OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 28 April 1993 *

Mr President,
Members of the Court,

1. The Second Chamber has referred these cases to the Full Court pursuant to Article 95(3) of the Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991. [1] By order of 9 December 1992 the parties which had submitted written observations to the Court were also asked to reply at the hearing to three questions. [2]

In this second Opinion I will examine mainly the observations submitted at the hearing held on 9 March 1993 and I will consider whether they alter the findings which I reached in my first Opinion of 18 November 1992. For the background to the proceedings I can refer to my first Opinion and to the Report for the Hearing. I need only recall that the issue in these cases is whether a national prohibition of resale at a loss is compatible with Article 30 of the EEC Treaty.

Nature of the legislation governing resale at a loss

2. I will first look at the third question asked by the Court, which was whether a prohibition of resale at a loss constituted an instrument for penalizing a sales promotion method or, rather, formed part of a national price control system. The Court's request for information appears to me to be prompted by its case-law on national rules governing prices. The Court has in fact repeatedly stated that

'... national measures regulating the fixing of prices, which apply without distinction to domestic and to imported products, do not in themselves constitute a measure having any equivalent effect to a quantative restriction, but they may have such an effect when, on account of the price level fixed, they place imported products at a disadvantage, in particular because their competitive advantage due to lower production costs is neutralised or else because a maximum price is fixed at so low a level that — given the general standing of imported products as compared with national products — traders wishing to import the products in question into the Member State concerned could do so only at a loss'. [3]

* Original language: Dutch.

1 — OJ 1991 L 176, p. 7.

2 — See the addendum to the Report for the Hearing for the exact wording of those questions.

3 — Judgment in Case 78/82 *Commission* v *Italy* [1983] ECR 1955, paragraph 16; see also, in particular, the judgments in Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, paragraph 19, Case 231/83 *Cullet* v *Leclerc* [1985] ECR 305, paragraph 23 and Case C-287/89 *Commission* v *Belgium* [1991] ECR I-2233, paragraph 17.

In other words, according to that case-law, national rules governing prices are not regarded as measures having an equivalent effect prohibited by Article 30 except in so far as such rules impede or prevent sales of *imported products* or make their sale more difficult than that of national products, [4] either by depriving imported products of the advantage of having a lower cost price or by compelling importers to purchase the product at a loss.

3. As could be expected, the parties' unanimous answer was that the French legislation in question, which is not intended to interfere with normal formation of prices, does not form part of a national price control system. It could hardly be otherwise since, with a few exceptions, France has abolished its price control rules by order of 1 December 1986. [5] That same order also introduced, in Article 32, the current version of the ban on resale at a loss that is in question in these proceedings. [6]

The question asked by the Court prompted the French Government to make a number of observations on the nature of resale at a loss and the regulation of resale at a loss in order to distinguish the situations existing in cases such as *Oosthoek* and *Buet* from that obtaining in the present case. In brief, the French Government's argument is that the French rules are not an instrument for penalizing a certain *promotion sales method* but a means of penalizing a form of *unfair competition between distributers.* [7]

French experience in detecting and penalizing sales at a loss shows that this type of sale is primarily used as an offensive technique by the big distribution networks which are highly concentrated in France. Furthermore, most of the infringements committed against the prohibition of resale at a loss do not in practice involve newly-launched products but well-known consumer products (washing powder, coffee, drinks, jams) the usual price of which is known by consumers. It would therefore follow that the rules on resale at a loss, unlike the rules in question in the *Oosthoek* case (ban on gift schemes) or in the *Buet* case (ban on doorstep selling of educational material) are general rules for regulating the market which *do not have as their purpose the regulation of trade flows between the Member States* but are the result of a choice of economic policy, which is to achieve a certain level of transparency and fairness in conditions of competition.

4. Although those observations may help to illuminate market conditions and conditions of competition in France, they do not alter the fact that resale at a loss is a sales technique which may, *in certain specific circumstances*, make it impossible or more difficult

4 — See the judgment in Case 181/82 *Roussel Laboratoria* [1983] ECR 3849, paragraph 17, and the judgment in Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 15.

5 — Order No 86-1243 of 1 December 1986 on freedom of pricing and competition, JORF of 9 December 1986.

6 — Article 32 of the order amends Article 1 I of Finance Law No 63-628 of 2 July 1963.

7 — It also refers in this regard to the place which the statutory prohibition occupies in the Order of 1 December 1986, namely in Title 4, under the heading 'Transparency and Restrictive Practices'.

to sell imported products, as I shall again attempt to show below.

