the case of Scotland, there is also a different legal system. In such circumstances it is difficult to see why the absence of corresponding legislation in Scotland should deprive the legislation in England of justification.

The United Kingdom proposes that the reply to the questions raised in the order for reference should be as follows:

'1. Article 30 of the EEC Treaty is not to be interpreted as meaning that a rule which prohibits retail premises from being open on Sunday save for the sale of certain items is a measure having equivalent effect to a quantitative restriction upon imports.

2. Question 2 does not require a reply.

3. The order for reference discloses no factor such as to render the measure in question a means of arbitrary discrimination or a disguised restriction of trade between Member States or a measure lacking in proportionality or otherwise unjustified.'

4. The Commission states that it is in the nature of quantitative restrictions on imports to reduce imports and thus to advantage national production. It points out that the combined effect of the Court's judgments in

the *Dassonville* and *Rewe-Zentral* cases has been interpreted as meaning that all State measures which have a restrictive or hindering effect on imports are contrary to Article 30 of the EEC Treaty unless they can be justified on the basis of a mandatory requirement within the meaning of the judgment in the *Rewe-Zentral* case or on one of the grounds listed in Article 36 of the EEC Treaty.

An examination of the Court's case-law on Article 30 as it applies to indistinctly applicable measures suggests that three broad categories may be distinguished. The first and largest category consists of State measures which regulate the conditions which products must satisfy in order to be admitted to the market. The second category of indistinctly applicable measures consists of those measures which prohibit the importation and manufacture (or simply the marketing) of certain products. The third category of indistinctly applicable measures which are capable of reducing imports concerns the circumstances in which goods may be sold or used. It includes measures which restrict the place, the time and the manner in which goods may be sold or used and the persons by whom they may be sold or used, (see the judgments in Cases 155/80 *Oebel*, 75/81 *Blesgen*, cited above, and the judgment of 25 November 1986 in Case 148/85 *Forest* [1986] ECR 3449, 3470).

Restrictions on shop-opening hours clearly fall within the final category. Such measures do not prevent the importation or marketing of goods from other Member States. The link with importation is more remote than in the first two categories. They may,

however, reduce the level of imports by reducing the outlets or uses and, therefore, the demand for the goods.

In the Commission's view, the first question seeks to ascertain whether the restrictions complained of in this case are capable of having any effect on trade between Member States at all.

There is nothing in the documents before the Court to show that the fact that garden centres are closed on Sundays will cause consumers to deprive themselves permanently of acquiring the goods they desire. On the contrary, it may reasonably be assumed that they will adapt themselves to the situation and plan their purchases accordingly. Even if it is assumed that consumers would spend less on gardening accessories if garden centres are closed on Sundays than they would if they were open, the defendant's allegation that they would then spend their money on boating, eating out, house improvement or other recreational activities appears to be pure speculation.

The restrictions on shop-opening hours complained of in this case appear to fall within the third category. They limit only the times at which certain goods may be sold. Furthermore, it is the restriction itself which causes the effect on trade complained of, not any disparity between the English rules and the rules applying in other Member States. Whether or not shops are open on Sundays in other Member States is irrelevant to the defendant's argument that its sales of imported products would be

reduced by the restriction which the prosecuting authority is seeking to have observed.

The Commission observes that, far from being the cause of any restriction of trade between Member States, disparities in shop-opening hours are likely to increase trade compared with the situation where shop-opening hours are harmonized.

The Commission takes the view that the question whether the restrictions on Sunday trading contained in the Shops Act 1950 may be justified on the basis of a mandatory requirement or on one of the grounds listed in Article 36 of the EEC Treaty does not arise in view of the Court's case-law referred to above, but it nevertheless briefly considers that question for the sake of completeness.

It points out that exceptions to the fundamental principle of the free movement of goods have to be interpreted strictly. In particular, the principle of proportionality is applicable, as is the second sentence of Article 36. The measure must therefore be no more restrictive than is necessary to achieve the legitimate objective and must not constitute a disguised restriction on trade or arbitrary discrimination.

It appears to the Commission that the three grounds which may be put forward as justification for a restriction on Sunday trading either as mandatory requirements or under the public policy exception of Article 36 are to ensure that shop workers have adequate time off, to ensure respect for the Christian sabbath (or the traditional English Sunday) and to control competition.

As regards shop workers, the Commission observes that that objective may be achieved in a less restrictive manner. As regards the Christian sabbath, it observes that, in view of the variety of exceptions, it is difficult to discern which objective is being pursued and still less to be satisfied that the restrictions are proportionate to the justified objective or are reasonable. As regards competition, it observes that it appears that enforcement varies from town to town and according to the type of shop involved.

Furthermore, whatever the ground of justification may be, the arbitrary nature of many of the exceptions provided for would appear to be capable of creating arbitrary discrimination within the meaning of the second sentence of Article 36 of the EEC Treaty. Why should it be permissible to trade in aircraft and motor and cycle accessories on a Sunday but not gardening accessories? An exemption for petrol and emergency motoring supplies could perhaps be justified, but not one for purely aesthetic motoring accessories.

For the reasons stated above, the Commission considers that the restriction on Sunday trading contained in the Shops Act 1950 would be difficult to justify in Community law if such justification were considered necessary. It does not, however, consider that the fact that the restrictions in question do not apply in Scotland constitutes a reason for considering them to be unjustified as suggested by the defendant in the case. Mandatory requirements may vary from one constituent part of a Member State to another as they do between Member States.

The Commission proposes that the reply to the question referred to the Court for a preliminary ruling should be as follows:

which makes it a criminal offence in part of a territory of a Member State to sell certain categories of goods on a Sunday.'

'Article 30 of the EEC Treaty is to be interpreted as not prohibiting a national rule

M. Díez de Velasco  
Judge-Rapporteur