The French Government regards the practice of selling products at a loss primarily as a strategy for eliminating competition. The comparison which it repeatedly draws with the phenomenon of dumping [8] shows that it has in view the situation of an undertaking, often a hypermarket, which attempts to eliminate its competitors *at the retail level* by selling products at a loss during a certain period and then, once the competition is eliminated, uses the dominant position acquired in this way to impose higher prices on consumers.

As I have already observed in my first Opinion, this strategy is indeed a very specific manifestation of resale at a loss the penalization of which may be judged to be necessary by a Member State in order to achieve the aim — recognised by the Court as a mandatory requirement under Article 30 — of ensuring fair trading or of preventing competition from being distorted. No problem arises here under Community law. In my previous Opinion, I also recognised that a similar justification, this time for the purpose of protecting consumers, cannot be denied in relation to the regulation of another type of sale at a loss, namely so-called 'loss-leadering': this technique consists of attracting customers with products sold at a loss or at an exceptionally low profit margin with the aim of inducing them, once they are on the sales premises, to purchase other products which — in order to compensate for losses on the loss leaders — are marked at a price higher than the normal price. [9]

5. Such forms of selling at a loss are sales promotion methods which are practised primarily at the level of *retail trade*. Nevertheless, a manufacturer, an importer or a wholesaler — that is to say *not only* retailers — may often find sale at a loss an effective method of launching a new product or penetrating a new market. Rather than being an offensive or loss-leader technique, sale at a loss in these circumstances amounts to a *marketing strategy* consisting in introducing a new product to customers by means of reduced prices with the motive of recovering the loss suffered on the promotional sales through improved sales of the same product at a later date and at a somewhat higher price. This method of promoting sales may be particularly useful to foreign traders in order to penetrate another national market. Where such a strategy is applied at the level *of the manufacturer, importer or wholesaler*, it is certainly relevant from the point of view of Community law. [10]

8 — The French Government made such a comparison in both the first and second hearings.

9 — See paragraph 8 of my first Opinion.

10 — I would point out in fact that in the *Van Tiggele* judgment cited by the French Government in its written observations the Court merely held that Article 30 was not applicable in relation to a national provision which prohibits '*retail sales*' at a loss: judgment in Case 82/77 [1978] ECR 25, at paragraph 16. In other words, in that judgment the Court did not, strictly speaking, address the matter of national rules which also apply to other levels of trade which, having regard to the facts of the main case (retail of gin at prices lower than the minimum fixed prices) was not even necessary.

I do not therefore see the slightest reason for drawing a distinction, for the purposes of Article 30, between certain more permanent methods, such as joint offers, doorstep selling and sale by mail order, [11] and a method such as sale at a loss where the accent is on the temporary, promotional aspect. According to the judgment in *Dassonville*, [12] the question is whether national rules governing such sales methods or sales promotion methods can hinder intra-Community trade 'directly or indirectly, actually or potentially'. I will examine this question in the paragraphs which follow.

At all events, it is irrelevant in this regard whether or not the national rules in question constitute pricing rules. Even where the rules do constitute pricing rules, the question is whether they are of such a nature as to impede or prevent the sale of imported products. Just like a prohibition of resale at a loss, pricing rules can in fact deprive a foreign producer of the advantage of his lower cost price when importing his products and may therefore be incompatible with the prohibition laid down in Article 30. [13]

Do rules concerning resale at a loss have 'direct, indirect or purely speculative' effects on intra-Community trade?

6. The Court also asked the parties which submitted observations about the effects on intra-Community trade of regulation of sale at a loss. It did so with reference to its most recent judgment concerning Sunday trading, that of 16 December 1992 in the *B&Q* case, in which it held that:

'Appraising the proportionality of national rules which pursue a legitimate aim under Community law involves weighing the national interest in attaining that aim against the Community interest in ensuring the free movement of goods. In that regard, in order to verify that the restrictive effects on intra-Community trade of the rules at issue do not exceed what is necessary to achieve the aim in view, it must be considered whether those effects are direct, indirect or purely speculative and whether those effects do not impede the marketing of imported products more than the marketing of national products'. [14]

7. The parties all responded differently. According to the French Government, the effects on intra-Community trade are purely speculative. The Commission considers that the effects are either indirect or speculative and concedes that there is no evidence to suggest that the regulation of resale at a loss has a direct effect on intra-Community

11 — The last-mentioned sales method was involved in the *Delattre* case: judgment in Case C-369/88 [1991] ECR I-1487.

12 — Judgment in Case 8/74 *Procurer du Roi* v *Dassonville* [1974] ECR 837, paragraph 5.

13 — As I explained in paragraph 3 et seq. of my first Opinion, I think that on this very point the precedent value of the judgment in *Van Tiggele*, cited above, is nullified in so far as one would deduce from it that a prohibition of sale at a loss cannot be incompatible with Article 30 once it applies without distinction to national products and imported products. See, as a matter of fact, the passage from the later case-law of the Court cited in paragraph 2 above.

14 — Judgment in Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council* v *B&Q* [1992] ECR I-6635, paragraph 15.

trade. Finally, according to Counsel for Mr Mithouard, the rules do produce restrictive effects.

8. In considering this issue I will assume that the Court adheres to the broad *Dassonville* formula. I would point out that in the Opinion I delivered in the first Sunday-trading case, [15] I proposed that the Court should adopt a more reserved approach towards national rules which, like the rules at issue in this case or in the aforementioned Sunday-trading case, are not intended to regulate intra-Community trade. My proposal was that Article 30 should be declared applicable to rules of this type only if they have the effect of *screening or partitioning* the market, that is to say if they jeopardize the interpenetration of national markets. [16]

The Sixth Chamber of the Court did not follow my proposal. In its judgment the Court implicitly adhered to the *Dassonville* formula and held that the balancing of interests which must be performed under that broad formula with reference to the principle of proportionality in Article 30 is a matter for the national court. [17] In its second Sunday-trading judgment, and even more clearly in its third Sunday-trading judgment mentioned above, the Court, sitting as the Full Court, reversed its earlier decision on the last point [18] but not on the first. As may be seen from the passage cited (in paragraph 6 above) from the third judgment, the Court tests the national rules concerned against the requirement of proportionality, which means that it recognises that in principle Article 30 is applicable.

I will thus assume from now on that the broad *Dassonville* formula still remains the cornerstone of the Court's case-law concerning the sphere of application of Article 30 of the EEC Treaty. In order to avoid any confusion, I think that the Court owes a duty to the national courts to make this quite clear.

9. If one applies the *Dassonville* formula in the present case, too, it cannot be excluded that a statutory prohibition of resale at a loss, such as that existing in France, might hinder 'directly or indirectly, actually or potentially' intra-Community trade. Although the French prohibition does not apply at the level of sale by a (national or foreign) producer, at least two potential obstacles exist, as I pointed out in my first Opinion: [19] on the one hand, the rules impede a retailer who, without the help of

15 — Opinion in Case C-145/88 *Torfaen Borough Council* v *B&Q* [1989] ECR 3865.

16 — On this point, as well as with regard to other proposals made by academic writers for restricting the scope of Article 30 of the EEC Treaty, see the recent article by Josephine Steiner, 'Drawing the line: uses and abuses of Article 30 EEC', *Common Market Law Review*, 1992, p. 749 to p. 774. This writer proposes that the *Dassonville* formula should be retained, the test being, however, not whether national rules affect (the volume of) imported goods but whether they *impede* (actually or potentially) intra-Community trade.

17 — Judgment in Case C-145/88 [1989] ECR 3851.

18 — In the judgment in Case C-312/89 *Conforama* [1991] ECR I-997, at paragraph 12, and in Case C-332/89 *Marchandise* [1991] ECR I-1027, at paragraph 13, as well as in the judgment in *B&Q*, cited above, at paragraph 16, the Court itself applies the criterion of proportionality.

19 — See paragraph 5 of that Opinion.

the foreign producer, wishes to launch on the French market a product which he imports from another Member State by selling it temporarily at a loss, that is to say below the price he is charged by the foreign producer; on the other hand, it is possible that an importer/retailer of a foreign product, even where he sells the product in France at his own cost price or at a higher price, is then placed in an unfavourable competitive position in relation to a national producer who may sell at a loss without restriction since the French prohibition does not apply at producer level.

10. My first Opinion in this case was delivered on 18 November 1992 and therefore antedates the Court's latest Sunday-trading judgment. Did the Court in that judgment give its case-law on the free movement of goods a more restrictive twist?

I do not think so. If the Court had wished to restrict the fundamental *scope* of the prohibition laid down in Article 30 of the EEC Treaty, it would have undoubtedly begun by expressly referring to the *Dassonville* formula, gone on to restrict it and then arrived at the conclusion, for example, that the rules concerned, prohibiting shops from trading on Sundays (which the court making the reference *had* found to affect the sale of imported products), did not constitute a measure having equivalent effect. [20] The Court, however, confirmed, as it had done in the previous Sunday-trading cases (*Torfaen, Conforama* and *Marchandise*), that such rules could have an adverse effect on the volume of sales of certain shops even if they affected sales of national products as much as sales of imported products and trade in products from other Member States was not therefore made more difficult than trade in national products. [21] The Court then went on to examine again the justification for the aim of the rules in question and ended its reasoning by looking at the proportionality of the rules.

11. In my view, the judgment in the *B&Q* case does significantly clarify the way in which the Court applies its *proportionality test*. For the first time the Court accepts unambigiously that, in order to ascertain whether or not rules go beyond what is necessary in order to attain the aim in view

20 — Here the Court could have adopted the position taken in my first Opinion concerning the ban on Sunday trading (see paragraph 8 above) or applied a *de minimis* rule in relation to Article 30, but that would have meant overruling paragraph 13 of the *Van de Haar* judgment (cited above in footnote 3), in which the Court held that 'if a national measure is capable of hindering imports it must be regarded as a measure having an effect equivalent to a quantative restriction, even though the hindrance is slight and even though it is possible for imported products to be marketed in other ways'; see also the judgments in Case 269/83 *Commission* v *France* [1985] ECR 837, paragraph 10, and Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 18. More can be read on this subject in the article written by Josephine Steiner, cited in footnote 16 above.

21 — Judgment in *B&Q*, paragraph 10; cf. the judgment in *Torfaen*, paragraph 11, the judgment in *Conforama*, paragraph 7 and 8, and the judgment in *Marchandise*, paragraphs 9 and 10.

(justified under Community law), the question to be considered in particular is whether the restrictive effects of the rules on intra-Community trade are 'direct, indirect or purely speculative'. In other words, if it appears that the claimed effect on (or link with) imports is so uncertain and speculative that it is impossible to say that the national rules in question impede trade between Member States, they are not incompatible with Article 30. [22]

Nevertheless, that additional clarification does not, in my view, alter the end result reached in my first Opinion as regards the way in which the test of proportionality is to be applied. The essence of the proportionality test is, as always, that the restrictive effects of a body of national rules may not go further than is necessary in order to achieve an *aim held to be legitimate under Community law*. So, in so far as the French prohibition of resale at a loss also covers situations not embraced by the mandatory requirements recognized by the Court — and the abovementioned situation in which a new imported product is launched is one of them — no Community *ground of justification* can be relied on in support of the prohibition and in principle there cannot therefore be any reason for the Court to assess the national prohibition with reference to the principle of proportionality. [23] In such cases, the obstructive effect of a statutory prohibition such as that in question in this case can, in any event, hardly be described as 'purely speculative'.

12. As I indicated in my first Opinion, that does not mean that in such a case the whole body of rules should be declared incompatible with Article 30. It is only insofar as there is no Community justification — and where as a matter of principle the rules cannot therefore be subject to an assessment of their proportionality either — that incompatibility exists. In the present case, that means that in practical terms that the national court is not obliged to disapply the French prohibition of resale at a loss: the main proceedings are in fact solely concerned with cases of sale at a loss occurring *at the retail level only*. [24] As the French Government points out, each case involves a French manager of a supermarket

22 — This is already reflected in the Court's earlier case law: see the judgment in Case 75/81 *Blesgen* [1982] ECR 1211, at paragraph 9; the judgment in Case 148/85 *Forest* [1986] ECR 3449, at paragraph 19; the judgment in Case C-69/88 *Krantz* [1990] ECR I-583, at paragraph 11 and the judgment in Case C-23/89 *Quietlynn* [1990] ECR I 3059, at paragraphs 10 and 11. See also my Opinion in the last Sunday-trading cases (C-306/88, C-304/90 and C-169/91) of 8 July 1992, not yet published in the ECR, at paragraph 16.

23 — I say 'in principle' because the Court could, for the sake of convenience, first determine whether the rules satisfy the proportionality test at all, leaving aside the question whether or not there is any ground of justification allowed by Community law. However, in an area such as that covered by Article 30, in which there is considerable conceptual confusion, I do not think that this approach is appropriate.

24 — The Court has already held that rules whose scope of application is limited to the retail level are not covered by the prohibition laid down in Article 30, at least in so far as intra-Community trade remains possible at all times: see the judgment in Case 155/80 *Oebel* [1981] ECR 1993, paragraph 20, the judgment in *Blesgen*, paragraph 9, and the judgment in *Quietlynn*, paragraph 10.

situated in France (admittedly by the French border) which has put on sale at a loss a specific consumer product, coffee (Sati Rouge) in the first case and beer (Picon Bière) in the second. Such a situation obviously has nothing to do with the case, mentioned above, of the launching of a new product — in which it is not even established that the product is one from another Member State — but belongs to the other phenomena of sale at a loss, either as a means of eliminating a competitor or in order to attract customers. [25]

13. Having regard to the last point made above, I would like to explain the result I reached in my first Opinion. I assume here that, in the context of the reference for a preliminary ruling, it is for this Court to give the national court all the information which it needs in order to decide the case before it, *but that information only*. To that end, it will be sufficient to tell the national court that a statutory prohibition of resale at a loss is not incompatible with Article 30 of the EEC Treaty since it appears that the events at issue in the main proceedings occurred at the retail level, that is to say at a level in respect of which a recognized ground of justification may be invoked for the rules in question and that at that level there is no more than a purely hypothetical effect on trade between Member States and certainly no more than an hypothetical hindering of trade flows. [26]

14. That is not to say, as I said in my first Opinion, that France would not do well to amend its legislation to bring it more into conformity with Community law. Even if it were true, as the French Government pointed out at the hearing, that in practice the only infringements of the rules to have been prosecuted hitherto have related to the retail trade situations considered above, legal certainty requires that the statutory prohibition should be framed in such a way that it is confined to situations not covered by Community law. According to the settled case-law of the Court,

'... the principles of legal certainty and the protection of individuals require, in areas covered by Community law, that the Member States' legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and to enable national courts to ensure that those rights and obligations are observed'. [27]

The fact that in practice the provision in question is not applied, or very rarely applied, in a way which conflicts with Community law cannot therefore be an argument

25 — According to the settled case-law of the Court, the provisions of the Treaty do not apply, at any rate in the sphere of movement of persons and provision of services, to activities which are confined in all respects within a single Member State: see the recent judgment in Case C-60/91 *Batista Morais* [1992] ECR I-2085, paragraph 7. Whether this is the case is, however, a question of fact which can only be determined by the national court: see, inter alia, the judgment in Case 52/79 *Debauve* [1980] ECR 833, paragraph 9; the judgment in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37.

26 — On the distinction between the affecting of inter-state trade and the hindering, in the sense of deterring, of imports of products from another Member State, see the article by Josephine Steiner, cited in footnote 16.

27 — Judgment in Case 257/86 *Commission* v *Italy* [1988] ECR 3249, paragraph 12; see also the judgment in Case 143/83 *Commission* v *Denmark* [1985] ECR 427, paragraph 10.

for not having to adjust it. [28] Pending a modification of the law, it is for the national court, according to the case law of this court,

'... within the limits of its discretion under national law, when interpreting and applying domestic law, to give to it, where possible, an interpretation which accords with the requirements of the applicable community law and, to the extent that this is not possible, to hold such domestic law inapplicable'. [29]

Conclusion

15. I propose that the Court should give the following answer:

In a situation such as that with which the main proceedings are concerned, Article 30 of the EEC Treaty does not preclude a statutory prohibition of resale at a loss.

28 — See the judgment in Case 166/82 *Commission* v *Italy* [1984] ECR 459, paragraph 24. The ambiguity of rules as regards their compatibility with Community law has in itself, potentially at least, an inhibiting effect on the free movement of goods, see, with regard to Article 34 of the EEC Treaty, the judgment in Case 173/83 *Commission* v *France* [1985] ECR 491, paragraphs 7 and 8.

29 — Judgment in Case 15/86 *Murphy* v *Bord Telecom Eireann* [1988] ECR 673, paragraph 11 second sentence. Although that judgment concerned Article 119 of the E.E.C Treaty, the dictum cited undoubtedly applies where it is a matter of interpreting provisions of national law with reference to another directly effective provision of the Treaty, in this case Article 30. It applies in fact to the interpretation of national provisions with reference to provisions of directives which are not directly effective: see the recent judgment in Case C-373/90 *Complaint against X* [1992] ECR I 131, paragraph 7.